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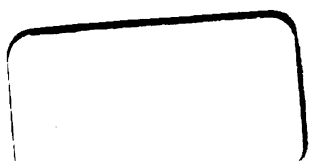
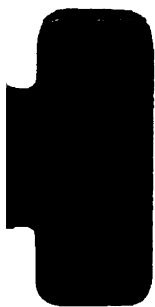
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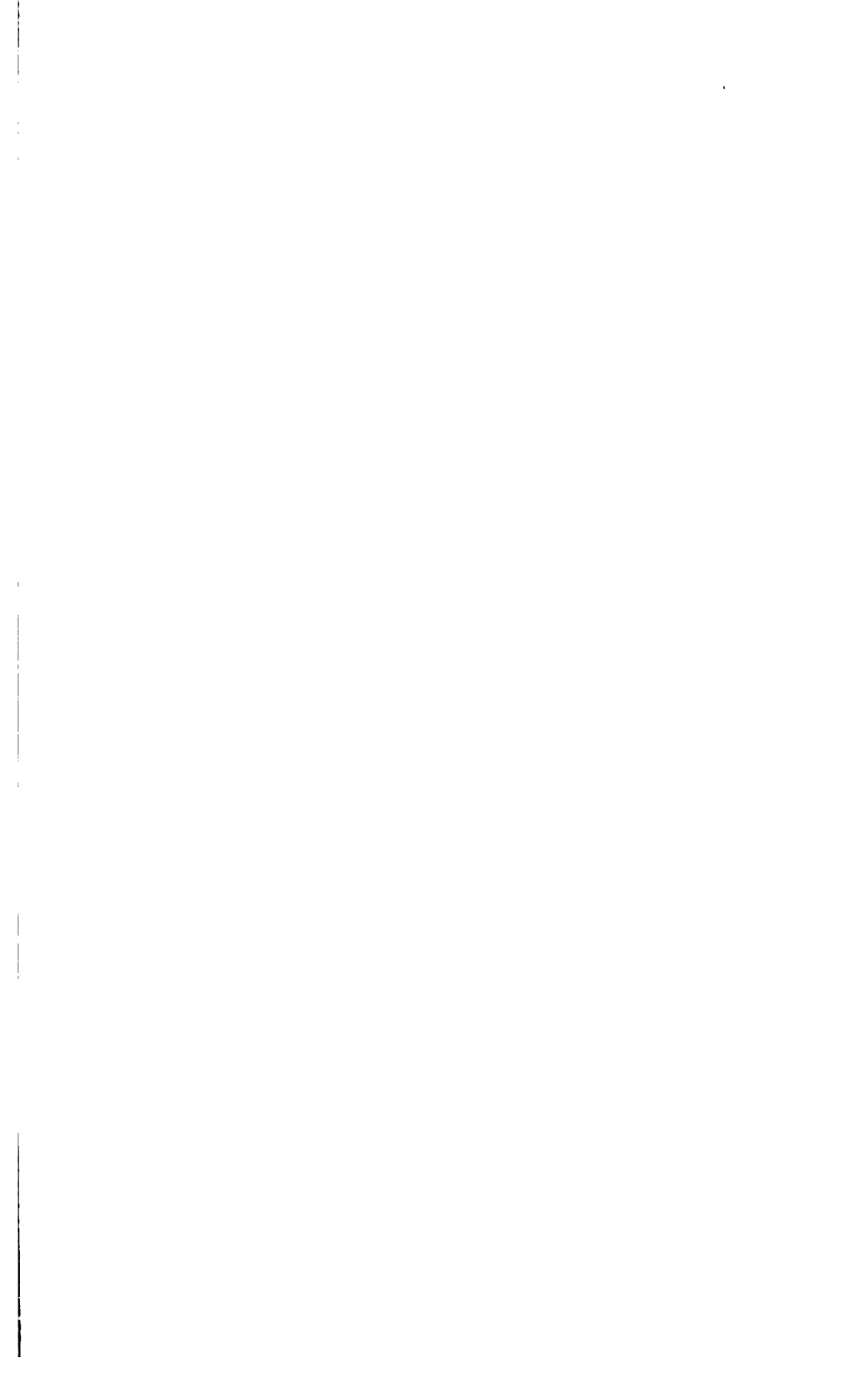
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THE LAWYERS REPORTS ANNOTATED

BOOK LXIV.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

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LAWYERS' REPORTS

ANNOTATED.

NEW HAMPSHIRE SUPREME COURT.

WILLIAMS *et al.*

v.

Selectmen of WARREN *et al.*

(.....N. H.....)

1. An establishment for the collection and distribution of electricity for the purpose of power and light is not for manufacturing purposes within the meaning of a statute permitting towns to exempt manufacturing establishments from taxation.
2. An exemption from taxation of a plant established to saw and dress lumber, and to collect and distribute electricity for power and light, is not effectual as to the portion devoted to the manufacture of lumber when it fails because of illegality

NOTE.—Taxation of manufacturing corporations in the United States.

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as to the electrical apparatus, where there is nothing to show that the exemption would have been voted upon that portion had it been known that the remainder was not subject to exemption.

(November 3, 1903.)

CASE transferred by the Superior Court for Grafton County for the opinion of the Supreme Court upon a petition for a writ of mandamus to compel the assessment of certain property for taxation. *Petition granted.*

The town passed in legal manner the following resolution: "The establishment—that said establishment shall include a saw-

In WILLIAMS v. WARREN the supreme court of New Hampshire has answered in the negative the question whether or not the generating and furnishing of electrical light, heat, and power is manufacturing. It has thus aligned itself with the court of appeals of Maryland, and against the court of appeals of New York. The writer of this note believes the weight of judicial opinion upon this question to be on its affirmative side. The authorities pro and con with as much of the reasoning upon which their conclusions rest as the limits of such a commentary as this permit, are collated and outlined, *infra*, VI. a, 2.

I. Scope of note.

This note is confined to cases decided in the United States involving the liability to taxation of corporations engaged in gainful productive industries not exclusively mining, agricultural, or commercial, or operations simply incidental to either pursuit, but really or supposedly entitled to be classed as manufacturers. It does not deal with questions relating to the taxation of manufacturing corporations which affect them merely in common with other corporations or individual taxpayers, but with such, only, as affect them because they are, or are asserted to be, manufacturers. Cases that but exemplify the elementary principles that all corporate grants are to be strictly construed, and that corporations have no powers not explicitly granted or necessarily implied, such as whether or not a manufacturing corporation may mine, farm, or trade, and, if it does one or another, whether it loses character, have not been taken in, except where the main controversy was concerning a tax, or by way of illustrating some obscure point.

The power of the legislature to treat manufacturing corporations as a class apart in en-

mill and dressing mill—for manufacturing lumber and wood, and furnishing steam and electric power and light and distributing the same, proposed to be erected and put in operation in the village of Warren by William R. Park, and the capital to be used by him in operating the same, not exceeding \$30,000, shall be exempted from taxation for the period of ten years: Provided, that said Park shall invest and expend not less than \$3,000 upon and in his said proposed establishment in the village of Warren; and Provided, further, that said Park shall give in to the town of Warren all personal property not hereby exempted, on the 1st day of each April, for the purpose of taxation in said Warren."

Park, in reliance upon the vote, erected

acting revenue laws is assumed throughout without discussion. For decisions holding that manufacturing corporations may be classified separately for taxation or exemption therefrom, the reader is referred to the note in this series on *Constitutional equality in the United States in relation to corporate taxation*, to Bacon v. State Tax Comrs. 60 L. R. A. 321.

The reader should consult the note on *What constitutes manufacture*, appended to Com. v. Northern Electric Light & P. Co. 14 L. R. A. 107.

II. Definitions.

a. General.

The investigator in this field encounters, at the very outset of his inquiries, great difficulty in determining what sense is to be attached to the words, "manufacture," "manufacturing," and "manufactured" when they occur in tax laws and decisions interpreting and applying them. It will be, therefore, helpful to begin the discussion by collating the dictionary and judicial definitions, and the principles that control a choice of meaning, with illustrative examples of their application.

1. *Lexicographical.*

In Webster the noun "manufacture" is defined to be (1) the operation of making wares or any products by hand, by machinery, or by other agency; and (2) anything made from raw materials by the hand, by machinery, or by art. And the verb, as (1) to make wares or other products by hand, by machinery, or by other agency; and (2) to work, as raw or partly wrought materials, into suitable forms for use. Worcester defines "manufacture" as an artificer, and "manufacture" as the process of making anything by art, or of reducing materials into a form fit for use, by hand or by machinery; while to manufacture, according to him, is to form by workmanship, by hand or machine; to make by art and labor. The Century Dictionary elaborates a little. That authority defines the noun "manufacture" as the operation of making goods or wares of any kind; the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery: Used more especially of production in a large way by machinery, or by many hands working co-operatively; and the verb as (1) to make or

an establishment for sawing and dressing lumber and wood with sufficient apparatus for furnishing steam and electric power and light, but made no effort to put the latter portion of the plant into operation. This proceeding was brought to compel the taxation of the property devoted to the purposes of the lumber mill.

Further facts appear in the opinion.

Messrs. Smith & Smith and Batchelor & Mitchell, for plaintiffs:

The same necessity for a consideration exists for the purpose of a contract exempting property from taxation that would exist if it were a contract between private parties.

Grand Lodge, F. & A. M. v. New Orleans, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep.

fabricate, as anything for use,—especially in considerable quantities or numbers, or by the aid of many hands or of machinery; work materials into the form of,—as to manufacture cloth, pottery, or hardware; to manufacture clothing, boots, and shoes, or cigars. Burrill says, manufacturing is the process of making a thing by art; Abbott, that a manufactured article is whatever is made by human labor, either directly or through the instrumentality of machinery. Anderson and Black each adopt the definition of manufacture given in *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440.

2. *Judicial.*

The courts have frequently essayed the task of framing a general definition of one or the other of the words. The most successful of these efforts follow.

"Manufacture" means to make anything by hand or artificial device. *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 808.

"Manufacture" is transformation,—the fashioning of raw materials into a change of form for use. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

To manufacture is to change and modify natural substances so that they become articles of value and use. *Re Capital Pub. Co.* 8 MacArth. 405, 18 Nat. Bankr. Reg. 319.

The maker by mechanical labor of a useful thing is usually entitled to be called a manufacturer. *People ex rel. L. E. Waterman Co. v. Morgan*, 48 App. Div. 395, 63 N. Y. Supp. 76.

Manufacturing in the modern sense is making an article, either by hand or machinery, into a new form capable of being, and designed to be, used in ordinary life. *Lawrence v. Allen*, 7 How. 785, 12 L. ed. 914.

That he who saws wood, and he who simply grinds corn, ordinarily is styled respectively a wood-sawyer or a miller, rather than a manufacturer of wood, or of corn meal, is because those terms definitely express the exact character of the business referred to; but when great quantities of salable articles are produced, even by a single operation of a simple machine, such production is properly characterized as manufacturing. *Schrieffer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

Change of name and manipulation do not

523; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

The people of Warren never voted to exempt Park unless and until he should build an establishment which should furnish electric power and light and distribute the same. It is no excuse for Park, for not doing it, that the selectmen told him he need not do it.

Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704; *School District v. Carr*, 63 N. H. 201.

Selectmen have no general authority to bind their town.

Andover v. Grafton, 7 N. H. 298.

Exemptions from taxation are regarded as in derogation of the common right, and are not to be extended beyond the express terms

necessarily constitute manufacturing. *Frazee v. Moffitt*, 20 Blatchf. 267, 18 Fed. 584.

The mere appropriation of an article which is furnished by nature is not manufacturing. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

Manufacturing is making, and to make in the mechanical sense does not signify to create out of nothing, for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some artificial process. *Norris Bros. v. Com.* 27 Pa. 494.

This definition is repeated in *New Orleans v. Le Blanc*, 34 La. Ann. 596, where it is added: A shoemaker is none the less a manufacturer because he does not also tan the leather; the tanner is none the less a manufacturer because he does not breed and raise the bullocks from which the raw hides are taken. The tanner makes leather to sell, but does not buy hides to sell again. He produces the article leather, and depends for his profit upon the labor which he bestows upon the raw material.

The legal meaning of the term "manufacturer" as defined by the Louisiana decisions is, one engaged in working raw materials into wares suitable for use; in giving new shapes, new qualities, new combinations, to matter which has already gone through some artificial process; and in preparing original substances for use in different forms; one making to sell and standing between the original producer and the dealer or first consumer, and depending for profit on the labor bestowed on the raw material. *State v. Dupré*, 42 La. Ann. 561, 7 So. 727.

When any article having a distinct name in the trade and commerce of the country is produced by machinery, or by a chemical process, from any material or materials having different commercial names from such article, the operation by which it is produced may generally be called manufacture. *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily the article so manufactured 64 L. R. A.

of the language used, and are to be construed *strictissimi juris*; and the same rule should be applied to a vote of this town.

Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Yazoo & M. Valley R. Co. v. Leves Comrs.* 132 U. S. 190, 33 L. ed. 308, 10 Sup. Ct. Rep. 74.

On motion for rehearing.

A mere change in the words of a revision will not be deemed a change in the law, unless it appears that such was the intention.

Crowell v. Clough, 23 N. H. 207; *Woodward v. Peabody*, 39 N. H. 189.

An electric-light plant would not be included within the meaning of the words "manufacturing establishments," as contained in the statute.

takes a different form, or at least subserves a different purpose, from the original materials, and usually it is given a different name. *Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837.

While from its derivation the primary meaning of the word "manufacture" is making with the hand, this definition is too narrow for its present use. Its meaning has expanded as workmanship and art have advanced, so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery,—which, after all, is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages,—are now commonly designated as "manufactured." *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440.

A manufactory, or a factory, is a building of which the main or principal design or use is to be a place for producing articles as products of labor. There is no difficulty in understanding what is meant when we speak of a factory or manufactory. It is something more than a place where things are made. *Franklin F. Ins. Co. v. Brock*, 57 Pa. 74.

What is the definition of a forge or furnace for the manufacture of iron?—asks the court in *Rogers v. Danforth*, 9 N. J. Eq. 289, for, it continues, if there is a definition comprehended and understood alike by scientific men and by mechanics acquainted with the business referred to, such definition ought to control the court in its construction of this covenant. What is such a forge or furnace? An establishment or mechanical contrivance by which iron is made or manufactured from the ore. A large manufactory or makes malleable iron direct from the ore. A blast furnace makes cast iron direct from the ore. From what is iron manufactured? It is manufactured from the ore. By a blacksmith's forge iron is not manufactured. But by it from iron itself machines or instruments of use are manufactured. It is not the intention of defendants to erect any forge for the manufacture of iron. Their intention is, not to make iron, but to use iron, when made, to be worked up into different materials.

The words "works, mines, manufactory," used in a preferential wages law, have a definite

Opinion of the Justices, 58 N. H. 623; *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839; *Com. v. Edison Electric Light Co.* 145 Pa. 131, 27 Am. St. Rep. 683, 22 Atl. 841, 845, 846; *Com. v. Brush Electric Light Co.* 145 Pa. 147, 22 Atl. 844; *Com. ex rel. McCormick v. Keystone Electric Light, Heat, & P. Co.* 193 Pa. 245, 44 Atl. 326; *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 599, 36 L. R. A. 130, 36 Atl. 362.

Messrs. Burleigh & Adams, for defendants:

Regardless of the question of constitutionality, exemptions made by vote of a town, and acted upon in good faith by the party exempted, within the plain terms of the law, come within the protection of leg-

signification well understood in their general and popular acceptance. *Ex vi termini* the branches of business intended to be described by them are in a sense complete and independent and of a fixed and permanent character, as opposed to a temporary employment merely incidental to a particular branch of business. *Pardee's Appeal*, 100 Pa. 408.

b. Principles.

The words "manufacturing corporation," in a tax exemption statute, must be interpreted according to the common understanding. *People v. New York Floating Dry Dock Co.* 92 N. Y. 487.

The definitions of the terms "manufacturing corporations" and "manufacture," derived from some decisions and statutes called to our attention, said, in substance, the New York court of appeals, in one case, are of little service in construing the language of this act (referring to the law imposing a state franchise or business tax upon corporations, and exempting from its payment manufacturing companies wholly engaged in manufacturing within the state). These terms must be construed in view of the general purposes of the acts in which they are used, and the general phraseology found in connection with them. To give effect to the legislative intention, their ordinary meaning may be enlarged or restricted. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirmed in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

The word "manufacture" is used in its ordinary sense in the Louisiana Constitution in the provision respecting tax exemptions. *Patterson v. New Orleans*, 47 La. Ann. 275, 16 So. 815.

The term "manufacturer," under the national bankrupt act, has a legal meaning, and this legal meaning must be governed by legal rules. It is true that everyone who manufactures is not to be embraced within the legal phrase. *Re Kenyon*, 1 Utah, 47, 6 Nat. Bankr. Reg. 238.

Words in a statute are to be taken in their ordinary and familiar signification, and regard is to be had to their general and popular use. Courts will presume that they were used to express their meaning in common usage. This rule of interpretation determines the judicial construction to be placed upon the word "manufacturer" in the bankrupt law; and there can be no doubt but that it was there used in the 64 L. R. A.

islative contracts, the binding obligation of which is inviolable under the Federal Constitution.

Brewster v. Hough, 10 N. H. 138; *Opinion of the Justices*, 58 N. H. 623; *Cox Needle Co. v. Gilford*, 62 N. H. 503; *Boody v. Watson*, 63 N. H. 320, 64 N. H. 162, 9 Atl. 794; *State v. United States & C. Exp. Co.* 60 N. H. 260; *Franklin Needle Co. v. Franklin*, 65 N. H. 177, 18 Atl. 318; *Franklin Falls Pulp Co. v. Franklin*, 66 N. H. 274, 20 Atl. 333; *Kimball Carriage Co. v. Manchester*, 67 N. H. 483, 39 Atl. 334; *Opinion of the Justices*, 70 N. H. 643, 50 Atl. 329; *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510.

When an express promise of exemption from taxation for a term not exceeding ten years has induced the promisee to make an

limited sense in which it is commonly understood. *Re Capital Pub. Co.* 3 MacArth. 408, 18 Nat. Bankr. Reg. 319.

If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places, or for power, is a manufacturing company depended upon the dictionary meanings of the words, or the technical language of science in describing electricity as a power or agent in nature, it would be difficult, and perhaps impossible, to show that the process which an electric light and power company calls manufacturing produces anything that in a certain sense and in some form did not exist before; but that is true of most, if not all, manufacturing operations, and the application of labor and skill to materials that exist in nature to give them a new quality or characteristic and adapt them to new uses is called manufacturing. These considerations are, however, not conclusive in determining the scope and meaning of the term "manufacturing corporations," used in a statute of exemption from taxation; the true inquiry is, whether a corporation organized as, and carrying on the business of, an electric light company would not be considered in common language as engaged in some manufacturing process, though all that is said by experts and others about electricity as a natural element or force be granted. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 20 N. E. 808.

Beard, J., of the Tennessee supreme court, in dissenting from its conclusion that logs are manufactured articles, quotes the dictionary definitions of the word "manufacture," and then says: All these definitions imply that by a combination of skill and labor the raw or crude material has taken on a new form convenient for use. I think the popular acceptance of the term is the same as that of the lexicographers, and that a layman of ordinary intelligence in the use of words would be surprised to find that one which he had long applied to articles the output of skilled workmanship also embraces sawlogs in whosever hands they chanced to be. Upon examination it will be found that the courts have applied to the term the same meaning as have both the lexicographers and the plain people. *Benedict v. Davidson County (Tenn.)* 67 S. W. 806.

The technical or scientific meaning of words does not always control in the construction of

investment which the promisors desired him to make, he cannot be defrauded by repudiation of the promise.

Opinion of the Justices, 58 N. H. 624; *State v. United States & C. Exp. Co.* 60 N. H. 219; *Boody v. Watson*, 63 N. H. 320.

By legislative action property may be exempted from taxation on the sanctity of contracts under the United States Constitution, when there is a consideration.

Cooley, Taxn. 53; *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *Wilmingon & W. R. Co. v. Reid*, 13 Wall. 266,

20 L. ed. 569; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *McGee v. Mathis*, 4 Wall. 143, 18 L. ed. 314; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326.

Tax exemption contracts cannot be invalidated by a judicial change in the construction of the Constitution or statutory law of a state.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 432, 14 L. ed. 1003; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Pease v. Peck*, 18 How. 595, 15 L. ed. 518; *Gelpoke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. ed. 38.

statutes. The cardinal rule is, the words in common use are to be taken in their ordinary signification. In the ordinary and general use of the word "manufacturer" the publishing of a newspaper does not come within the popular meaning of the term. *State, Evening Journal Assn., Prosecutor, v. State Board*, 47 N. J. L. 36, 52 Am. Rep. 107, note.

The words and terms of a constitutional article, like those of a law, are to be understood in their most usual signification; and, in order to ascertain the true meaning of a statute, the reason and spirit of it should be considered, and also the cause which superinduced its enactment. This is the accepted canon of construction of statutes, and equally so of the Constitution. We are not to consider, said the Louisiana supreme court in stating and applying that principle to a case in hand, the terms employed in an article of the Constitution from a scientific point of view, as we do not regard it to have been the intention of the framers of the amendment that they should be so considered and construed. We do not understand that illuminating gas is generally understood to be a chemical, and it is for that reason, presumably, that plaintiff resorted to scientific information upon the subject. *Shreveport Gas, Electric Light & P. Co. v. Caddo Parish*, 47 La. Ann. 65, 16 So. 650.

Nevertheless, should be heeded the warning of Sharswood, Ch. J., of Pennsylvania, when he says: The moment we depart from the plain words of a statute according to their ordinary grammatical meaning in a hunt for some intention founded on the general policy of the law we find ourselves involved in a "sea of troubles." Difficulties and contradictions meet us at every turn. *Dane's Appeal*, 62 Pa. 417.

c. Examples.

One who, on a considerable scale, works up lumber solely from trees grown on his own land is a manufacturer. His case is unlike that of a farmer making cheese or cider. *Re Chandler*, 1 Low. Dec. 478, Fed. Cas. No. 2,591.

Logs at a sawmill, awaiting conversion into lumber, are manufactured articles. *Benedict v. Davidson County (Tenn.)* 67 S. W. 806.

But the work of cutting logs on woodland, and running them into booms, is not manufacturing. *Pardee's Appeal*, 100 Pa. 408.

Rattan from which the outer rind or enamel has been cut by machinery for chair cane, leaving a cylindrical core, is not manufactured;

but, when such core is further cut into an oval, a square, or flat section form, it is manufactured. *Foppes v. Magone*, 40 Fed. 570.

India rubber resulting simply from the changed color, consistency, and bulk, and the hardening of the milky fluid, drawn from the caoutchouc tree by exposure to air, heat, and evaporation, although in a certain sense manufactured, is to be regarded as an unmanufactured natural product when it is left in form and shape so as to be solely available as raw material for manufacturing something else. *Lawrence v. Allen*, 7 How. 785, 12 L. ed. 914.

But when it is made to take a particular shape, as by successively dipping a cast into the juice or sap of the india rubber tree and forming thereon a rubber shoe useful at once to wear without further labor or change, a manufactured article is produced, and the process of producing it is manufacturing, notwithstanding the article thus made is the same in substance, quality, and condition, and equally available in every respect for manufacturing something else, as is the shapeless mass of raw material. *Ibid.*

A corporation which makes and sells sewer pipe and drain tiles, in which the ingredients are clay dug from its own lands, water pumped from a river, and salt bought in the open market, and whose products at producers' prices are worth tenfold the value of these materials, is a manufacturer, and not a merchant. *Iowa Pipe & Tile Co.'s Appeal*, 101 Iowa, 170, 70 N. W. 115.

Conceding that the compounding of an asphalt mixture for use as a street pavement is manufacturing, it cannot be admitted that the preparation of the street to receive it, and the spreading upon it of the plastic pavement, are in any sense manufacturing within the meaning of the New York tax law. *People ex rel. Syracuse Improv. Co. v. Morgan*, 59 App. Div. 302, 69 N. Y. Supp. 263.

Making coke from coal is manufacturing. *Com. v. Juniata Coke Co.* 157 Pa. 507, 22 L. R. A. 232, 27 Atl. 373.

Smelting and reducing metal-bearing ores is manufacturing. *Re Tecopa Min. & Smelting Co.* 110 Fed. 120, 3 Nat. Bankr. Reg. 841, Disapproving *obiter dictum* to the contrary in *Re Rollins Gold & S. Min. Co.* 102 Fed. 982.

By smelting the form of ore is changed, useless matter is eliminated, and the product given another name. The product is both useful

On motion for rehearing.

An establishment designed for furnishing and distributing electric power and light is a "manufacturing establishment" within the meaning of the statute.

19 Am. & Eng. Enc. Law, 2d ed. pp. 922-926; 12 Am. & Eng. Enc. Law, pp. 345-351.

The following are plainly deducible as the distinguishing and essential elements of manufacturing: First, human agency, involving superintendence, skill, and labor, one or more of them, in every case; second, the employment of certain processes or devices, mechanical, chemical, or otherwise, or the artificial manipulation or combination of natural forces, in a way to produce a commodity for commercial use, as distinguished from the free gifts of nature, or things in

their natural state, such as sunshine, air, water, fruits, vegetables, animals, natural oils and gases, wood, timber, coal, minerals, metals, ice found on ponds, etc.

An erroneous or imperfect conception of just what manufacturing is, has led to conflicting opinions by different judges in their distinctions between natural resources and artificial products. That there is a logical, well-defined, divisional line between them, however, and that such line, when found, determines whether the given commodity is a manufacture or a thing in its natural state, has long been recognized by the judiciary.

The liberation of natural gas or oil from the earth, and its transportation to market, are held not to be manufacturing, but the

and more valuable; and, while the ore taken from the mine is unchanged in substance, and even in form, save by breaking, remains ore still, when smelted it is no longer ore in form, and is altered in substance by taking away some of its component parts, and, as this is effected by human hands and machinery, it comes clearly within the popular definition of manufacturing. *Ibid.*

The white mineral powder, resembling pulverized alum, chemically considered hydrate of alumina, and called refined bauxite, differing from crude bauxite only in the fact that it has gone through a process that has mechanically removed impurities of iron and silica, and which, like crude bauxite, is used for the purpose of making alum and aluminous products, and which has undergone no chemical change, is a dutiable manufactured article, and not to be classed as the bauxite of a tariff free list. *Re Irwin*, 62 Fed. 150.

A corporation whose capital is invested exclusively in blast furnaces, rolling and steel mills, the equipment thereof, and sundry appurtenant buildings, and which makes pig iron, railroad iron, steel beams, channels, bars, plates, etc., for structural purposes, is a manufacturing corporation engaged in manufacture only. *Com. v. Pottsville, Iron & Steel Co.* 157 Pa. 500, 22 L. R. A. 228, 27 Atl. 371.

According to the common comprehension, and the ordinary use, of language, the refining at a United States assay office of base bullion into standard silver is not a manufacture, nor is the assay office a manufacturing establishment. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirmed in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

Bending the edges of discs of copper does not make a manufactured article. *United States v. Potts*, 5 Cranch, 284, 3 L. ed. 102.

The builder of locomotives is a manufacturer. *Norris Bros. v. Com.* 27 Pa. 494.

So, too, is the builder of boats. *Norton Naval Constr. & Ship Building Co. v. State Board*, 53 N. J. L. 564, 22 Atl. 352.

So, too, is one making, selling, and setting up in permanent place, steel bridges, roofs, viaducts, turntables, and similar structures and machinery. *Com. v. Keystone Bridge Co.* 156 Pa. 500, 27 Atl. 1; *Com. v. Pittsburgh Bridge Co.* 156 Pa. 507, 27 Atl. 4.

But one who constructs and uses dry and

wet docks for building, raising, repairing, and coppering vessels, and who builds, raises, repairs, coppers, and improves ships, is not a manufacturer. *People v. New York Floating Dry Dock Co.* 92 N. Y. 487.

Making fish lines, packing, and other hempen articles is manufacturing textile fabrics. *New Orleans v. Arthurs*, 36 La. Ann. 98.

Ropes and twines are textile fabrics. *Waterbury v. Atlas Steam Cordage Co.* 42 La. Ann. 723, 7 So. 783; *Hernsheim v. Atlas Steam Cordage Co.* 42 La. Ann. 726, 7 So. 784.

But coats and trousers are not. *Cohn v. Parker*, 41 La. Ann. 894, 6 So. 718.

A book-binder and blank-book maker is a manufacturer. *Seeley v. Gwillim*, 40 Conn. 106.

A corporation whose authorized and principal business is printing, publishing, and selling books is a manufacturer. *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73.

A corporation engaged in the business of printing and publishing books, and general job printing, is a manufacturing company. *Press Printing Co. v. State Board*, 51 N. J. L. 75, 16 Atl. 173.

A bond and coupon register in book form with spaced pages, etc., is a manufactured article. *Munson v. New York*, 13 Blatchf. 237, 3 Fed. 338.

A corporation organized for the purpose of, and engaged in, making blank books and stationery, printing, and lithographing, and in selling the products of such work, is a manufacturing corporation doing manufacturing. *Com. v. Wm. Mann Co.* 150 Pa. 64, 24 Atl. 601.

So, too, is a corporation that prints and publishes for sale books and periodicals, and makes stationery, and binds blank books to sell. *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10.

But the making of billheads, blank books, notes, order blanks, and other printed forms used in commercial business, and the cutting and folding for the purpose into required sizes of paper bought ready for use, are not manufacturing stationery or paper. *Patterson v. New Orleans*, 47 La. Ann. 275, 16 So. 815; *Earle v. New Orleans*, 47 La. Ann. 277, 16 So. 816.

The business of editing, printing, publishing, and vending a daily newspaper is manufacturing. *State v. Dupré*, 42 La. Ann. 561, 7 So. 727.

In *Re Kenyon*, 1 Utah, 47, 6 Nat. Bankr. Res. 238, the court was unanimous in thinking the

collecting and distribution of a natural product.

Emerson v. Com. 108 Pa. 111.

While the making of artificial illuminating gas has been held to be such manufacturing business.

Covington Gaslight Co. v. Covington, 84 Ky. 94; *Consolidated Gas Co. v. Baltimore*, 62 Md. 588, 50 Am. Rep. 237; *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

Ordinarily a butcher who merely slaughters animals and sells the meat dressed therefrom would not be carrying on a manufacturing business; but where one purchases and slaughters swine, and uses certain processes and combinations of other materials whereby the carcasses are converted into ba-

con, lard, and cured meats for commercial use, he is taxable as a manufacturer.

Engle v. Sohn, 41 Ohio St. 691, 52 Am. Rep. 103; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 20 App. Div. 521, 47 N. Y. Supp. 123.

The cutting, storing, and selling of ice from a natural pond are generally held not to be a manufacturing business.

Byers v. Franklin Coal Co. 106 Mass. 131; *Hittinger v. Westfall*, 135 Mass. 262; *People v. Knickerbocker Ice Co.* 99 N. Y. 183, 1 N. E. 689.

But the artificial production of ice by mechanical or chemical process is a manufacturing business.

Atty. Gen. ex rel. Miner v. Lorman, 59 Mich. 164, 60 Am. Rep. 287, 26 N. W. 311.

business of printing and publishing a daily newspaper, manufacturing; but it was not necessary so to decide in that case.

Two different courts in other jurisdictions have decided exactly the reverse, viz.: That the printing and publishing of a daily newspaper are not manufacturing. *Re Capital Pub. Co.* 3 MacArth. 405, 18 Nat. Bankr. Reg. 319; *State, Evening Journal Asso., Prosecutor, v. State Board*, 47 N. J. L. 36, 52 Am. Rep. 107, note; *Press Printing Co. v. State Board*, 51 N. J. L. 75, 16 Atl. 173.

The opportunity which came to the New York court of appeals to decide this question was not embraced. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

Making paper boxes is not manufacturing paper. *Washburn v. New Orleans*, 48 La. Ann. 226, 9 So. 37.

Brewing malt liquors is manufacturing. *Com. v. Germania Brewing Co.* 145 Pa. 83, 22 Atl. 240; *Christian Moerlein Brewing Co. v. Hagerty*, 8 Ohio C. C. 330; *National Brewing Co. v. Ahlgren*, 63 Ill. App. 475; *Keeley Brewing Co. v. Emrick*, 64 Ill. App. 247; *Welsh v. Ferd Helm Brewing Co.* 47 Mo. App. 608.

So is distilling spirituous liquors. *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593.

But rectifying distilled spirits is not. *Com. v. Glithnan*, 64 Pa. 103.

The drawing from oil wells of crude petroleum is not manufacturing; but a corporation producing from crude petroleum refined oil and other commercial products manufactures. *Com. v. National Oil Co.* 157 Pa. 516, 27 Atl. 374.

A corporation formed to refine oil, coal, and other minerals, and prepare them for use, is strictly a manufacturing corporation. *Hawes v. Anglo-Saxon Petroleum Co.* 101 Mass. 385.

The Louisiana supreme court did at one time hold that refining raw sugar and crude molasses was not manufacturing (*State v. American Sugar Ref. Co.* 51 La. Ann. 562, 25 So. 447, affirmed in 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43); but it has since candidly confessed itself in error, and overruled its former decision, in a very elaborate opinion, with such an abundance of cited authority as practically to demonstrate the total incorrectness of this view (108 La. 603, 32 So. 965).

A roaster of coffee, mixer of spices, and blender of teas is not a manufacturer. *People ex rel. Union Pacific Tea Co. v. Roberts*, 145 N. Y. 375, 40 N. E. 7.
64 L. R. A.

Neither is one who, by a secret process, selects, roasts, and by peculiar methods cools, green coffee to produce known brands of valued flavors. *New Orleans v. New Orleans Coffee Co.* 46 La. Ann. 86, 14 So. 502.

One who buys wet, muddy, and damaged cotton, and dries, cleans, picks, and prepares it for sale, is not a manufacturer of cotton. *State v. Hemard*, 23 La. Ann. 263.

A washing and ironing concern is not a manufacturing plant and business as defined by statute, lexicon, or judicial utterance. *Com. v. Keystone Laundry Co.* 203 Pa. 289, 52 Atl. 326.

But a corporation formed to bleach, callender, print, dye, and finish silk, cotton, and linen goods, whose actual business is bleaching goods after they come from the mills, is a manufacturing corporation. *Johnson v. Somerville Dyeing & Bleaching Co.* 15 Gray, 216.

The making of corn into meal is manufacturing. *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 803.

A steam flour mill is a manufactory. *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440.

Millers of rice are manufacturers, and rice flour is a manufactured article; but rice millers are not manufacturers of flour, nor is rice flour a manufacture of flour. *State ex rel. Ernst v. State & City Board*, 36 La. Ann. 347; *New Orleans v. Ernst*, 35 La. Ann. 746; *Martin v. Thibaut*, 37 La. Ann. 21.

An ice-cream maker is not a manufacturer. *New Orleans v. Mannessier*, 32 La. Ann. 1075. Neither is a baker of bread. *State v. Eckendorff*, 46 La. Ann. 131, 14 So. 518.

But a corporation making out of flour, not bread, but biscuits, crackers, Italian, fancy, and soup pastes is a manufacturer. *State v. American Biscuit Mfg. Co.* 47 La. Ann. 160, 16 So. 750.

Making and bottling soda-water, seltzer, vi- chy, and other carbonated beverages is not manufacturing chemicals. *Crescent City Seltz & Mineral Water Co. v. New Orleans*, 48 La. Ann. 768, 19 So. 943.

It was held in *Jackson v. State*, 15 Ohio, 652, that the business of purchasing and slaughtering hogs and packing pork for transportation and sale was not manufacturing; but that decision was afterwards overruled in *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103, in which it was decided that such business, coupled with

Nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of machinery are now commonly designated as manufactured.

Carlin v. Western Assur. Co. 57 Md. 526, 40 Am. Rep. 440; *Allen v. Smith*, 173 U. S. 399, 43 L. ed. 744, 19 Sup. Ct. Rep. 446; *Emerson v. Com.* 108 Pa. 111; *Murphy v. Arson*, 96 U. S. 131, 24 L. ed. 773; *Engle v. Sohn*, 41 Ohio St. 694, 52 Am. Rep. 103; *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *Lawrence v. Allen*, 7 How. 785, 12 L. ed. 914.

The product of an electric power and light

the production of lard, and the curing and encasing of hams and bacon, was true manufacturing.

However, refrigerated mutton, rendered tallow, pulled wool, and raw hides are not manufactures. *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53.

But it is otherwise as to fertilizers made from the offal of slaughtered animals. *Ibid.*

Salt, said the court in *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481, is manufactured by the simple process of boiling or solar evaporation of brine. The statement seems to be justified by the decisions. *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 376, 20 L. ed. 611; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686; *Salt Co. v. Wilkinson*, 8 Blatchf. 30, Fed. Cas. No. 12,269.

Hay is not a manufactured article; neither is hay making manufacturing. *Frassee v. Moffitt*, 20 Blatchf. 267, 18 Fed. 584.

Neither in a popular, nor in a legal, sense is there any such use of the term "manufacturing company" as would include the functions of an aqueduct company, or describe the distribution of pure water as a branch of manufacture. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183.

Bones pulverized or ground to small irregular fragments, called bone dust, are manufactures of bone, and taxable as such under the internal revenue laws. *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

Bones crushed and screened are also manufactures of bone. *Re Gardner*, 72 Fed. 494.

But wool purposely torn to bits is not manufactured. *United States v. Patton*, 46 Fed. 461.

Firewood is not a manufactured article. *Correlo v. Lynch*, 65 Cal. 273, 3 Pac. 889.

But kindling wood is, when cut up by machinery in large quantities, dried, and bound in bundles. *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122; *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

And so are elephants' tusks merely sawed into pieces of different sizes, when the operation requires discriminating skill to separate varying grades of ivory adapted to divers uses. *Re Gerdaun*, 54 Fed. 143.

The cutting into blocks, and the storing, preserving, and distributing to consumers, of ice

plant is "electrical energy," a commodity of commerce artificially made by a complicated mechanical process, which can be as accurately measured as a gallon of molasses, as readily distributed on wires as gas or oil is in pipes, and as easily stored and transported in jars as kerosene is in barrels. It is a manufactured article, and not a gift or product of nature.

People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808; *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669; *Com. v. Northern Electric Light & P. Co.* 145 Pa. 117, 14 L. R. A. 107, 22 Atl. 839; *Com. v. Edison Electric Light & P. Co.* 170 Pa. 231, 32 Atl. 419; *Com. ex rel. McCormick v. Keystone Electric Light, Heat & P. Co.* 193 Pa. 245, 44

naturally formed upon natural bodies of water is not manufacturing; but the making of artificial ice is. *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669; *Hittinger v. Westford*, 185 Mass. 258; *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

He is not inappropriately termed a manufacturer who produces artificial ice by the method of evaporation and expansion, said Dickman, J., in *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103.

In *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311, a majority of the court was of the opinion that even the cutting into cakes, scraping, housing, preserving, and distributing on a large scale, by the aid of machinery and many workmen, of natural ice formed on natural waters was manufacturing.

The liberation from the earth of natural gas or oil is not manufacture. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

A corporation to supply natural gas for fuel is not a manufacturing corporation. *Emerson v. Com.* 108 Pa. 111.

Producing artificial illuminating gas from coal distillation or water decomposition and hydro-carbon vapors is manufacturing. *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

It is, indeed, generally admitted that the ordinary gaslight company, making and supplying artificial gas, is a manufacturing company. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476; *Williams v. Rees*, 9 Biss. 405, 2 Fed. 882; *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Covington Gaslight Co. v. Covington*, 84 Ky. 94; *Com. v. Allegheny Gas Co.* 1 Dauphin Co. Rep. 93; *West Manayunk Gaslight Co. v. Philadelphia*, 3 Pa. Dist. R. 52.

But artificial illuminating gas is not a chemical so as to win tax exemption as such. *Shreveport Gas, Electric Light & P. Co. v. Caddo Parish*, 47 La. Ann. 65, 16 So. 650.

The generating and transmitting of electricity for illumination, heat, and power are manufacturing. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808; *People ex rel. Edison Electric Il-*

Atl. 326; *Edison United Mfg. Co. v. Farmington Electric Light & P. Co.* 82 Me. 464, 19 Atl. 859; *Opinion of the Justices*, 150 Mass. 597, 8 L. R. A. 487, 24 N. E. 1084; *Lamborn v. Bell*, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989; *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381.

When a company has invested a part of its capital stock in property not used for manufacturing purposes an apportionment may be made.

Com. v. Westinghouse Air Brake Co. 151 Pa. 276, 24 Atl. 1111, 1113; *Com. v. Wm. Mann Co.* 150 Pa. 64, 24 Atl. 601.

The manufacturer does not forfeit his claim to exemption, where the property is used principally in the manufacture of ex-

empt articles, although it may be incidentally employed in the manufacture of other articles, intimately connected with the principal business.

State ex rel. Frederick v. Board of Assessors, 41 La. Ann. 534, 6 So. 337; *Smith v. Board of Assessors*, 44 La. Ann. 91, 10 So. 387; *Com. v. Juniata Coke Co.* 157 Pa. 507, 22 L. R. A. 232, 27 Atl. 373; *Com. v. Savage Fire Brick Co.* 157 Pa. 512, 27 Atl. 374; *Com. v. East Bangor Consol. Slate Co.* 162 Pa. 599, 29 Atl. 706; *Com. v. Lackawanna Iron & Coal Co.* 129 Pa. 360, 18 Atl. 133, 1120; *Com. v. Mahoning Rolling Mill Co.* 129 Pa. 360, 18 Atl. 135; *Robinson v. Green*, 3 Met. 159; *Mavor v. Pyne*, 3 Bing. 285; *Perkins v. Hart*, 11 Wheat. 237, 6 L. ed. 463; *Withers v. Reynolds*, 2 Barn. & Ad.

Illuminating Co. v. Wemple, 129 N. Y. 684, 29 N. E. 812; *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun. 527, 34 N. Y. Supp. 711; *Re Consolidated Electric Storage Co.* (N. J. Eq.) 26 Atl. 983; *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381; *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487, 24 N. E. 1084; *Edison United Mfg. Co. v. Farmington Electric Light & P. Co.* 82 Me. 464, 19 Atl. 859; *Mauldin v. Greenville*, 33 S. C. 1, 8 L. R. A. 291, 11 S. E. 434.

But, although it is manufacturing, it does not follow that electric light and power companies are included under a general designation of manufacturing companies in tax exemption laws. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839; *Com. v. Edison Electric Light & P. Co.* 170 Pa. 231, 32 Atl. 419; *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 599, 36 L. R. A. 130, 36 Atl. 362.

Still, when it is a question of reorganization after sale on foreclosure of the franchise of such a company, a general statute authorizing manufacturing companies to be reorganized by the purchasers is sufficient to warrant a legal reorganization of an electric light company. *Com. ex rel. McCormick v. Keystone Electric Light, Heat, & P. Co.* 193 Pa. 245, 44 Atl. 326.

However, a corporation chartered to supply electric light, heat, and power for public and private use is not organized for purely manufacturing purposes. *Evanston Electric Illuminating Co. v. Kochersperger*, 175 Ill. 26, 51 N. E. 719.

The reader will find in the opinion in *State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965, in which the Louisiana supreme court reversed itself upon the question of sugar refining being manufacturing, a longer list of citations, of decisions, and legislative, judicial, scientific, and popular utterances by way of definition and illustration of what constitutes manufacturing processes, than can be found in any other reported case.

III. Evolution of manufactured products.

a. In general.

The work of the manufacturer begins as soon as that of the miner, the woodsman, the farmer, and the planter ends. Coal mined, and stone quarried, from the earth, needing only break-

ing into sizes suitable for use; oil pumped and gas caught escaping through the soil, and held in tanks for distribution by measure; trees felled in the forest, and cane cut in the brake, and hauled to mills; grain reaped and grass mowed in the field and meadow and stored in barns; and water from lakes and rivers, impounded in reservoirs,—are plainly not manufactured. When, however, ore is reduced, and its metal separated from the dross; when oil is refined; the tree lopped of its branches and cut into logs; the grain threshed and the grass dried,—processes of manufacturing have begun. How much further, if at all, must these processes proceed to produce manufactured articles? A very troublesome question. And when the first operation ends,—when a natural product has undergone an initial change,—when metal has been freed from dross, oil from impurities, grain from chaff, and stone and wood have been cut into regular forms, it is just as puzzling to determine how far the next operations must be carried to result in a new manufacture. It is not surprising that in their attempts to answer these questions satisfactorily courts have been confused and inconsistent. As their decisions are examined their conclusions are often found in conflict, sometimes in exactly parallel circumstances, and even occasionally in the same jurisdiction.

b. Nature's bounty.

It has been seen that the mere appropriation of a gift of nature is not manufacturing. The cases are substantially agreed that a natural product is not manufactured, even when human labor has to be applied to fit it for use, if its substance, general condition, and quality remain the same as before.

A corporation organized to mine coal, and engaged in coal mining as its sole business, is not within a statute relating to manufacturing corporations, and making the officers thereof liable for their debts. *Byers v. Franklin Coal Co.* 106 Mass. 131.

Mining is not a manufacturing, trading, or mercantile pursuit within the meaning of the national bankrupt act. *Re Elk Park Min. & Mill Co.* 101 Fed. 422.

A mining company, notwithstanding it does some smelting and ore reducing, is not engaged principally in manufacturing within the terms of that act. *Re Rollins Gold & S. Min. Co.* 102 Fed. 982.

882; *Sickels v. Pattison*, 14 Wend. 257, 28 Am. Dec. 527; *McKnight v. Dunlop*, 4 Barb. 36; *Snook v. Fries*, 19 Barb. 313; *Carleton v. Woods*, 28 N. H. 290; *East Kingston v. Toule*, 48 N. H. 57, 2 Am. Rep. 174, 97 Am. Dec. 575; *Boston, C. & M. R. Co. v. State*, 60 N. H. 87; *Dow v. Northern R. Co.* 67 N. H. 1, 36 Atl. 510; *Smith v. Burley*, 9 N. H. 423; *Opinion of the Justices*, 4 N. H. 565; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *State v. Wheeler*, 25 Conn. 290; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State v. Jackson*, 69 N. H. 511, 43 Atl. 749; *Leavitt v. Lovering*, 64 N. H. 607, 1 L. R. A. 58, 15 Atl. 414; *Opinion of the Justices*, 45 N. H. 590.

Chase, J., delivered the opinion of the court:

The statute under which the town acted

A corporation to supply natural gas as fuel to be converted into heat by consumers is not a manufacturing corporation; nor does a statute authorizing the formation of manufacturing corporations afford any authority for incorporating a natural gas supply company. *Emerson v. Com.* 108 Pa. 111.

The mere appropriation of an article which is furnished by nature is not manufacture. Thus, the liberation of natural gas or oil from the earth is not manufacture; but the production of illuminating gas artificially is. The collection, storage, preparation for market, and transportation of ice naturally congealed is not manufacture; but the making of ice by artificial means is. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

A gaslight company is a manufacturing corporation. Illuminating gas is an artificial product, not a bounty of nature merely liberated from coal. The process of making it is by a destructive distillation of coal. *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

Hay is the same article it was when stalks of grass rooted in the earth; the substance of dried grass is still grass. The facts that in making hay the grass is cut, scattered by a tedder to enable it to dry, raked up and piled in cocks over night to sweat, opened out to dry again, and put in barns to remain a month before it is in a condition to press and bale; and that by this process the starch and gluten in cut grass is converted into sugar,—does not make hay a manufactured article, as sugar is from maple sap or cane juice or salt from the evaporation of brine. *Frazee v. Moffitt*, 20 Blatchf. 207, 18 Fed. 584.

An aqueduct company manufactures nothing. Nothing is put into the article it supplies to change its natural condition. The whole operation of the waterworks is designed merely to keep foreign substances from mingling with the water. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183.

The cutting of ice produced by the agencies of nature on the surface of a pond into pieces of a size convenient to handle, and storing the pieces in a building, cannot, in any proper sense, be called a manufacture. The material is in no way changed, or adapted to any new or different use; it still remains ice, to be used simply as ice; it is no more a manufacture than

in making the exemption to Park reads as follows: "Towns may by vote exempt from taxation for a term not exceeding ten years any manufacturing establishment proposed to be erected or put in operation therein, and the capital to be used in operating the same, unless such establishment has been previously exempted from taxation by some town." Pub. Stat. 1901, chap. 55, § 11. The establishment contemplated by the town's vote was to be equipped for furnishing steam and electric power and light, and distributing the same, as well as for manufacturing lumber and wood. It was a single establishment, designed for two independent purposes. While it is possible that a boundary line might be discovered separating the portions of the building and machinery used for one purpose from the portions used for the other, and that the capi-

putting the water of the pond into casks for transportation and use would be a manufacture. It is like the harvesting of hay or grain or other agricultural crops, and the analogy is so strong and obvious that the "ice crop," the "ice harvest," and "harvesting ice," are terms in common use. *Hittinger v. Westford*, 135 Mass. 258.

A company incorporated to harvest and collect ice from natural bodies of water, to store, preserve, and carry it to market, and to sell it, and whose performances correspond with its license, is not a manufacturing company, neither does it carry on manufacture. Its dealing is with ice as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces, or otherwise. It collects, stores, and preserves that which natural causes created, and which other natural causes would destroy and waste. It seeks only to hold these last in check. Similar operations would apply to water, fruit, sand, gravel, coal, and other natural productions. Water might be improved by filtration; fruit by judicious pruning of tree or vine, or protection by glass; sand and gravel by screening; cobble stones by selection; and coal by breaking; and each by various processes stored until the season of demand, when, having been "collected, stored, preserved, and prepared for sale" the natural articles, and no other, would be put upon the market. *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669.

A majority of the judges of the Michigan supreme court were, however, of the opposite opinion in the case of *Atty. Gen. ex rel. Miner v. Lorman*, 50 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311.

Whether, said the New York supreme court, in passing upon the claim of an electric light company to exemption from a state tax upon the ground that it was a manufacturing corporation, an electric light company is a manufacturing company seems to depend upon the question whether electricity is manufactured, or is already in existence and simply collected or gathered and utilized. The processes adopted by the reiator are stated in the case, and we have differing opinions of learned experts laid before us. As a scientific question, it would seem to be still in the debatable stage. Something also seems to depend upon the definition

tal might be appropriated in definite shares to the several purposes, it is not possible to ascertain whether the vote would have been adopted if it had not provided that both kinds of business should be carried on at the establishment. Some of the voters may have been induced to favor the scheme by the promise of an electric light and power plant, and would have voted against it in the absence of such promise. Others may have voted for it because they were more particularly interested in having a lumber mill established in the town, and were willing to subsidize an electric plant, in addition to the mill, to secure their wish. See *Cow Needle Co. v. Gilford*, 62 N. H. 503. The provision for having a light and power plant is a material part of the vote, and cannot be separated from the other provisions and treat-

ed as void, leaving the latter in force. The action of the town covered both subjects indiscriminately, and must stand or fall as a whole. It therefore is a fundamental question in the case whether an establishment designed for furnishing and distributing such power and lights is a "manufacturing establishment," within the meaning of the statute. In attempting to answer the question, it must be borne in mind that the policy of the state requires the taxation of property, as a general rule. "Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is, therefore, bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent." Bill of Rights, art. 12; Const. art. 5. "It

of terms. Following our impressions, however crudely formed they may be, we conclude that electricity exists in a state of nature, and that the relator collects or gathers it and does not manufacture it. We refrain from any exposition of the premises upon which this conclusion is based; if it is sound the relator is not a manufacturing corporation, and therefore not within the exemption of the statute. *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 61 Hun, 53, 15 N. Y. Supp. 711.

But the New York court of appeals deemed the conclusion unsound, and reversed the judgment. 129 N. Y. 664, 29 N. E. 812.

To say, said that tribunal in deciding the case followed as authority for such reversal, that electricity exists in a state of nature, and that the relator collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808.

And the supreme court of Alabama, in deciding whether or not electric light companies were manufacturing corporations so as to be authorized to consolidate under the laws of that state, said, after quoting the dictionary definitions of manufacture: According to these definitions we are constrained to consider and declare an electric light company a manufacturing corporation to all intents and purposes. It is no answer to say that electricity exists in a state of nature, and that an electric light corporation collects or gathers it. This does not fully or exactly express the process by which such corporations are able to make, sell, and deliver something useful and valuable. The electricity of nature is of a very different quality from that produced by machinery. *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381.

c. Initial operations.

Notwithstanding bones broken into small fragments by grinding and pulverizing, or crushing and screening, are manufactured enough to be taxable under the United States revenue laws (*Schriever v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481; *Re Gardner*, 72 Fed. 494), wool intentionally torn to fragments and commercially called waste, but not true waste, which consists of refuse or broken particles thrown off in the

process of manufacture, merely resembling real waste, is not a manufacture of wool so as to be subject to a tariff duty (*United States v. Patton*, 46 Fed. 461).

A corporation which employs a secret unpatented process for so selecting green coffee that by careful, cleanly roasting and a peculiar mode of cooling produces, without the use of chemicals, brands of coffee of distinct, recognizable, and valued flavors is not a manufacturer, and hence not entitled to the exemption from license taxes accorded by the Louisiana Constitution to manufacturers. *New Orleans v. New Orleans Coffee Co.* 46 La. Ann. 86, 14 So. 502.

And a corporation which purchases spices and baking powders in bulk, and puts them up into packages for sale; which takes tea in the state in which it is imported, and mixes various kinds together to produce a certain brand; and which buys coffee in the raw beans, roasts it, grinds it, and, in some instances, blends different grades or kinds in combination,—is not a manufacturing corporation, and therefore not exempt from taxation as such. *People ex rel. Union Pacific Tea Co. v. Roberts*, 145 N. Y. 375, 40 N. E. 7, Affirming 82 Hun, 352, 31 N. Y. Supp. 243.

But a refiner of sugar and molasses, who purchases the crude or raw sugar and syrup and puts it through a refining process which improves its quality and appearance and enhances its value, is a manufacturer within the immunity of a constitutional provision exempting manufacturers as a class from license and occupation taxes. The product is not the same as the raw material, which is disagreeable to see, taste, and smell, and which in process of refinement must undergo dissolution and recrystallization. *State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965, Overruling the prior contrary decision in *State v. American Sugar Ref. Co.* 51 La. Ann. 562, 25 So. 447, Affirmed in 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

Shells whose surfaces have been ground, cleaned, polished, and etched with acids are not manufactures of shells dutiable under the tariff act, but unmanufactured and free. *Hartman v. Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *Hartman v. Winters*, 121 U. S. 616, 30 L. ed. 1015, 7 Sup. Ct. Rep. 1244.

These decisions were founded on the fol-

will never be assumed that the government intended to release any part of the property entitled to its protection from the burden incident to such protection, and it is the duty of those who assert that claim to show it in language which can admit of no other conclusion; and, where doubt arises as to the meaning of the language used which it is claimed confers the exemption, it will be construed most strongly against those who maintain the exemption." *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 307, 42 Am. Rep. 589; *Boody v. Watson*, 63 N. H. 320, 321; *Kimball Carriage Co. v. Manchester*, 67 N. H. 483, 484, 39 Atl. 334; *Alton Bay Campmeeting Asso. v. Alton*, 69 N. H. 311, 312, 45 Atl. 95. The burden is upon Park to clearly show that the legislature intended by the statute to authorize the ex-

emption from taxation of an establishment like his. "Any manufacturing establishment" is a phrase that may have a broad meaning, but was it used in the statute in its broadest sense? The earliest statutes specified the manufactures that were to have the benefit of exemption. Mills, etc., used for the manufacture of linseed oil (*Laws*, ed. 1792, p. 341), for slitting, rolling, or plating iron (*Id.* p. 343), for the manufacture of sail cloth or duck (*Id.* p. 347), and for the manufacture of malt and malt liquors (*Laws*, ed. 1797, p. 400), were exempted in the first decade after the adoption of the present Constitution. By the act of June 18, 1819, the buildings, machinery, and capital of the Souhegan Nail, Cotton, & Woolen Factory, not exceeding in value \$30,000, were exempted for a term of ten years.

lowing reasoning: They are still shells. They have not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor, either by hand or by mechanism, does not make an article necessarily a manufactured article within the meaning of that term as used in the tariff laws. Washing and scouring wool do not make the resulting wool a manufacture of wool. Cleaning and ginning cotton do not make the resulting cotton a manufacture of cotton. *Ibid.*

Animal charcoal or bone-black, produced as wood is carbonized to make vegetable charcoal, by burning or exposing to the action of fire bones, is taxable as a manufacture of bone under the United States revenue laws. *Schriefer v. Wood*, 5 B'tchf. 215, Fed. Cas. No. 12,481.

The production of coke from coal is a process of manufacture. *Com. v. Juniata Coke Co.* 157 Pa. 507, 22 L. R. A. 232, 27 Atl. 373.

Smelting, a process by which ore is put into an incombustible receptacle with coke and at times a flux in alternate layers, fired, melted, and run off free from slag into pigs of bullion, which are sorted according to their kinds, but still need further refining, is manufacturing. *Re Tecopa Min. & Smelting Co.* 110 Fed. 120, 3 N. B. N. Rep. 841.

There is in this case a sharp criticism of the prior one of *Re Rollins Gold & S. Min. Co.* 102 Fed. 982, which expressed the contrary opinion, — an opinion characterized as an *obiter dictum*, unsupported by either reason or authority.

Even the breaking up of ore by mechanical means, such, for instance, as producing from crude bauxite the fine, white, refined bauxite or hydrate of alumina, by driving out or eliminating the impurities, such as iron, silica, and titanate acid, but without effecting any chemical change, and resulting in a substance only used for the same purposes, is manufacturing. *Re Irwin*, 62 Fed. 150.

One who works up lumber on a considerable scale is a manufacturer, and the fact that he makes use only of trees grown upon his own land is not material. His case is unlike that of the farmer making cheese or cider, because, first such products are not usually made on a large scale, and, second making them is merely incidental to cultivating the farm; but in the lumber business the land may almost be said to be an incident to the timber which forms

its chief value, and of which the manufacture furnishes the main source of profit independent of any cultivation or other use of the soil. *Re Chandler*, 1 Low Dec. 478, Fed. Cas. No. 2,591.

A sawmill is not within a constitutional provision exempting from taxation the capital and machinery employed in manufacturing furniture and other articles of wood. *Jones v. Raines*, 35 La. Ann. 996; *Martin v. New Orleans*, 38 La. Ann. 397, 58 Am. Rep. 194.

And mere planks, joists, and sills designed to be fitted into particular structures are not embraced by the phrase "articles of wood" in such a constitutional provision. *Carpenter v. Bruslé*, 45 La. Ann. 456, 12 So. 483; *White Castle Lumber & S. Co. v. Browne*, 45 La. Ann. 454, 12 So. 485; *Rosedale Cypress Lumber & S. Co. v. Bruslé*, 45 La. Ann. 459, 12 So. 484; *Plaquemine Lumber & Improv. Co. v. Browne*, 45 La. Ann. 459, 12 So. 485.

Nevertheless the work of a sawmill is manufacturing; so that, under a constitutional exemption of all manufacturers from license taxation except certain non-inclusive ones, a sawmiller cannot be subjected to a license tax. *State ex rel. Browne v. A. W. Wilbert's Sons Lumber & S. Co.* 51 La. Ann. 1223, 26 So. 106.

But logs upon the yard in the hands of the sawyer, and lumber rough and smooth just cut by him from logs all grown on the soil of the state, are exempt from taxation in virtue of a constitutional provision that no article manufactured of the produce of the state shall be taxed otherwise than to pay inspection fees. *Benedict v. Davidson County (Tenn.)* 67 S. W. 806. *Beard, J.*, in this case, while "barely conceding" that the majority might be right in holding that lumber sawed from logs which were the produce of the state fell within the exempt class, altogether dissented from the decision that the logs themselves, though in the hands of the sawyer to be cut up forthwith, could in any proper sense be called "articles manufactured for use," and thus be exempt.

Fire wood is not a manufactured article within the meaning of the California Civil Code having reference to the warranty by sale that manufactured articles are reasonably fit for the purpose for which they are bought. *Correlo v. Lynch*, 65 Cal. 273, 3 Pac. 889.

But slabs of wood, kiln dried, sawed, and chopped by machinery into small pieces, and the pieces bound together in bundles to sell

Souhegan Nail, Cotton, & Woolen Factory v. McConike, 7 N. H. 310. The preamble of the first act states the reason of its adoption as follows: "Whereas the manufacturing of oil from flaxseed, within this state, will furnish employment for poor persons, have a happy influence on the balance of trade, and greatly contribute to the wealth of the good subjects of this state: Therefore, to encourage the same, Be it enacted," etc. The prevention of a drain of money from the state to foreign countries is given as the reason for the enactment of other statutes. The object of them all was to promote the increase, industry, and prosperity of the inhabitants of the state. A careful examination has not brought to notice any statute upon the subject passed between 1819 and 1860. In the latter year an act was passed

"to Encourage Manufactures," by which the machinery and capital used for the manufacture of "fabrics of cotton or wool, or of both cotton and wool," might, with the assent of the town, be exempted from taxation for the term of ten years after the passage of the act; the town's assent to have "the force of a contract, and be binding for the full term above specified." Laws 1860, chap. 2361, § 1, p. 2262. By the General Statutes enacted in 1867, the term of the exemption was made a period not exceeding ten years, to be fixed by the town granting the exemption. In other respects the statute continued the same in substance, although its form was changed. Gen. Stat. 1867, chap. 49, § 9. It seems that prior to 1871, exemption was sought for other industries, aside from cotton and woolen manufac-

ture for kindlings, are manufactured, and the production of them is manufacturing, so as to exempt from taxation a corporation exclusively engaged in making and selling them. *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122. The article produced by the relator, said the court, is a commercial article known and recognized by a specific and distinctive name; a product of capital and labor, different in form and condition from the material out of which it is made. It is obvious that neither the tree from which the wood comes, nor the slabs of wood, could be used in their original form as kindling wood, and that the relator has, by the use of machinery, skill, capital, and labor, produced a new article different in form, quickly inflammable, with a distinctive name, fitted for sale, use, and consumption, which, within the definitions, constitutes a manufactured article, and the business of producing it that of manufacturing. *Ibid.*

And in *Schrieffer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481, to sustain the bone-dust ruling, the court said: The splitting of large quantities of wooden blocks into kindling wood by machinery adapted to that special purpose is manufacturing kindlings.

Under a tariff act classifying rattans and reeds, manufactured but not made up into completed articles, as dutiable at a certain rate, and rattans and reeds unmanufactured as free, rattan from which the outer rind or enamel has been cut by machinery for chair cane so as to leave a core of round section commercially known as a reed is unmanufactured and free; but when such cylindrical core is further cut into forms of oval, square, or flat section it is to be deemed manufactured and dutiable. *Foppes v. Magone*, 40 Fed. 570.

And when a tariff act fixing duties upon articles of wood and wooden wares scheduled in one class "manufactures not specially enumerated and provided for" and in another, wood "rough-hewn or sawed only," gun blocks, made from planks sawed to the proper thickness and passed under a planing machine and afterwards cut to a design penciled on the planed surfaces, are in the first class. *United States v. Windmuller*, 42 Fed. 292.

d. Development.

In some instances, and for some purposes, a 44 L. R. A.

manufactured article may be the product of one kind of process performed on what is found in a natural state, and in some another kind. Thus, the juice of the maple or the cane is in some views manufactured when it is made into molasses or syrup, and in others when again made into sugar or spirit from molasses. And so the juice from the grape is in one sense manufactured when converted into wine, and in another when made into brandy. And so is-lye from ashes when boiled down to potash, or pearl ash, manufactured into them. The juice or sap of the India rubber tree while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance and in its natural form, and in one sense and to a certain extent its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may be then turned into, is a manufacture. It is as much so as butter or cheese is a manufacture from animal milk, or tar from turpentine, and rosin from tar. *Lawrence v. Allen*, 7 How. 785, 12 L. ed. 914.

Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., then by entirely different processes are fashioned into boxes, furniture, doors, window-sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but, by a large number of processes or transformations, each successive step in which is a distinct process of manufacture and for which the article so manufactured receives a different name. *Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837.

Discs of copper turned up at the edges and called raised bottoms, in distinction from oblong or square plane plates of the same metal called sheets or flat bottoms, are exempt from custom duties as unmanufactured raw copper. *United States v. Potts*, 5 Cranch, 284, 3 L. ed. 102.

Lumber sawed from logs and cut into suitable shapes and sizes, put up in bundles, and called "shooks," from which boxes are made that require nothing but nailing together to complete,

tures. In 1869 Littleton was specially authorized to exempt an establishment for the manufacture of hoes, forks, shovels, or scythes. Laws 1869, chap. 124, § 1, p. 370. Authority for the exemption of establishments generally engaged in such manufactures and the manufacture of fabrics from other materials was granted by the act of July 7, 1871. The subjects of exemption were described in the act as establishments for the manufacture of "fabrics of cotton, wool, wood, iron, or any other material." Laws 1871, chap. 25, § 1, p. 529. Upon the compilation and revision of the statutes in 1891, the phrase "any manufacturing establishment" was substituted for "any establishment . . . for the manufacture of fabrics of cotton, wool, wood, iron, or any other material," but without an intention of

changing the law. Com'r's Rep. Pub. Stat. chap. 55, § 11. "Manufacturing," then, in the present statute, is used in the sense of working materials into a fabric or structure for use,—as, for example, cotton into cloth, iron into tools, wood into carriages, etc. This is the ordinary meaning of the word, and, independently of the light thrown upon it by the history of the statute, would be regarded as the meaning which the legislature attached to it. The question then resolves itself into this: Whether the collection and distribution of electricity for purposes of power and light are manufacturing, within this sense of the word? Machinery and manual labor are required in the process, but this fact alone does not bring it within the meaning of the word. The product of the machinery and labor must be a fabric of

are within the constitutional term "articles of wood," in a section exempting from taxation the capital and machinery employed in the manufacture of furniture and other articles of wood. Washburn v. New Orleans, 43 La. Ann. 228, 9 So. 37.

But property devoted to the manufacture of cabins and planks,—articles not ready, without further labor, for immediate use,—is not exempt by virtue of such constitutional provision. Carre v. New Orleans, 41 La. Ann. 996, 6 So. 353.

The phrase "articles of wood," in that provision of the Louisiana Constitution, includes shingles, laths, posts, cross-ties, mouldings, sashes, doors, blinds, boxes, pickets, palings, bannisters, planed, tongued, and grooved lumber, dressed weather-boards, dressed flooring, car-sidings and roofings cut to length, and casings capable of instant use without change of form or condition. Carpenter v. Bruslé, 45 La. Ann. 456, 12 So. 483; White Castle Lumber & S. Co. v. Browne, 45 La. Ann. 454, 12 So. 485; Rose-dale Cypress Lumber & S. Co. v. Bruslé, 45 La. Ann. 459, 12 So. 484; Plaquemine Lumber & Improv. Co. v. Browne, 45 La. Ann. 459, 12 So. 485; Martin v. New Orleans, 38 La. Ann. 307, 58 Am. Rep. 194.

Staves for pipes, hogsheds, and other casks are not within the designation "timber and lumber of all kinds, round, hewn, and sawed, unmanufactured in whole or in part," so as to be entitled to admission free of duty under a reciprocity treaty providing for the free admission of such timber and lumber. United States v. Hathaway, 4 Wall. 404, 18 L. ed. 395.

In Simpson v. Davis, 20 Blatchf. 413, Benedict, J., expressed the opinion that the cap of a newel post, often manufactured as a distinct article by itself, but never used except in connection with other parts, which, combined, go to form a complete newel post (itself merely part of a stair rail), is within the statute authorizing a patent for any new and original design for a manufacture; but he did not find it necessary to so decide.

A corporation engaged solely in making and inserting boiler linings, composed of lead, brick, and cement, for digesters of wood pulp, under a patent, is exempt from taxation as a manufacturing corporation employing all its capital in manufacturing and selling the products thereof. People ex rel. Non-Antem Sulphite Digester Co. v. Knight, 67 App. Div. 365, 73 N. Y. Supp. 743.

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In Louisiana the capital and machinery employed in manufacturing leather or shoes are constitutionally exempt from taxation; but shoe uppers are not to be classed as either, and their manufacture confers no immunity. Ricks v. Board of Assessors, 43 La. Ann. 1075, 10 So. 202.

Coal consumed by a manufacturer of sewer pipe and drain tiles for the purpose of burning them after they have been fashioned from clay, water, and salt is not material entering into the combination or manufacture, and therefore is not to be included in estimating the value of the product for the purposes of taxation. Iowa Pipe & Tile Co.'s Appeal, 101 Iowa, 170, 70 N. W. 115.

Neither is labor employed in the making. *Ibid.*

e. Manufacturing through contractors.

Whether or not the familiar maxim, *Qui facit per alium, facit per se*, applies to a manufacturing corporation, the courts are not agreed. The New York court of appeals holds that it does not, the New Jersey supreme court, that it does. That the reader may be enabled to decide which opinion is most logically supported, the reasoning upon which each is grounded follows in juxtaposition.

In deciding against the claim of a foreign mining corporation doing business in New York to be exempt from a tax therein, the court of appeals in that state, speaking through Earl, J., in 1887, reasoned thus: The business of the defendant in Utah consisted in mining ore and manufacturing it into base bullion. The bullion was then shipped to Chicago, where it had a refinery in which the lead was smelted and the base bullion separated from the silver. The bullion thus refined was then shipped to the city of New York, where it was delivered to the United States Assay Office and still further refined into standard silver bars, for doing which defendant paid 2 per cent of the silver. It did not have or carry on within this state any refining or manufacturing establishment, and its claim to be a manufacturing corporation carrying on manufacture within this state is based solely upon the fact that it delivered its bullion to the assay office to be further refined for a compensation to be paid by it. Upon these facts, the referee found that it was not engaged

structure made from materials of some kind. It has not yet been discovered what electricity is. Sir Oliver Lodge, an eminent English scientist, said in a lecture delivered in 1880: "We cannot assert that it is a form of matter, neither can we deny it. On the other hand, we certainly cannot assert that it is a form of energy, and I should be disposed to deny it. It may be that electricity is an entity *per se*, just as matter is an entity *per se*." In a lecture delivered the present year he seems to give assent to the theory that it is matter in a fourth state, consisting of something very much smaller than atoms,—“ultra-atomic corpuscles,”—which revolve about each other within atoms at tremendous speed. The knowledge of electricity thus far acquired certainly does not warrant one to speak of it as a manufacture.

In common speech, an electric light and power plant is not spoken of as a manufacturing establishment. In enumerating the manufacturing industries of a town, the electric plant would not ordinarily be included. It is true that the collection of electricity is sometimes spoken of as manufacturing it; but in such cases other words are usually added, as generating, producing, supplying,—showing a consciousness that “manufacturing” does not correctly express the idea. Laws 1881, chaps. 235, 237, 241, pp. 605, 606, 610; Laws 1887, chaps. 237, 243, 247, 287, 292, pp. 595, 601, 605. The charter of the Franklin Gas & Electric Light Company probably describes the process more nearly correctly by the words “produce, collect, and store.” Laws 1887, chap. 261, § 3, p. 619. There is direct evidence that the legislature

in manufacture within this state, and we are of the same opinion. As its name implies, it is a mining corporation, and was organized primarily for that purpose, and all its other business was incidental, connected with and related to that. But even if it could in any proper sense, according to the common understanding of the phrase used in this statute, be deemed a manufacturing corporation in Utah, yet it cannot with any propriety be said that it carried on manufacture within this state. According to common comprehension and the ordinary use of language, the process of refining this bullion at the assay office was not a manufacture, and the assay office was not a manufacturing establishment. But whether it was or not the defendant which employed the assay office to refine the bullion for a compensation was not itself engaged in the manufacture. It was no more a manufacturer than a farmer is who takes his grain to the grist-mill to be ground into flour for a part of the grain or a money consideration, or who takes his wool to a cloth manufacturer to be made into cloth for a compensation, and then to be returned to him. A railroad company may manufacture all its cars and engines, and yet it cannot be properly classified as a manufacturing company. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirmed in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

It is plain that, so far as this reasoning is concerned, it is inconclusive upon the particular point with which this subdivision is concerned. Its learned author intends to lay down three propositions, *viz.*: (1) That a mining company which smelts and reduces its own ores and refines its metals is not a manufacturing corporation; (2) that refining base bullion into standard silver in an assay office, is not manufacturing; (3) that, if it is manufacturing, the employing of an independent agent to do it upon shares is not a carrying on of manufacture by the principal. Any one of these propositions, if sound, is fatal to a claim of exemption by virtue of a statute which grants it only to manufacturing corporations, and to them alone that carry on manufacturing within the state. Peckham, J., dissented from the decision in the case, but his opinion was not reported and Rappallo, J., did not vote.

A few years later the supreme court, third degree 64 L. R. A.

partment, in the same state, expressed the opinion that a corporation engaged in printing and publishing books for sale carries on a manufacturing business none the less because it employs contractors to perform portions of its work. *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73. In that case the court said, in substance: Although the relator contracted with other parties to do the printing, binding, and other portions of the work on the books it published, yet much of the work necessary to produce and manufacture such books was done by the relator or its employees. We think the evidence shows that the books published by the relator were in fact manufactured by it; and hence incline to believe that, if it appeared that the printing, publishing, and selling of books was the only business of the relator, it would not be liable for the tax.

The New York court of appeals, soon afterwards, being called upon to say whether or not a corporation which published a weekly trade newspaper was exempt from the same tax as a manufacturing company engaged in carrying on manufacture in the state, chose to avoid deciding that a newspaper publisher was or was not a manufacturer, and held, instead, that the particular publisher *coram* was not carrying on manufacturing because all the mechanical operations were performed by independent contractors; and therefore that it was not entitled to the exemption it claimed. The court in thus concluding did not make an extended argument. It was content to say, briefly: Upon the assumption that the printing of a newspaper is manufacturing within the meaning of the statute, the relator would still be entitled to no relief. It does not own or operate any plant for the printing of its paper. The type is set and the paper printed by third persons at a price agreed upon, and no part of the work is done by the relator further than to have a foreman, who overlooks and watches the work as it progresses in the hands of the contractor. This does not constitute the relator a manufacturer. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

The decision is in conflict with one made by the New Jersey supreme court about five years earlier. There was no substantial difference in the statutes of the two states. The New Jersey law exempted manufacturing companies carry-

did not intend by this statute to authorize the exemption from taxation of electric-light plants. By an act approved March 25, 1897, a vote of the town of Franconia, "exempting from taxation an electric-light plant, to be established in said town," was made legal and valid. Laws 1897, chap. 208, p. 207. Of course, this vote would have been unnecessary if it had been understood that the general statute authorized the town to grant the exemption. If it be said that doubts existed whether the general statute authorized the vote, and the special statute was passed to remove them, the evidence, in that view, is scarcely less effective in establishing the proposition that the general statute does not authorize such exemption, for, by the well-established principle of law above mentioned, the doubts should be con-

strued most strongly against the exemption.

A similar question has arisen in other jurisdictions, but the decisions are conflicting. In a recent Maryland case it was held that an electric light company does not carry on a "manufacturing industry," within the meaning of a city ordinance exempting from municipal taxation "the machinery and manufacturing apparatus of all manufacturing industries" located in the city. *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 599, 36 L. R. A. 130, 36 Atl. 362. In New York it was held that such a company was a "manufacturing corporation," within the meaning of a statute exempting manufacturing corporations from taxation. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808. See also *Com. v.*

ing on business in that state, and the New York statute manufacturing companies wholly engaged in carrying on manufacturing within that state.

The New Jersey tribunal decided that the fact that a domestic phonograph manufacturing company contracts with another corporation having works in New Jersey, giving it the exclusive right to manufacture in perpetuity the phonograph, the various devices and apparatus used in connection therewith, and the supplies therefor, for which it owns the patents, taking in turn practically the entire factory output at a stipulated price 20 per cent above the cost of manufacture inclusive of labor, material, and general expense, with 5 per cent allowance for wear and tear,—does not make it any the less a manufacturing company carrying on business in the state of New Jersey, nor deprive it of the exemption given such companies by the proviso in the statute exempting them from taxes laid upon corporations in general. *State ex rel. North American Phonograph Co. v. State Board*, 54 N. J. L. 430, 24 Atl. 507.

The New Jersey court reasoned in this wise: It thus appears, it said after stating the facts, that all the goods manufactured and sold by the prosecutor are prepared in this state, and that they do not manufacture phonographs elsewhere. The work is not done by themselves directly, but by a manufacturing agency. It is certain that the phonographs which they are incorporated to make are made by their procurement in this state, and that they take them when manufactured and pay all the expenses of materials, labor, and other charges under the contract. The contention on the part of the state assessors is that by this arrangement the Edison Phonograph Company is the manufacturer, and the North American Phonograph Company is the purchaser, of the manufactured products at a stipulated price. But the position of the parties . . . is not that of maker and buyer, but of principal and agent, and, whether the agency is conducted by an individual or by an aggregation of individuals called a corporation, is immaterial. The great value of the plant is the patent right to make the phonograph; without this the manufacture could not lawfully be carried on. This is the property of the prosecutor, and without it the materials and labor used in its construction would be of little value. The prosecutor can 64 L. R. A.

hardly be said, therefore, to be the purchaser of this phonograph in which they have the peculiar property right which forbids its sale to any other person. In effect the prosecutor controls the manufacture of those phonographs, and the Edison company is but the instrument by which they are made. The plant of this company is *pro hac vice* its plant, and it is thereby located and carries on business within this state. *Ibid.*

2. Assembling ready-made parts.

A manufacturing corporation of another state cannot bring its products to New York, and, by putting the several parts together and adjusting them to each, or by performing upon the articles some slight operations, although these involve labor that is necessary before the articles can be used or exposed for sale, and thereby entitle itself to exemption from taxation upon the ground that it is carrying on manufacturing within that state. *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238.

A foreign corporation engaged in its home state in manufacturing wire and wire ropes, which it ships from its factory in coils to a place of business in New York, and there performs such necessary acts as are required to fit the wire and ropes for market, such as making loops and attaching hooks to the cables for use as switching rods and for various other ends, is not engaged in carrying on manufacturing in the latter state so as to be free from taxation on that account. *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 582, 34 N. E. 386.

Especially is this the case when such a corporation has power by its charter, outside of its home state only to have an office for the sale of its manufactures and for the transaction of other business connected therewith, and to buy and sell materials, make contracts, and transact incidental business. *Ibid.*

Boxes, simply nailed together and the parts trimmed to fit, in the United States, out of shooks of Canadian lumber cut into the required lengths, widths, and sizes in Canada, are not entitled, upon exportation from the United States, to any drawback for duties paid on the shooks when imported from Canada, in virtue of the provisions of § 3019, Rev. Stat. U. S. (p. 1990, U. S. Comp. Stat. 1901), allowing such a draw-

Northern Electric Light & P. Co. 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839; *Com. v. Edison Electric Light & P. Co.* 170 Pa. 231, 32 Atl. 419; *Com. ex rel. McCormick v. Keystone Electric Light, Heat, & P. Co.* 193 Pa. 245, 44 Atl. 326.

The real question is, What was the intention expressed by the language of the legislature in this case? In view of the ordinary meaning of the terms used in the statute, the policy of the state, and the evidence furnished by the history of the legislation on the subject, and the action of the legislature in the *Franconia Case*, it does not clearly appear, to say the least, that the legislature intended to authorize the exemption of property of this kind. As the exemption of the electric plant is so connected with the ex-

emption of the other property mentioned in the vote that it cannot be separated and treated independently, the entire vote must fail, and be regarded as unauthorized and void. This conclusion renders it unnecessary to consider the question of the constitutional power of the legislature to authorize towns to exempt property from taxation, and the other questions argued in the briefs. The petition should be granted so far as it relates to property situated in Warren. *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794.

Case discharged.

Parsons, Ch. J., did not sit. The others concurred.

Rehearing denied.

back on all articles exported, wholly manufactured in the United States, from duty paid on imported materials. *Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837.

The court reasoned thus: The material of which each manufacture is formed is not necessarily the original raw material,—in this case the tree or log,—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank. This case, then, resolves itself into the question whether the materials out of which these boxes were constructed were the boards manufactured in Canada or the shooks imported into the United States. While the planing and cutting of the boards in Canada into the requisite lengths and shapes for the sides, ends, tops, and bottoms of the boxes was doubtless a partial manufacture, it was not a complete one, since the boards so cut are not adaptable as material for other and different objects of manufacture, but were designed and appropriate only for a particular purpose, *i. e.*, for the manufacture of boxes of a prescribed size, and were useless for any other purpose. It is not always easy to determine the difference between a complete and a partial manufacture, but generally an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be partially manufactured, and the mere assembling and nailing together of parts complete in themselves and destined for a particular purpose are not a complete and separate manufacture. Thus, chairs are made of bottoms, backs, legs, and rounds, each one of these parts being made separately and in large quantities. If imported in this condition from abroad, and the parts were assembled and glued or screwed together here, we think it entirely clear that such chairs would not be wholly manufactured in the United States. And the same thing may be said of the staves, heads, and hoops which constitute a barrel. Generally, although not universally, a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring or a penknife, or an intermediate product which may be used for different purposes, such as pig iron, iron bars, lumber, or cloth; while a partial manufacture is merely a stage in the development of the material toward an ultimate and predestined product, such as the different parts

of a watch which need only to be put together to make the finished article. If the wheels, chain, springs, dial, hands, and case of a watch were all imported from abroad and merely put together in this country, we do not think it could be said that the watch was wholly manufactured in the United States. The same remarks we think may be made with reference to the shooks in this case, which were practically worthless except for being put together for a box of a definite size. *Ibid.*

Employing coopers who make barrels, hogsheads, etc., from rough logs and splits, and who carry on a general cooperage business, are exempt from an occupation license tax by virtue of a constitutional provision declaring that there shall be exempt from taxation and license for a stated period the capital, machinery, and other property employed in the manufacture of furniture and other articles of wood. *New Orleans v. Le Blanc*, 34 La. Ann. 598.

But such a constitutional provision does not entitle one who makes finished barrels by machinery from staves, headings, and hoops imported from other states in a practically finished condition ready to be put together to any exemption. *Brooklyn Cooperage Co. v. New Orleans*, 47 La. Ann. 1314, 17 So. 804.

The record in this case showed that the prepared material for making the barrels was imported from the north and west. It consisted of staves, hoops, and headings. The staves were dressed and jointed ready for use. The hoops and headings were shaped. The work done upon these materials consisted in drying them and setting them up by hand in the form of barrels, then by machine shaping each barrel, followed by a heating process, and then driving on the hoops by a trussing machine. Each barrel then went to a machine to get the croze and chimb ready, and finally workmen set the hoops, finished the barrel, and turned it into the warehouse. The case raises the question, said the court, whether processes of this kind, which put into shape the parts of a barrel ready to set up from staves, heads, and hoops already cut, shaped, and prepared, is to be deemed the manufacture of articles of wood in the sense of the Constitution. Undoubtedly the plaintiffs' machinery serves the purpose of setting up the prepared staves already bent for the purpose, inserting the heads, and putting on the hoops that come with the staves; but the component parts of the barrel are supplied and at hand, and

whether the barrel is set up by manual labor or machinery, the processes cannot, we think, be considered as the manufacture of an article of wood in the ordinary or legal sense of the word. The heating of the prepared staves, the putting in of the prepared heads, the driving of the hoops, are all necessary to the completion of the barrel, but not one nor all of these processes constitute in any ordinary significance the manufacture of the article; nor does the additional fact that the barrel is held by machinery to receive the heads or hoops furnish, in our view, any support to the claim that the plaintiff is a manufacturer. *Ibid.*

This decision was followed without independent reasoning in *Chickasaw Coopersage Co. v. Police Jury*, 48 La. Ann. 523, 19 So. 478, where in the facts were much the same. In the later case instead of sugar and rice barrels there were produced oil, molasses, and whiskey casks hooped with iron. These required the straight iron strips furnished for hoops to be flared and fitted, the staves to be chamfered and grooved, and the complete cask to be planed smooth in a lathe and to have a bung-hole bored in it. This made about 12 per cent of the work of making the cask, and this the court thought was not a substantial part of the whole manufacture.

The courts of Louisiana hold that the constitutional exemption is only allowed when the manufacturing is done in the state. *Taylor Bros. Iron Works v. New Orleans*, 44 La. Ann. 555, 11 So. 3.

But what is manufacturing? asks the supreme court of Pennsylvania in the course of deciding upon the claim of a firm of locomotive builders to immunity from a tax from which manufacturers were exempt, where the claimants purchased, ready forged, the tires of the driving wheels. And it answers its question by saying: A cunning worker in metals is the maker of the wares he fashions, though he did not dig the ore from the earth or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather. A bureau is made by the cabinet maker although it consists in part of locks, knobs, and screws bought ready made from a dealer in hardware. *Norris Bros. v. Com.* 27 Pa. 494.

The same line of reasoning is adopted by the New York supreme court, third department, in deciding that a domestic corporation organized to make and vend a patented fountain pen, which purchased and did not make the constituent parts thereof, but shaped, moulded, fitted, and assembled them with great skill and dexterity into complete useful writing instruments, was exempt from taxation as a manufacturing corporation carrying on manufacturing within that state. *People ex rel. L. E. Waterman Co. v. Morgan*, 48 App. Div. 395, 63 N. Y. Supp. 76.

Whoever creates a useful thing by mechanical labor, said the court in that case, is entitled usually to be called a manufacturer. The fact that he purchases rather than makes some of the parts does not destroy that character. A boiler maker is a manufacturer although he purchases the boiler plates rolled into form, and purchases, also, the tubes and rivets. So with the cabinet maker who buys the wood he uses in polished form or carved, and buys the cloth, hair, and leather he uses. No manufacturer of the finished product in this age works up the raw material. That is done by specialists all along the line. The practical manufacturer assembles the material he needs from all quar-

ters in its must finished condition, and does the rest himself. Then, descending from generalities to the case in hand, the court continued, substantially: The corporation was organized solely to manufacture and sell a patent fountain pen, and actually confined itself to that business. Its pen differed in construction from that of other makers in the adjustment of the pen and feed, and this difference was the thing patented and the chief factor in producing a serviceable writing implement. The fitting and adjustment were the work the corporation did to create an integral fountain pen which in its completed entirety exceeded fourfold the value of its parts. The partly made holders are brought to the factory and none is sold or used until finished. (Gold pens are made outside in independent establishments according to specifications and under instruction and supervision. The holders are moulded and shaped to fit the pens, and the pens are treated to remove the set from their nibs and fit the holders. Skilled workmen are needed for both processes. In fitting the pens to the holders each is shaped more or less by hand. Every holder is fitted by mechanical means with a feed bar, warmed and shaped over a flame so that holder, feed, and pen are so exactly adjusted each to the others as to have the ink flow freely in use by capillary attraction, and so nicely as to pass scrutiny under the microscope. If in heating, the feed gets too hot, or not hot enough, it will not retain its form. The completed pen is turned and polished in a lathe, and sometimes ornamented by a gold band attached and chased at the same time. All this, the court held, was true manufacturing, and not simply the putting together of parts manufactured by others. Skilled labor was requisite after the parts were assembled to make them useful. The one feature of a serviceable fountain pen had yet to be created. The capillary feed duct must be formed by a skillful combination, or the pen is useless. Without the corporation's work a fountain pen is not produced,—a marketable article does not exist. The fact that the rubber-rolled into the form of a manufactured pen and the gold pens made by specialists are purchased does not make the producer of the completed pen the less a manufacturer. *Ibid.*

A corporation engaged in mixing dry colors with oil and turpentine, etc., to make ready mixed paints, 50 per cent of which are made from pigments of its own production, the proportions of the various ingredients being a trade secret, and the mixing being done by machinery, after which the compound is put through a grinding process, the final product being applied to uses for which its constituents are not separately available, is a manufacturer carrying on manufacture. *People ex rel. F. W. Devoe & C. T. Reynolds Co. v. Roberts*, 51 App. Div. 77, 64 N. Y. Supp. 494.

g. Finished works.

Shoes made wholly of India rubber, by dipping moulds or lasts into the milky liquid that flows on tapping the rubber tree and drying it over the fire, repeating the process from time to time until by successive layers a proper thickness is obtained, when they are ready to wear without addition or essential change, are to be classified as shoes manufactured of India rubber, and dutiable when imported, rather than as India rubber in bottles, sheets, or otherwise unmanufactured and free, notwithstanding they

are in substance and condition the same as shapeless masses of crude rubber, and may be used for the same purposes. *Lawrence v. Ailen*, 7 How. 785, 12 L. ed. 914.

The term "articles of wood," in that clause of the Louisiana Constitution which exempts from taxation and license capital, machinery, and property employed in manufacturing furniture and other articles of wood, embraces those wooden things fashioned from lumber complete and ready for immediate, convenient, and general use, without further work or addition, and not cut lumber designed to take its place in a particular structure. *Carpenter v. Bruslé*, 45 La. Ann. 456, 12 So. 483; *White Castle Lumber & S. Co. v. Browne*, 45 La. Ann. 454, 12 So. 485; *Rosedale Cypress Lumber & S. Co. v. Bruslé*, 45 La. Ann. 459, 12 So. 484; *Plaquemine Lumber & Improv. Co. v. Browne*, 45 La. Ann. 459, 12 So. 485.

The making of paper boxes is not the manufacturing of paper, so as to bring capital and machinery devoted to producing them within a constitutional exemption of such as is employed in manufacturing paper. *Washburn v. New Orleans*, 43 La. Ann. 226, 9 So. 37.

Neither are the cutting and making of coats and trousers from cloth already woven by others a manufacturing of textile fabrics within the meaning of such a constitutional provision. *Cohn v. Parker*, 41 La. Ann. 894, 6 So. 718.

But the making of fish lines, ropes, packing, and other hempen articles is manufacturing textile fabrics because they have to be woven. *New Orleans v. Arthurs*, 36 La. Ann. 98; *Waterbury v. Atlas Steam Cordage Co.* 42 La. Ann. 723, 7 So. 783; *Hernsheim v. Atlas Steam Cordage Co.* 42 La. Ann. 726, 7 So. 784.

A corporation making and selling sewer pipe and drain tiles formed of clay, salt, and water subjected to fire, 90 per cent of whose value is outside of the ingredients, is taxable as a manufacturer, and not as a merchant or dealer, under the Iowa statutes. *Iowa Pipe & Tile Co.'s Appeal*, 101 Iowa, 170, 70 N. W. 115.

A corporation organized to buy, sell, lease, and operate mines and mining claims and smelting reduction and refining works; to conduct in all its branches a general mining, milling, and smelting business, including the purchasing and vending of mineral ores and bullion; to buy and sell goods, wares, merchandise, and miners' supplies and stores; to build and operate roads, tramways, and transportation routes; and to acquire, hold, and dispose of, when no longer useful, real and personal property necessary to its business; and which conducts its financial affairs and correspondence in a foreign state, whether it brings base bullion to be finally refined into standard silver bars,—is not in such state a manufacturing corporation engaged in manufacturing, within an exemption given in its tax laws. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, Affirming 105 N. Y. 76, 11 N. E. 155.

A statute taxing all dealers in American goods, wares, and merchandise, and all persons concerned in the manufacture of the same who keep a store for the sale thereof, except mechanics who keep a store or warehouse at their own shops or manufactories for the purpose of vending their own manufactures exclusively, does not include locomotive builders who sell their output at their own mills. *Norris Bros. v. Com.* 27 Pa. 494.

A corporation incorporated for and actually
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engaged in, boat, yacht, and ship building of a peculiar construction with double bottoms to prevent sinking by collision, under letters patent, is a manufacturing company engaged in manufacturing. *Norton Naval Constr. & Ship-Building Co. v. State Board*, 53 N. J. L. 564, 22 Atl. 352.

But the term "manufacturing corporation" cannot be considered as comprehending the business of constructing, using, and providing one or more dry docks, or wet docks, or other conveniences and structures for building, raising, repairing, and coppering vessels and steamers, if the words are interpreted (as they must be) according to the common understanding of such language. *People v. New York Floating Dry Dock Co.* 92 N. Y. 487.

The court did not resort to extended argument in reaching this conclusion. The substance of its reasoning was that the main purpose of the corporation was to build, raise, repair, and copper vessels, and its chief work was improving them after they were constructed, not constructing them; taking all it did together or separately its work did not fall within the definition of manufacturing. The constructing, using, and providing of docks was, it was said, no more manufacturing than was building warehouses, elevators for warehousemen, or erecting residences. *Ibid.*

And yet a corporation which from raw or unfinished iron, steel, or lumber fashions, assembles, and joins all the completed parts of a bridge, viaduct, or turntable, is none the less a manufacturer because it afterwards sets them up in permanent place ready for actual use. Such a corporation actually engaged in making and selling iron and steel bridges, building roofs, viaducts, turntables, and other articles and machinery composed wholly or partly of wood, iron, steel, or other material, which buys from others in the rough, unfinished state the lumber, iron, steel, and other metals it needs, and finishes, shapes, designs, and fashions them suitable for use at its own shops, sometimes selling the finished material, and at others framing, assembling, and uniting it, and then with it erecting bridges, roofs, and other structures or machinery, is a manufacturing corporation exclusively carrying on manufacture, and as such exempt, in Pennsylvania, from capital-stock taxation. *Com. v. Keystone Bridge Co.* 156 Pa. 500, 27 Atl. 1; *Com. v. Pittsburgh Bridge Co.* 156 Pa. 507, 27 Atl. 4.

A corporation which manufactures an asphalt pavement compound is, so far as the preparation of that material is concerned, a manufacturer; but when, in addition it prepares streets and highways to receive it, and applies it thereto to form a roadbed, the latter process is not manufacturing; and hence, such corporation cannot be deemed a manufacturing corporation wholly engaged in carrying on manufacture, so as to be exempt from the New York state franchise tax. *People ex rel. Syracuse Improv. Co. v. Morgan*, 50 App. Div. 302, 69 N. Y. Supp. 263.

But a domestic corporation producing by a secret process an asphaltic composition for floors, sidewalks, and streets, employing in its production a plant for heating to a high degree the materials it uses, is a manufacturing corporation, and is entitled to the exemptions allowed to manufacturing corporations to the extent of the capital employed in the state of New York in manufacturing, and in the sale of the products of manufacturing. *People ex rel.*

Eastern Bermudez Asphalt Paving Co. v. Morgan, 61 App. Div. 373, 70 N. Y. Supp. 516.

IV. Organisation.

a. In general.

Gaslight companies are manufacturing companies although they are not organized under the so-called general manufacturing act in the state of New York. As manufacturing companies they are subject to the same taxation, and entitled to the same exemptions, as other manufacturing corporations. *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

The exceptions which include manufacturing corporations, contained in the New York statute (Laws 1880, chap. 542), for taxing corporations generally at a specified rate upon their capital stock according to declared dividends, are not confined to those organized under the general manufacturing act of 1848, but embrace all manufacturing companies under whatsoever statute organized. *Ibid.*

The fact that an electric light company was incorporated under the act for the formation of gas companies, instead of the general manufacturing act, is not material upon the question whether or not it is a manufacturing company. *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 129 N. Y. 664, 29 N. E. 812.

Whether or not a given corporation is a manufacturing corporation, and, therefore, when carrying on business in New Jersey, exempt from the capital-stock tax by virtue of the excepting proviso in the act imposing it upon corporations generally, is to be determined, not by the certificate of its incorporation and the statement it contains of the objects for which the company is organized, but by the actual business to which the capital is applied. *State, Evening Journal Assn., Prosecutor, v. State Board*, 47 N. J. L. 36, 52 Am. Rep. 107, note.

The business in which the corporate capital is invested and used, and not the purposes for which the corporation was formed as avowed in its certificate of incorporation, determines its liability to or exemption from taxation in New Jersey. *Press Printing Co. v. State Board*, 51 N. J. L. 75, 16 Atl. 173.

To determine whether a corporation is within the proviso excepting from the operation of the New Jersey tax law manufacturing or mining companies carrying on business in that state, reference must be had to its actual business; because the business in which its capital is invested, and not the objects for which it was formed, is the controlling and decisive circumstance. *Norton Naval Constr. & Ship Building Co. v. State Board*, 53 N. J. L. 564, 22 Atl. 352.

Although the charter of a corporation authorizes it to carry on manufacturing, building, and transportation, yet, if it is actually engaged in manufacturing solely, it is entitled to the tax exemption accorded to manufacturing companies carrying on business in New Jersey. *Re Consolidated Electric Storage Co.* (N. J. Eq.) 26 Atl. 983.

A corporation empowered by its charter to dig iron ore, build and operate furnaces, forges, factories, and rolling mills, and to manufacture machinery and other works of iron and steel, which does not exercise all its powers, but invests its entire capital in manufacturing, and does nothing else, is altogether exempt from taxation under the Pennsylvania tax laws exempting corporations exclusively manufacturing. 64 L. R. A.

Com. v. Pottsville Iron & Steel Co. 157 Pa. 500, 22 L. R. A. 228, 27 Atl. 371.

A manufacturing corporation exempt as such from taxation, both by a provision in its charter and by statute because it carries on business in the state, does not lose the benefit of its immunity when, without any change in its character, attributes, or purposes, its rights and powers are extended by law to widen the scope of its operations by condemning additional lands, raising dams, etc. *State v. Society for Establishing Useful Manufactures*, 43 N. J. Eq. 410, 5 Atl. 724.

A corporation which actually only rents out premises to others manufacturing on their own account, furnishing steam power for the tenants' use, although it calls itself a manufacturing company, and in its certificate declares its purpose to be manufacturing steam and supplying it to the building it owns, is merely a landlord supplying tenants with power in order the more readily to rent its buildings; and is not a manufacturer or producer of anything; and has no claim to be exempt from taxation as a manufacturing corporation. *Com. v. Arrott Mills Co.* 145 Pa. 69, 22 Atl. 243.

A corporation formed, as expressed in its articles of association, "for the purpose of putting up, packing, and manufacturing for market, river and lake ice, and distributing and selling the same," is legally incorporated in Michigan under a general statute authorizing the organization of corporations for manufacturing purposes, irrespective of whether or not the business it actually carries on afterwards is legally a manufacturing business or not. The articles of association are conclusive as to the purpose of incorporation, and it is not necessary in them to set forth *in extenso* the means or methods of the manufacturing it is purposed to do; and it is not for the court to say that in the stated case manufacturing is impossible. *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311.

A statute authorizing the formation of corporations for manufacturing, agricultural, mining, or mechanical purposes warrants incorporation to manufacture lumber, flour, and meal. *Cross v. Pinckneyville Mill Co.* 17 Ill. 54.

Inasmuch as the Pennsylvania laws do not authorize incorporation to buy, sell, and deal as a merchant, the inclusion of such a purpose in the charter of a manufacturing corporation is nugatory, and confers no powers. Such a charter must be treated as if the null purpose were absent from it altogether, and the corporation formed exclusively to manufacture. *Com. v. Thackara Mfg. Co.* 156 Pa. 510, 27 Atl. 13; *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10.

Probably, for like reasons, the opinion was expressed in *Wagner v. Corcoran*, 2 Pa. Dist. R. 440, that a corporation for the manufacture and sale of all kinds of lumber, and the purchase and sale of mills, lands, standing timber, logs, and lumber for the purposes of such business was a manufacturing corporation authorized by the general manufacturing incorporation law; but the case was decided upon another point.

In an action in Michigan, brought by a bank upon a promissory note made in a corporate name against the individual incorporators, the bank contended that the supposed corporation had no legal existence because the Michigan statute only authorized the formation of corporations for mining and manufacturing purposes, and this company was not formed either

to mine or to manufacture. The objects of incorporation set forth in the articles were "the cutting, rafting, and manufacturing of timber," and the actual operations of the company were, getting out long round timber. It felled trees, lopped off the branches, cut off the tops at a point where the trunk was a foot in diameter, hauled the logs to a river, floated them down stream, and rafted them. The court did not decide whether or not the maker of the note was legally incorporated, but held that the bank had so dealt with it as a *de facto* corporation that it could not recover of the individual incorporators. Marston, J., who dissented from the decision, was of the opinion that the operations of the company were not manufacturing, and that no legal incorporation could be had to carry them on. Taking up the argument that a manufacture is literally anything made by the human hand, and includes every step by which raw material is advanced toward fitness for human use, he concurs in the proposition that any attempt to distinguish between what is and what is not a manufactured article based upon a change in the form in one case, or because in another an article finished for a particular use has been produced, would rest on no sound principle, and would be incorrect. But, he says, if it be held that the word "manufacturing," as used in the statute, takes a strictly literal sense,—"includes every step by which the raw material is advanced toward fitness for human use,"—a great deal would be included that the legislature neither intended nor contemplated. Under such a construction, separate corporations might be formed to manufacture round timber, logs, telegraph poles, or cord wood; wheat and oats by cradling, cutting, or reaping standing grain; or cutting, husking, and shelling corn. Indeed, in getting out cord wood several different corporations might be formed, one to fell the timber, another to cut it into suitable lengths, another to split it,—each a distinct step by which raw material is advanced towards fitness for human use. And it might just as appropriately be said that lopping off branches from a felled tree was manufacturing brush as to hold such successive steps manufacturing within the meaning of the statute. He invokes the principle that the true sense in which words are used in a statute is to be ascertained, not by following out their literal signification to absurd results, and thus giving them a meaning the legislature evidently never designed or expected, but by giving them when untechnical their ordinary and popular significance. *Merchants' & Mfrs. Bank v. Stone*, 38 Mich. 779.

A corporation organized for the purpose of bleaching, calendering, printing, dyeing, and finishing textile fabrics, whose actual business is bleaching goods after they come from the mills, must, in Massachusetts, be classed with manufacturing corporations whose stockholders are liable for the corporate debts. *Johnson v. Somerville Dyeing & Bleaching Co.* 15 Gray, 216.

The purpose for which a corporation is organized must be ascertained from its charter. *Distilling & Cattle Feeding Co. v. People*, 161 Ill. 101, 43 N. E. 779; *Evanston Electric Illuminating Co. v. Kochersperger*, 175 Ill. 28, 51 N. E. 719.

Thus, under the Minnesota constitutional provision that each shareholder in every corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the

amount of his stock for the corporate debts, the purpose stated in the articles of incorporation is controlling, and to fall within the exception the corporation must be organized to manufacture exclusively. If it has other powers not necessarily incidental to manufacturing, such, for instance, as to buy and sell for gain the wares of other manufacturers, even though it does not in fact exercise such powers, the stockholders are liable. *Arthur v. Willius*, 44 Minn. 409, 43 N. W. 851; *Densmore v. Shepard*, 46 Minn. 54, 48 N. W. 528, 681; *First Nat. Bank v. Winona Plow Co.* 58 Minn. 167, 59 N. W. 997; *St. Paul Barrel Co. v. Minneapolis Distilling Co.* 62 Minn. 448, 64 N. W. 1143; *Anderson v. Anderson Iron Co.* 65 Minn. 281, 33 L. R. A. 510, 68 N. W. 49; *Holland v. Duluth Iron Min. & Development Co.* 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50.

And even if a corporation is organized under the manufacturing act avowedly as a manufacturing corporation, yet, if its primary purpose is that of merchandising, its stockholders will still be liable for its debts. *Mohr v. Minnesota Elevator Co.* 40 Minn. 343, 41 N. W. 1074.

b. Domestic and foreign corporations.

A foreign corporation actually engaged in manufacturing in New York is exempt from taxation upon its capital stock employed in that state the same as a domestic corporation of the same character; the exemption in each case applying only when the corporation is wholly engaged in carrying on manufacture within the state. *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238; *People ex rel. John A. Roebbing's Sons' Co. v. Wemple*, 138 N. Y. 582, 34 N. E. 386.

The exemption from taxation accorded to manufacturing corporations in New York applies without distinction to both domestic and foreign corporations, and in either case to such alone as are engaged in carrying on manufacture in the state. *People ex rel. Blackinton Co. v. Roberts*, 4 App. Div. 368, 38 N. Y. Supp. 872, Affirmed in 151 N. Y. 652, 46 N. E. 1150.

Foreign corporations organized for manufacturing, and actually exclusively engaged in manufacturing, in Pennsylvania, are exempt from capital-stock taxation the same as are domestic corporations in that state. *Com. v. American Car & Foundry Co.* 203 Pa. 302, 52 Atl. 326; *Com. v. Olcott*, 203 Pa. 310, 52 Atl. 326; *Com. v. National Tube Works Co.* 203 Pa. 310, 52 Atl. 326; *Com. v. Niles-Bement-Pond Co.* 203 Pa. 311, 52 Atl. 326; *Com. v. American Steel & Wire Co.* 203 Pa. 311, 52 Atl. 326; *Com. v. Carbon Steel Co.* 203 Pa. 312, 52 Atl. 326; *Com. v. Ashley & B. Co.* 203 Pa. 312, 52 Atl. 326; *Com. v. Danville Bessemer Co.* 203 Pa. 313, 52 Atl. 326.

The capital stock of a domestic manufacturing corporation is exempt from taxation in Pennsylvania because it is invested and actually exclusively employed in manufacturing within the state, notwithstanding it is owned in its entirety by a foreign corporation. *Com. v. American Cement Co.* 203 Pa. 298, 52 Atl. 330; *Com. v. Lorain Steel Co.* 203 Pa. 300, 52 Atl. 330.

But a foreign corporation engaged in obtaining or preparing mineral oil, holding oil lands, and doing business in Pennsylvania, is taxable there by virtue of statutes applying generally to corporations, both foreign and domestic, doing business in the state, notwithstanding statutes exempting manufacturing and mining com-

panies, as oil producing companies are not in the exempt classes. *Com. v. Central Petroleum Co.* 1 Pearson (Pa.) 373.

V. Operation.

a. In general.

When an exemption from taxation depends upon a proviso in a statute, which, but for such proviso, would reach the claimant of immunity thereunder, the burden rests upon such claimant to bring itself within the terms of the proviso. *Edison United Phonograph Co. v. State Board*, 57 N. J. L. 520, 31 Atl. 1019.

Thus, when an exemption from a particular tax is granted by a proviso in the statute imposing it to manufacturing corporations having half their capital stock invested in manufacturing carried on within the state, a manufacturing corporation claiming to be exempt from such tax has the burden of establishing the facts necessary to bring it within the exempting proviso. *State, Electric Storage Battery Co., Prosecutor, v. State Board*, 60 N. J. L. 66, 36 Atl. 1090, Affirmed in 61 N. J. L. 289, 41 Atl. 1117.

To entitle a corporation to exemption from the New York franchise or business tax as a manufacturing corporation it must not only be such a company, but it must, as well, be engaged in carrying on manufacturing within that state. *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155, Affirmed in 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 582, 34 N. E. 386; *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238; *People ex rel. Blackinton Co. v. Roberts*, 4 App. Div. 388, 38 N. Y. Supp. 872, Affirmed in 151 N. Y. 652, 46 N. E. 1150.

For a corporation to be exempt from taxation in New Jersey as a manufacturing corporation carrying on business in that state, it is necessary that it should there do its principal work,—should establish its factory within the state, and bring there its raw materials and convert them into wares. It is not enough that it maintains an office, holds business meetings, makes some purchases and sales, and transports goods within the state while maintaining and operating all its factories and carrying on the bulk of its business beyond its boundaries. *American Glucose Co. v. State*, 43 N. J. Eq. 280, 5 Atl. 803.

A domestic manufacturing corporation having an office and procuring much of the material used by it within the state of New Jersey, but manufacturing in another state its special product into which these materials enter, is not entitled to the exemption from capital-stock taxation accorded only to manufacturing companies carrying on business within the state. *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733, Affirming (N. J. Eq.) 18 Atl. 581.

A domestic manufacturing company which has its factories and does all its manufacturing in a foreign state, but which in its home state has its general offices, keeps its bank account, makes its sales, controls and manages all its business, is not exempt in the state of its origin from a state franchise tax laid by a statute which excepts from its application corporations wholly engaged in carrying on manufacturing within such state. *People ex rel. Blackinton Co. v. Roberts*, 4 App. Div. 388, 38 N. Y. Supp. 872, Affirmed in 151 N. Y. 652, 46 N. E. 1150. 64 L. R. A.

It is only when articles of the kinds mentioned in the Louisiana constitutional provision for the exemption of capital and machinery employed in manufacturing are made within the state that the exemption attaches. *Smith v. Board of Assessors*, 44 La. Ann. 91, 10 So. 387; *Taylor Bros. Iron Works Co. v. New Orleans*, 44 La. Ann. 554, 11 So. 3.

To entitle a manufacturing corporation to the benefit of a constitutional exemption from taxation of capital and machinery employed in certain classes of manufacture, it must be shown, affirmatively, that the property claimed to be free is thus actually employed; it is not sufficient that it belongs to a corporation in one of the exempt classes. *Ivens & Son Mach. Co. v. Parker*, 42 La. Ann. 1103, 8 So. 399.

Such a constitutional exemption of property employed in manufacturing does not extend to premises rented out for manufacturing purposes. To earn the exemption the owner must "employ" his property in manufacturing, not simply let others employ it. *State ex rel. Ward v. Board of Assessors*, 46 La. Ann. 859, 15 So. 384.

To entitle a manufacturing corporation to an exemption from a tax imposed by a statute which excepts from its operation manufacturing companies carrying on business in the state, it is essential that it be actually located and manufacturing under its charter within the state. Until it actually locates its business and begins work, although preparing in good faith so to do, and engaged in needful preliminaries, it is taxable. *Norton Naval Constr. & Ship Building Co. v. State Board*, 53 N. J. L. 564, 22 Atl. 352.

And it will cease to be exempt when it permanently stops manufacturing. *State, Edison Phonograph Co., Prosecutor, v. State Board*, 55 N. J. L. 55, 25 Atl. 329.

After the closing of a factory and formal abandonment of manufacturing in it, a constitutional exemption from taxation ceases; but if that takes place during a taxing year it is error to assess it for the entire year. *Electric Traction Co. v. New Orleans*, 45 La. Ann. 1475, 14 So. 231.

The temporary suspension of a manufacturing business while the factory is maintained and the property and machinery are dedicated to manufacture within the terms of a constitutional exemption clause does not deprive it of the immunity from taxation. *Waterbury v. Atlas Steam Cordage Co.* 42 La. Ann. 723, 7 So. 783; *Hernsheim v. Atlas Steam Cordage Co.* 42 La. Ann. 726, 7 So. 784.

But a leasing of such factory and business for the express purpose of discontinuing manufacturing so as to repress competition and reduce the supply of the product is subversive of the object for which such exemption was granted, and renders the property and machinery formerly employed liable to taxation. *Ibid.*

The exemption from taxation on account of capital employed, accorded by statute to a corporation, even a foreign one, wholly engaged in manufacturing within the state, does not depend upon the percentage of its total manufacturing carried on in New York, nor upon the magnitude of its manufacturing operations. If it is wholly engaged in manufacturing at all, to however small an extent within the meaning of the exempting statute, it is entitled to immunity. *People ex rel. Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323, 31 N. E. 238.

When a statute for the taxation of corporations generally excepts from its application such

manufacturing corporations only as have half of their outstanding capital stock invested in manufacturing carried on within the state, a manufacturing corporation capitalised at \$1,000,000, of which 99 per cent has been invested in patent rights; that has only about \$8,500 worth of tools, besides the necessary rights to manufacture, invested in the works of an independent contractor within the state; and has business relations and manufacturer's rights throughout the world,—does not, by proof of these naked facts, show itself within the exception of the statute, and so fails to establish a right to exemption from a tax imposed in virtue thereof. *Edison United Phonograph Co. v. State Board*, 57 N. J. L. 520, 31 Atl. 1019.

And when it is made to appear that a domestic manufacturing company carries on manufacturing both within and without the state; that its plant in the state is worth from 20 to 40 per cent less than the one without; that at the plant without the state there are employed ten times as many men as there are at work at the one within the state; and that its entire manufacturing is carried on under home and foreign letters patent, for the purchase of which most of its capital stock was issued,—such corporation does not come within the exemption proviso of the tax statute applicable to manufacturing corporations with 50 per cent of their capital stock invested in manufacturing in the state upon the hypothesis that the patents appertain, alone, to the factory within the state because it is there that the raw material is made to be transferred for finishing and assembling to the outside works, since the corporation is not a mere licensee using patents under a local shop right. *State, Electric Storage Battery Co., Prosecutor, v. State Board*, 60 N. J. L. 66, 36 Atl. 1090, Affirmed in 61 N. J. L. 289, 41 Atl. 1117.

A foundry engaged in making railings, posts, bridges, etc., and in casting iron, brass, and other metals, is not, without proof that its output was used in machinery or agricultural implements, exempt under the Louisiana Constitution freeing from taxation capital, machinery, and property employed in the manufacture of machinery and agricultural implements. *Benedict v. New Orleans*, 44 La. Ann. 793, 11 So. 41.

b. Manufacturing and its incidents.

Whatever is purely and necessarily incidental to a manufacturing enterprise, a manufacturing corporation may do without in any wise impairing its rights or curtailing its privileges as a manufacturing company. It may, for instance, rent, furnish, and maintain an office for the transaction of its business, and the capital invested therein is just as much exempt as if it were invested in a factory and its machinery. *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122.

And the power to manufacture implies the power to sell the manufactured product. *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 168, 38 N. E. 990; *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73; *Re Consolidated Electric Storage Co. (N. J. Eq.)* 26 Atl. 983; *Com. v. Thackara Mfg. Co.* 156 Pa. 510, 27 Atl. 13; *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10.

A corporate power to do work upon glass containers, by implication, the power to buy glass to work upon, and to sell the glass when it is

worked. *Hawkes Glass Beveling & Silvering Co. v. Bohn Mfg. Co.* 40 Ill. App. 649.

A distinction between the manufacturing of electricity and the supplying of it when the question is one of taxation or of tax exemption of a corporation doing both is without force. The power to supply includes the power to manufacture electricity. *Southern Electric Light & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123.

And a brewing company with power to manufacture and sell lager beer and other fermented and malt liquors has incidental power to rent a saloon to sell at retail the beer it brews. *Welsh v. Ferd Helm Brewing Co.* 47 Mo. App. 608; *National Brewing Co. v. Ahlgren*, 63 Ill. App. 475; *Keeley Brewing Co. v. Emrick*, 64 Ill. App. 247.

A brass and sheet-iron worker manufacturing steam trains for sugar making, shake pans, evaporators, clarifiers, juice tanks, breeching, fire bricks, steam and water pipes, all used in machinery for preparing an agricultural product, to wit, sugar, of the state of Louisiana, is not to be denied his tax exemption conferred by the Constitution of that state, because, as an incident to his main business, he also manufactures turpentine stills, distillery and brewery apparatus, to which such exemption does not extend. *State ex rel. Fredericks v. Board of Assessors*, 41 La. Ann. 534, 6 So. 337.

c. Incidental manufacturing.

Merely doing some manufacturing as an incident to another and wholly distinct business will not confer upon a corporation any of the rights, or obtain for it any privilege, peculiar to manufacturers.

A company incorporated for the purpose of cleansing, bleaching, and smoothing textile fabrics by machinery, and whose principal business is washing and ironing, in spite of the fact that it makes the soaps, detergents, and dyes it uses, is not within a statute exempting from taxation the capital stock of manufacturing corporations invested in carrying on manufacturing. *Com. v. Keystone Laundry Co.* 203 Pa. 289, 52 Atl. 326.

And yet the stockholders of a corporation organized to bleach, print, dye, callender, and finish woven goods, whose actual business is only bleaching, are liable for the corporate debts in virtue of a statute that applies exclusively to manufacturing corporations. *Johnson v. Somerville Dyeing & Bleaching Co.* 15 Gray, 216.

While fertilizers made from the offal of slaughtered animals may well be regarded as manufactured, yet, when the making of them is only incidental to the killing and preserving of meat, the pulling of wool, and the saving of raw-hides for market, their preparation does not entitle a corporation that makes them to exemption from taxation as a manufacturer. *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53.

The dust brushed off in polishing rice grains, sold as rice flour, is a by-product of rice milling, and its incidental production does not make rice millers manufacturers of flour. *State ex rel. Ernst v. State & City Board*, 36 La. Ann. 347; *Martin v. Thibaut*, 37 La. Ann. 21.

d. Associated enterprises.

1. Production of raw materials.

A manufacturing company does not cease to

be such because it seeks to supply its raw materials by production instead of purchase. It may subject so much of its capital as it thus employs to taxation, but it does not lose its own identity. *Com. v. Pottsville Iron & Steel Co.* 157 Pa. 500, 22 L. R. A. 228, 27 Atl. 371.

The mining of coal has no necessary connection with the manufacture of coke. The Pennsylvania legislature has conferred exemption from taxation upon manufacturing companies, and denied it to mining companies. Manufacturing corporations must purchase their supplies. It may be convenient for them to produce their raw materials, and if they may not do so, the cost of the manufactured article may be enhanced. The statutory exemption cannot be extended so as to cover operations outside of the legitimate processes of manufacturing. Nevertheless, a corporation organized to manufacture, and engaged in manufacturing coke as its principal business, which for economic reasons mines the coal out of which its coke is manufactured, and which has a charter power to mine coal as well as manufacture coke, is still a manufacturing company carrying on manufacture, and, to the extent of its investment in the manufacturing branch or department of its business, is exempt from taxation, but taxable upon the other branch of its operations. *Com. v. Juniata Coke Co.* 157 Pa. 507, 22 L. R. A. 232, 27 Atl. 373.

This is true also of a corporation manufacturing fire brick, tiles, and other articles of fire clay, that digs or quarries from its own lands the clay it works. *Com. v. Savage Fire Brick Co.* 157 Pa. 512, 27 Atl. 374.

It is equally true of an oil manufacturing company which draws its raw material from its own oil wells, instead of purchasing it from others. *Com. v. National Oil Co.* 157 Pa. 516, 27 Atl. 374.

And it is also true of a slate company manufacturing various articles of commerce out of slate from its own quarries, quarried by itself. *Com. v. East Bangor Consol. Slate Co.* 162 Pa. 599, 29 Atl. 708.

But if the exemption depends upon whether the corporation is exclusively organized for manufacturing purposes only, a corporation that has lawful charter power to do other things will be subject to taxation. *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265, 24 Atl. 1107, 1111; *Com. v. Coplay Iron Co.* 11 Pa. Co. Ct. 295, 1 Pa. Dist. R. 353; *Com. v. Thomas Iron Co.* 12 Pa. Co. Ct. 654.

A corporation with a fourfold character, organized for and engaged in coal mining, quarrying, mining iron ore, and manufacturing articles of iron, but whose principal business is manufacturing, is exempt under a statute abolishing taxes on manufacturing corporations and repealing laws for the collection thereof; but upon only so much of its invested capital as properly and solely belongs to its manufacturing business, notwithstanding the products of its mines and quarries are chiefly consumed in its manufacturing operations. *Com. v. Lackawanna Iron & Coal Co.* 129 Pa. 346, 359, 18 Atl. 133, 1120.

A corporation organized to execute a contract to remove and dispose of the garbage and refuse of a city, and to manufacture therefrom chemicals, oils, soaps, candles, and similar articles; and which operates a plant including vats wherein the dead animals, kitchen refuse, and offal gathered from the streets are placed, and subjected to heat to drive off moisture and gases

and extract grease and oil, leaving a residuum fit, and actually used, for a fertilizer,—is a manufacturer of chemicals and fertilizers, and as such entitled to exemption from taxation of its capital, machinery, and property employed therein, notwithstanding it gathers its raw material in virtue of its city contract, and evolves by-products of merchantable value, which, if they were the sole or principal product of its plant, would leave it taxable. *Southern Chemical & F. Co. v. Board of Assessors*, 48 La. Ann. 1473, 21 So. 31.

A corporation that has leased, and is operating with a few men, a mine, and near it, with four or five times as many hands, smelting works, from which most of its gains are made, incidentally running a store and boarding house for its employees, is engaged principally in manufacturing, within the meaning of the national bankrupt act. *Re Tecopa Min. & Smelting Co.* 110 Fed. 120, 3 N. B. N. Rep. 841.

2. Trade and commerce.

Manufacturers constitute a separate class from merchants and traders. *Com. v. Campbell*, 33 Pa. 380; *Com. v. Wm. Mann Co.* 150 Pa. 64, 24 Atl. 601; *Com. v. Westinghouse Air Brake Co.* 151 Pa. 276, 24 Atl. 1111, 1113; *Com. v. Thackara Mfg. Co.* 156 Pa. 510, 27 Atl. 13; *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10; *Iowa Pipe & Tile Co.'s appeal*, 101 Iowa, 170, 70 N. W. 115; *State ex rel. Davis & S. Lumber Co. v. Fors*, 107 Wis. 420, 51 L. R. A. 917, 83 N. W. 706.

A corporation organized for mining and manufacturing lime, and barrels to hold it, has no power or authority to engage in merchandising. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

The power to buy and sell,—to purchase in order to sell,—habitually as a business, thus becoming a merchant or trader, is no necessary incident to a manufacturing business. *Com. v. Thackara Mfg. Co.* 156 Pa. 510, 27 Atl. 13; *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10; *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 166, 38 N. E. 990; *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73; *People ex rel. F. W. Devoe & C. T. Reynolds Co. v. Roberts*, 51 App. Div. 77, 64 N. Y. Supp. 494.

A corporation engaged in manufacturing oil-cloths, which, at a distance from its factory, conducts a store where it deals in that class of goods, selling not only its own, but others' products, is not, merely because incorporated under the manufacturing act, exempt from taxation as a merchant so far as it carries on a mercantile business, when the only exceptions to those liable for the tax, made by the tax law, are mechanics and manufacturers selling their own products, and not keeping a store or warehouse or selling goods made by others to a greater extent than \$1,000. *Com. v. Thomas Potter Sons & Co.* 159 Pa. 583, 28 Atl. 492.

A domestic corporation formed to manufacture, buy, sell, and deal in lamps, gas, and electric fixtures, is organized exclusively for manufacturing purposes, because the attempted reservation of power to buy, sell, and deal is void. Therefore, when such a corporation actually carries on manufacturing within the state it is exempt from capital-stock taxation to the extent that it has invested in manufacturing, and is taxable upon the remainder in Pennsylvania.

Com. v. Thackara Mfg. Co. 156 Pa. 510, 27 Atl. 13.

The same is true of a book and periodical printing and publishing, and stationery and blank-book manufacturing, corporation that likewise attempted to reserve power to deal in maps, books, periodicals, stationery, and similar articles made by others. Com. v. J. B. Lipincott Co. 156 Pa. 513, 27 Atl. 10.

A New York corporation organized under the general manufacturing act to manufacture and sell gold and silver ware and other articles of ornament and use, and limited by its charter to the exercise of such powers, and by statute to such others, as are necessary and incidental to them, 80 per cent of whose capital is employed in the exercise of its corporate power to manufacture and sell its manufactured wares; but which, *ultra vires*, employs a part of its capital in buying and selling goods of the same character as its own, made by others to complete its lines of stock and meet the demands of its customers for articles it cannot profitably make,—is conclusively presumed to be “wholly engaged in manufacturing within the state of New York,” and entitled to tax exemption in virtue of the so-phrased laws thereof; but the extent of its exemption is limited to the amount of capital actually employed in exercising its chartered powers. It is taxable upon its *ultra vires* business. People *ex rel.* Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990, Reversing 80 Hun, 95, 30 N. Y. Supp. 70.

This decision in effect overruled *Re Tiffany & Co.* 80 Hun, 486, 30 N. Y. Supp. 494, wherein the supreme court third department, at the instance of the attorney general, set aside an assessment of this corporation to the end that the comptroller might increase it according to the entire capital, upon the ground that it was not wholly employed in manufacture.

A foreign corporation chartered for manufacturing purposes only, and engaged therein in the state of New York, is exempt, also, to the extent of its capital invested in manufacturing, notwithstanding *ultra vires* it deals in similar products and articles incidental to the trade, which it does not manufacture. People *ex rel.* F. W. Devoe & C. T. Reynolds Co. v. Roberts, 51 App. Div. 77, 64 N. Y. Supp. 494.

But when a New York corporation not only has power, by its charter, to manufacture, so that it would be exempt as a manufacturing corporation if it had no other powers, but has also the chartered power to trade in articles similar to those it manufactures, but made by others; and it does actually exercise all its chartered powers and carry on both manufacturing and trading,—it is not exempt from taxation, because it is not wholly engaged in carrying on manufacture. People *ex rel.* Frederick A. Stokes Co. v. Roberts, 90 Hun, 533, 36 N. Y. Supp. 73.

The principle of that decision was the same as that applied in People *ex rel.* Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 239, and People *ex rel.* Edison Electric Light Co. v. Campbell, 88 Hun, 530, 34 N. Y. Supp. 713, Reversed on another ground in 148 N. Y. 759, 43 N. E. 177. (*Vide* VI. a, 2, *infra*.)

Manufacturing corporations carrying on manufacturing in New York are taxable under a statute of that state imposing upon domestic and foreign corporations alike taxes measured by capital stock employed within the state, except when such corporations are wholly engaged in carrying on manufacturing within the state, if they are engaged in outside trade, even

though their outside operations are solely either foreign or interstate commerce. People *ex rel.* William J. Matheson & Co. v. Roberts, 158 N. Y. 162, 52 N. E. 1102; People *ex rel.* American Soda Fountain Co. v. Roberts, 158 N. Y. 168, 58 N. E. 1104.

That a part of the capital stock of a manufacturing corporation is employed in disposing of the manufactured product does not exclude it, in estimating the amount of capital stock invested in manufacturing in the state, under a statute exempting from a given tax such a corporation when it has half of its capital stock invested in manufacturing within the state. *Re Consolidated Electric Storage Co.* (N. J. Eq.) 26 Atl. 983.

3. Miscellaneous.

A corporation formed to manufacture, trade in, buy, sell, lease, and otherwise acquire, hold, and dispose of phonographs, graphophones, and instruments of any other kind or description, made, used, or intended for recording and reproducing sounds, and any and all supplies, appliances, materials, and articles used or required presently or *in futuro* in the manufacture, use, or operation of phonographs, etc., is a manufacturing corporation. State *ex rel.* North American Phonograph Co. v. State Board, 54 N. J. L. 430, 24 Atl. 507.

For two New York cases, *vis.*: People *ex rel.* Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 239, and People *ex rel.* Edison Electric Light Co. v. Campbell, 88 Hun, 530, 34 N. Y. Supp. 713, Reversed in 148 N. Y. 759, 43 N. E. 177, here in point,—see VI. a, 2, *infra*.

In Pennsylvania a domestic corporation, otherwise within the terms of a statute thereof exempting from taxation the capital stock of corporations organized exclusively for manufacturing purposes and actually carrying on manufacture within the state, does not lose its exemption by investing in property not used for manufacturing purposes, except, of course, to the extent that it is represented by such property. Com. v. Westinghouse Air Brake Co. 151 Pa. 276, 24 Atl. 1111, 1113.

An investment of part of the capital of a manufacturing corporation in houses and lots for its workmen is not an investment for manufacturing purposes; nor are such houses and lots any necessary part of the manufacturing plant. *Ibid.*; West Chester Gas Co. v. Chester County, 30 Pa. 232; Com. v. Mahoning Rolling Mill Co. 129 Pa. 360, 18 Atl. 135.

The same is true of an investment in a house rented out to a tenant. Schuylkill County v. Citizens' Gas Co. 148 Pa. 162, 23 Atl. 1055.

A Pennsylvania corporation exempt as a manufacturing company is not taxable upon real estate used by it exclusively as a business office, even when located in a city distant from its works; but it is taxable on dwellings that it owns and rents near its works, to its workmen. Com. v. Salt Mfg. Co. 1 Dauphin Co. Rep. 97.

A statute imposing a capital-stock tax upon corporations, with a proviso that it shall not apply to so much of the capital stock of corporations organized for manufacturing as is invested and actually exclusively employed in manufacturing within the state; but that such corporations shall pay such tax upon so much, if any, of their capital stock as may be invested in any property or business not strictly incident or appurtenant to manufacturing,—carries no exemption to railroad bonds owned by a manu-

facturing corporation, notwithstanding a statute that subjects such bonds to taxation makes the railroad which issued them state agent to collect the tax thereon, and the railroad has agreed with its bondholders to bear itself the burden of such tax, and has reported such agreement to the state. *Com. v. Jarecki Mfg. Co.* 204 Pa. 36, 53 Atl. 517.

A corporation formed to distill, redistill, and rectify high-wines, alcohol, and spirits; to feed and deal in cattle and other live stock; and to malt and deal in malt,—is not organized for purely manufacturing purposes, and, therefore, is not within the exception of a statute for assessing domestic corporations upon their capital stock by a state board, except corporations organized for purely manufacturing purposes, which are left to be assessed by local assessors upon their property in like manner as are individual property owners. *Distilling & Cattle Feeding Co. v. People*, 161 Ill. 101, 43 N. E. 779.

In New York corporations for laying asphalt pavements, although they manufacture the asphalt mixture used for the purpose, are not exclusively manufacturing corporations; and when a statute imposes a tax upon all corporations except those "wholly engaged in carrying on manufacture within the state," they are taxable; but, after the statute has been amended so as to exempt manufacturing corporations "to the extent, only, of the capital actually employed in this state in manufacturing, and in the sale of the product of such manufacturing," then they become entitled to exemption to the extent in which their capital is employed in making the asphalt mixture used for pavement. *People ex rel. Syracuse Improv. Co. v. Morgan*, 50 App. Div. 302, 69 N. Y. Supp. 263; *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 873, 70 N. Y. Supp. 516.

VI. *Special industries.*

There are certain business enterprises, plainly productive industries, and certainly not mining nor agricultural, and which cannot properly be classed under the head of commerce, that the courts have been unable to agree in styling manufacturing. These are those which produce and vend light, heat, and power, books and newspapers, and foods fitted for human consumption, and which gather, preserve, and sell ice naturally congealed.

a. *Light and power companies.*

1. *Gas.*

A corporation organized for manufacturing and supplying illuminating gas, and actually engaged therein, is a manufacturing corporation. Gas extracted from the richer cannel coals, being unfitted for use because of imperfect combustion, is ordinarily mingled in definite proportions with non-illuminating gas from poorer coals to dilute and carry it. The resulting compound, which differs widely from each of its constituents, must still undergo further modifications before it is fit to use for light. Condensation and washing rid it of some impurities, and a chemical process of others. It is measured on delivery to consumers; it requires mechanical devices and operating skill to adapt it to use. A gas company, therefore, is within the express exception of a statute imposing upon corporations generally a tax at a specified rate upon their capital stock graded according to divi-

dends, and excepting from its operation manufacturing corporations carrying on manufacture in the state; and, by consequence, is subject to assessment and taxation under other statutes for taxing property. *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

A corporation organized to supply gas to the people of a given city, and to dispose of the by-products, actually engaged in making illuminating gas by distillation of bituminous coal and decomposition of steam enriched by hydro-carbon vapors, is organized exclusively for manufacturing purposes, and actually carrying on manufacture within the state, within the meaning of the Pennsylvania tax exemption laws. *Com. v. Allegheny Gas Co.* 1 Dauphin Co. Rep. 93.

A gas company is strictly a manufacturing corporation, within both the letter and the spirit of a tax law discriminating in the method of assessing corporate personal property, when it consists of machinery employed in a branch of manufacture. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183.

But the impounding and supplying of natural gas for fuel, etc., are not manufacturing. *Emerson v. Com.* 108 Pa. 111; *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

Authority, said the court in *West Manayunk Gaslight Co. v. Philadelphia*, 3 Pa. Dist. R. 52, is massed in solid phalanx in favor of the exemption of the real estate of a gas company necessary for the conduct of its business. The cases of *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Coatesville Gas Co. v. Chester County*, 97 Pa. 476, and *Schuylkill County v. Citizens' Gas Co.* 148 Pa. 162, 23 Atl. 1055, settle the question beyond controversy.

Under the Massachusetts taxing system, whereby the personal property of corporations is subjected to taxation by assessing the shares of their stockholders, except that machinery, when employed in any branch of manufacture, is to be taxed where it is situated or employed; and in assessing the stockholders of a manufacturing corporation the value of the corporate real estate and machinery is to be deducted from the value of the shares,—the mains, pipes, and meters of a gas company in the streets and at places of consumption are to be classed as machinery employed in manufacture. *Com. v. Lowell Gaslight Co.* 12 Allen, 75.

The rule is otherwise in Kentucky. A section in a municipal charter providing that raw material held by manufacturers for the purpose of being manufactured in the city, and machinery in factories, shall be exempt from taxation, does not free lamp-posts in streets, meters at points of consumption, and pipes and mains belonging to a gas company for conveying illuminating gas from the works to consumers; because the means of conveying gas through the streets and measuring it on delivery are for the purpose of furnishing, and not of manufacturing, it. *Covington Gaslight Co. v. Covington*, 84 Ky. 94.

The capital and machinery employed in making illuminating gas are not exempt from taxation in virtue of a constitutional provision freeing such as are employed in manufacturing chemicals, because illuminating gas is not a chemical. *Shreveport Gas, Electric Light & P. Co. v. Caddo Parish*, 47 La. Ann. 65, 16 So. 650.

But while it is generally agreed that making artificial illuminating gas is manufacturing, and that artificial gas companies are manufacturing companies, they may be, and frequently are, in tax legislation denied the exemptions given to

other manufacturing corporations. *Williams v. Rees*, 9 Biss. 405, 2 Fed. 882; *Com. v. Germania Brewing Co.* 145 Pa. 83, 22 Atl. 240.

Although a gas company is a manufacturing company, in Illinois, it is not included in the general class of corporations organized for purely manufacturing purposes, assessable only by local assessors, within the exception of a statute providing for the assessment of the capital stock of domestic corporations by a state board; because in such statute, afterwards, gas companies are named among the corporations that are required to furnish the state board with sworn statements of their capital stock for the purpose of assessment and taxation. *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

2. Electricity.

There has been less harmony among the decisions respecting the status of electric light and power companies under statutes relating to taxation and exemption, and especially favorable to manufacturing enterprises. The weight of authority, notwithstanding the decision in the principal case (latest in point), classifies them with manufacturers in general, and holds them entitled to the privileges and immunities of manufacturing corporations, unless these are expressly denied them by direct and explicit designation in pertinent legislation.

A New York corporation organized under an act for the formation of corporations for manufacturing purposes, and engaged in the business of producing electricity and supplying it to customers for the purpose of public and private illumination, is a manufacturing corporation. As such it was not subject in that state to taxation upon its corporate franchise under a statute providing for such a tax upon corporations generally, with certain exceptions, among which were manufacturing corporations carrying on manufacture within the state. But it became so taxable upon the amendment of such statute, taking out of the exception electric light companies by name; and all this notwithstanding, before the amendment, the state officials uniformly insisted that electric light companies never were within the statutory exception. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 120 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808.

And this also was the case with a domestic electric light company organized, not under the general manufacturing act, but under a statute authorizing the formation of gaslight companies. *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 129 N. Y. 664, 29 N. E. 812.

The business, it was said in reasoning out the conclusion in the first of these two cases, renders it necessary to invest large capital in a plant, which may be, appropriately enough, called a factory; to purchase and consume vast stores of coal to make steam and furnish power to operate machinery; and to have and operate a complicated system of machinery, boilers, engines, dynamos, shafting, belting, and other things common in manufacturing establishments; and then, by means of wires, cables, and lamps, streets and private houses are electrically lighted for compensation. The electricity or electric current that produces this result cannot properly be said to be the free gift of nature gathered from air or clouds. It is the product of capital and labor, and in this respect not dis-

tinguishable from the results of ordinary manufacturing operations. In the common understanding the thing that brings about the results that yield the corporate income is generated or produced from power applied to machinery by a process wholly artificial.

Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808.

And in the same state the supreme court, third department, following this decision, held that a corporation which owns and operates electric light and power plants, and manufactures and distributes by conductors from a central station electricity to its customers, and also makes contracts with licensees to construct, operate, and sell complete central station plants for the same purpose, is a manufacturing corporation, and as such exempt from taxation. *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun, 527, 34 N. Y. Supp. 711.

But when a foreign electric light company doing business in New York is empowered by its charter to manufacture, buy, sell, lease, or otherwise procure, own, and dispose of electric and electric telegraph and telephone instruments and apparatus of all kinds, and all parts of the same, and to acquire by purchase patent and other rights and franchises, and to acquire and dispose of capital stock in other corporations, with its main office and factory in its home state, and conducts in New York an extensive manufacturing and general business according to its chartered powers, it is subject to taxation in that state, because, having and exercising such broad powers beyond manufacturing, it is not classed among manufacturing corporations wholly engaged in carrying on manufacture within the state,—the only class that is exempt. *People ex rel. Western Electric Co. v. Campbell*, 145 N. Y. 587, 40 N. E. 239.

For the same reason, a domestic corporation whose main business is owning and leasing patents relating to lighting, heating, and supplying motive power by electricity, which patents are operated under by other corporations in which it holds stock, is not exempt from taxation. *People ex rel. Edison Electric Light Co. v. Campbell*, 88 Hun, 530, 34 N. Y. Supp. 713, Reversed in 148 N. Y. 759, 43 N. E. 177, but upon another point, the stated proposition having been approved.

Electric light and power companies are manufacturing companies within the Alabama Code of 1886, § 1565, authorizing the consolidation of any two or more mining, quarrying, or manufacturing corporations. *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 38 Am. St. Rep. 94, 11 So. 381. This conclusion was reached by a line of reasoning identical with that followed by the New York court of appeals in the case first cited in this subdivision, and of which an outline has been given.

The supreme court of Colorado upheld the right of an individual to condemn a right of way across private lands for a ditch to convey water to furnish power to operate an electric-light plant, under a provision in the state Constitution that forbids private property to be taken for private use without the owner's consent, except for private ways of necessity, and for reservoirs, drains, dunes, or ditches for agricultural, mining, milling, domestic, or sanitary purposes.

It was contended that the term "milling," the one by virtue of which the right to condemn existed, if at all, for the purpose avowed, was restricted in meaning to milling ore or grain; but the court thought the word "should be given its modern acception, and held as synonymous with the word 'manufacturing,' if not of broader signification and including that term." After citing several definitions of the meanings of manufacture and manufacturing, the court continued: "We cite the foregoing at length, as it upholds our view of the meaning to be given to the words 'manufacturing purposes' and also shows that the purpose of the appellee is within the ordinary meaning of those terms." *Lamborn v. Bell*, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989.

The judiciary of South Carolina, Massachusetts, and Maine have respectively, under different circumstances, made use of language implying that they took for granted that an electric light company was a manufacturer. In passing upon the right of a municipality in South Carolina to own and operate an electric-light plant, the supreme court in that state used the following language: "The city has the express power to own property, and it also has the implied right to light the city. Do these powers necessarily imply the right to make the city the owner of the plant and a manufacturer of electricity?" *Mauldin v. Greenville*, 33 S. C. 1, 8 L. R. A. 291, 11 S. E. 434.

The justices of the Massachusetts supreme court, in furnishing the legislature of that commonwealth an opinion concerning the constitutionality of proposed legislation authorizing municipal ownership of works to make and distribute gas and electricity for public and private illumination, repeatedly use expressions indicating their belief that generating and supplying electricity are manufacturing. They speak of "works for the manufacture and distribution of gas and electricity." They say: "The fundamental question is whether the manufacture and distribution of gas or electricity . . . is a public service;" and: "It is practically impossible for every individual to manufacture gas or electricity for himself;" and again: "If the legislature is of opinion that the common convenience and welfare . . . will be promoted by conferring . . . the power of manufacturing and distributing gas or electricity;" and, finally: "We have confined our opinion to the questions asked, which . . . relate to the manufacture and distribution of gas or electricity solely for the purpose of furnishing light." Opinion of the Justices, 150 Mass. 592, 8 L. R. A. 487, 24 N. E. 1084.

While the supreme court of Maine, in disposing of a case that presented the single question whether an electric light and power company belonged to the class of corporations subject to the state insolvency laws, which laws applied to all domestic corporations carrying on manufacturing or other private business, but not to those engaged in a business involving public duties or obligations, among which were corporations supplying cities and towns with gas and water, and other corporations of like character, held the electric light company was just like a gas company. "Each," it said, "supplies a town with artificial light. Each manufactures its power." *Edison United Mfg. Co. v. Farmington Electric Light & P. Co.* 82 Me. 464, 19 Atl. 859.

In Pennsylvania, in the first great contest over the question, the supreme court affirmed the judgment of the common pleas, denying to

an electric light and power company an exemption from taxation to which manufacturing corporations in that state were entitled. The court below did so upon the ground that such corporations were not manufacturers. We have not been referred to, nor have we been able to find, it said, any definition of the term "manufacture" or "manufacturing" that does not limit them to the production of material substances. And in every case in which the question, what was a manufacture, or who was a manufacturer, arose, and it was held that either term applied, it was assumed that the articles produced must be material substances. Whatever electricity may be, it is manifestly and admittedly not a material substance. Whatever electric light companies do, they do not, in generating or evolving electricity, make changes or modifications by art or industry in the form or substance of material articles. They do not make wares of any kind, nor reduce raw materials to a form fit for use. When all has been heard that can be said upon the subject there is nothing to lead to the belief that electricity is a material substance, nor is it claimed by anyone so to be; therefore, its production, generation, or evolution, does not come within the authoritative lexicographic, scientific, or legal definitions of the term "manufacture" or "manufacturing;" hence we cannot say that defendant manufactures electricity. But the supreme court did not agree with this reasoning. The company, said that tribunal, in substance, sells the electricity it makes or "brings into being" as a commodity. It provides lamps or appliances for the use of its customers, by means of which the light is produced; it sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It may be too early to say just what it is. The scientists whose views the learned judge adopted may be right or wrong. We have no need to decide that question. Laws are written ordinarily in the language of the people, and not in that of science; and, if this case depended on the question on which it turned in the court below, we should be led to a different conclusion, and hold that this company was a manufacturing company. *Com. v. Northern Electric Light & P. Co.* 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839.

Nevertheless, the supreme court affirmed the judgment, because it held that, even if an electric light company was a manufacturing corporation, it was not within the apposite statute, because it was not the kind of a manufacturing corporation that the Pennsylvania legislature had in mind and intended to include when it enacted, in 1885, the law abolishing capital-stock taxes upon manufacturing corporations, and repealing, so far as manufacturing corporations were concerned, all laws for their collection. The abolition and repeal applied, according to the view of the court, only to such kinds of manufacturing corporations as had been known and legislated about during the previous half century. And electric light companies were not among these. *Ibid.*

This decision was followed and adopted in *Com. v. Edison Electric Light Co.* 145 Pa. 131, 27 Am. St. Rep. 683, 22 Atl. 841, 845, 846; *Com. v. Brush Electric Light Co.* 145 Pa. 147,

22 Atl. 844; Com. v. Edison Electric Light & P. Co. 170 Pa. 231, 32 Atl. 419.

Judge Simonton, whose judgment was approved while his reasoning was condemned, was naturally resentful, and took the opportunity which came to him in Com. v. American Car & Foundry Co. (judgment affirmed, *per curiam*, on opinion of the court below in 203 Pa. 302, 52 Atl. 326) to strike back. If the question in this case, he said, in substance, were whether an electric light, heat, and power company were exempt from the tax on capital stock, we would, of course, unhesitatingly follow the precedent of the Northern Electric Light & Power Case, and decide that it was not. But the electric light cases are not authority for cases involving the question of the right of other companies to the exemption. These are to be decided by determining the proper construction of the acts taxing the capital stock of corporations, and, if the language of the acts is clear and unambiguous, the court is in duty bound to enforce them according to their obvious meaning, and is not at liberty to enlarge or limit their scope by any ideas it may have of what should be the policy of the legislature. This has been so often said that it is commonplace, but as it seems to have been overlooked in the discussion of the electric-light cases we refer to a few of the utterances of the courts on this subject. Then, after quoting remarks in point by Field, J., in *Hadden v. The Collector*, 5 Wall. 111, 18 L. ed. 519; Thompson, J., in *Bradbury v. Wagenhorst*, 54 Pa. 180; Sharswood, J., in *Dame's Appeal*, 62 Pa. 417; Marshall, Ch. J., in *The Paulina v. United States*, 7 Cranch, 52, 3 L. ed. 266; Chase, J., in *Priestman v. United States*, 4 Dall. 28, 1 L. ed. 727; and Sedgwick on the Construction of Statutory and Constitutional Law (p. 205),—he adds: Citations of utterances to the same effect from judges both in this country and in England might be multiplied indefinitely, but these we think are sufficient to make clear the principle upon which the case is to be decided.

The question was subsequently raised in Pennsylvania, whether the purchasers of the rights and franchises of an electric light company at a sheriff's sale were authorized to reorganize the company,—a question the answer to which depended upon whether such a company was a manufacturing corporation within the meaning of the authorizing act. The court below, upon the authority of Com. v. Northern Electric Light & P. Co. 145 Pa. 105, 14 L. R. A. 107, 22 Atl. 839, and Com. v. Edison Electric Light & P. Co. 170 Pa. 231, 32 Atl. 419, just cited, held that it was not, and so could not be reorganized; but this decision the supreme court of Pennsylvania reversed. Its argument was, in substance, as follows: The ground on which the decision is said to rest, *vis.*, the definition of manufacturing companies adopted by the legislature, will not bear the test of the act of 1874 in the light of later decisions, or of the legislative interpretations of the earlier act by more recent ones which are *in pari materia*. It supported this statement by citing various laws enacted between 1874 and 1895, providing for the incorporation of companies for the manufacture of gas or supply of light or heat to the public by any other means; for the supply of light, heat, or power by electricity; authorizing corporations so formed to erect and maintain buildings, etc., for manufacturing gas, heat, or light from coal or other materials; authorizing boroughs to manufacture electricity; and making it unlawful to connect or dis-

connect electrical conductors belonging to any company engaged in the manufacture and supply of electrical currents for light, heat, or power. And it cited its decision in *Southern Electric Light & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123, that there is no distinction between manufacturing and supplying electricity; that power to supply it includes the power to manufacture it. And yet at the same time it earnestly protested that what it was saying was not intended to affect the decisions it was cutting the ground from under, and that they were properly decided. But it did say that the reason assigned for those decisions was unsatisfactory, and, carried to its logical conclusion as the court below had done in the instant case, it lead to a wrong result. Electric light companies are manufacturing companies, and embraced with other manufacturing corporations so as to permit purchasers of their franchises at a sheriff's sale to reorganize them; but they are not exempt from capital-stock taxation because not within the policy of the legislature in passing the exempting act, and not intended to share in its benefits. Com. *ex rel. McCormick v. Keystone Electric Light, Heat & P. Co.* 193 Pa. 245, 44 Atl. 326.

But they are exempt from taxation upon their real estate and other property essential to the conduct of their business. *Southern Electric Light & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123; *Brush Electric Light Co. v. Philadelphia*, 8 Pa. Dist. R. 231; *Lancaster v. Edison Electric Illuminating Co.* 8 Pa. Co. Ct. 631.

The circumstance that a part of the property of such a corporation is reserved for use for its manufacturing purposes only in emergencies or to meet unusual demands does not change its character as property used or intended to be used for its essential objects. *Southern Electric Light & P. Co. v. Philadelphia*, 191 Pa. 170, 43 Atl. 123.

A municipal ordinance providing that the machinery and manufacturing apparatus of all manufacturing industries established within the corporate limits within two years after it was ordained and actually employed in the business of manufacturing in the city shall be exempt from taxation for five years; passed pursuant to legislative authority to exempt from taxation for municipal purposes manufacturing property, mechanical tools, implements, machinery, apparatus, or engines actually used in manufacturing within the city whenever the municipal authorities deem it expedient to encourage the growth and development of manufactures and manufacturing industries; and when the legislation of the state respecting the formation of corporations distinguishes electric light companies from those carrying on any kind of manufacturing, ship-building, mechanical, industrial, or chemical business,—does not embrace a local electric light and power company. *Frederick Electric Light & P. Co. v. Frederick City*, 84 Md. 599, 36 L. R. A. 130, 36 Atl. 362.

In thus deciding, the court, after stating that the question in the case was whether the production and supplying of electric light are a manufacturing industry within the meaning of the ordinance, said, in substance: In determining this question we do not deem it necessary to attempt a scientific discussion of what electricity is. Nor do we think we can gather much assistance from encyclopædias, dictionaries, or other books endeavoring to define it. Whether an electric light company can properly be said to "manufacture" electricity, or whether it

simply brings into action that which is already made, we need not determine. The purpose of the law is "for the encouragement of the growth and development of manufacturing industries" in the city. The exemption embraces "the machinery and manufacturing apparatus of all manufacturing industries." Now, would the term "manufacturing industries" strike the mind of the average man, when used in the above connection, as including an electric-light plant? We mean by the average man, one of fair and ordinary intelligence, such as a legislature or a town council might be composed of; but not one who looks at everything from a technical or scientific standpoint. In speaking of the manufacturing industries of a city we would not ordinarily include an electric-light plant if it had one. In advertising a town as a desirable place for manufactures the fact that it was lighted with electricity might be mentioned, just as good roads, pure water, healthy climate, or other attractions might be; but, if a list of its manufactures were to include the electric-light plant, it would be looked upon as an effort to enlarge the number beyond what the facts justified. If a company proposed to manufacture armatures, lamps, or other electrical appliances, one would think of it as a manufacturing industry, but not as an ordinary electric plant for furnishing electricity. But even if an electric-light plant is conceded to be in a certain sense a manufacturing industry, it is not necessarily such an one as the ordinance meant. Can it be contended that, if the owner of one of the hotels has an electric plant to light his own property, it is exempt from taxation because it is a manufacturing industry? The fact that appellant lights houses by electricity for compensation cannot give it more right to exemption, if as much, than one who uses it only for his own purposes, and the one would be a manufacturing industry as well as the other. (This argument the court itself promptly demolished by immediately saying: Companies furnishing artificial gas have been held to be manufacturing companies, but would the plant of a person who makes his own gas be exempt as a manufacturing industry under this ordinance?) It seems to us clear that the ordinance does not have such a broad meaning. *Ibid.*

An additional reason for holding that the ordinance did not apply was found in its declared purpose of fostering the growth and development of manufacturing industries in the city; and it was said that this purpose could in no wise be subserved by exempting a local electric-light plant, because that could not be brought to locate there from another place; it must come there or not exist at all; it has no liberty of choice, and, anyway, it does not employ much labor or admit of any great growth or development. *Ibid.*

Granting, too, that the Maryland statutes providing for the formation of corporations are broad enough to authorize the organization of electric light companies as "carrying on a kind of manufacture," the case is not affected, because such statutes are to be liberally construed, while exemption laws, on the other hand, are to be construed most strictly. *Ibid.* The opinion of the dissenting judge, if one was written, is not reported.

A corporation formed to furnish light, heat, and power for public and private uses, although it generates the electricity it supplies, is not within the exception of a statute for assessing
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domestic corporations upon their capital stock by a state board, except corporations organized for purely manufacturing purposes, which are assessable by local assessors the same as individual taxpayers. *Evanston Electric Illuminating Co. v. Kochersperger*, 175 Ill. 26, 51 N. E. 719.

This decision was grounded upon the proposition that an organization to "furnish" was not an organization to "manufacture." It is not necessary in this case, said the court, to consider whether a company formed for the purpose of generating or collecting electricity, or producing electric light by a current of electricity and furnishing such light or heat or power for public and private use, could be regarded as a corporation purely for manufacturing purposes. Appellant was not organized for that purpose, but, under its charter might furnish light, heat, and power procured from another without engaging in the business of generating the electricity at all. *Ibid.*

b. Printing and publishing.

The courts differ widely upon the question whether printing and publishing are a manufacturing business, or, rather, whether the printing and publishing of a newspaper are manufacturing. In the main they agree that general job printing, and printing and publishing books, are manufacturing.

A corporation formed according to its certificate of organization to carry on the business of printing and publishing, in a named city, a daily newspaper, and to do general jobbing, printing, and publishing; but whose entire capital is employed in publishing the newspaper (the decisive consideration),—is not in a legal sense a manufacturer. *State, Evening Journal Assn., Prosecutor, v. State Board*, 47 N. J. L. 36, 52 Am. St. Rep. 107, note.

But a corporation formed to conduct and prosecute the business of book printing, job printing, engraving, electrotyping, and lithographing, and actually engaged in such business, whose output consists of pamphlets, textbooks, and all descriptions of printed matter, including chromos and illuminated cards made to order, is a manufacturing corporation engaged in manufacturing. *Ibid.*

In so far as the publishers of a daily newspaper carry on also a job-printing office wherein they make, to sell, blank books, cards, bill heads, posters, show bills, and other printed matter, they are clearly manufacturers within the meaning of the national bankrupt act; and, although it is unnecessary in this case so to decide, the court is of the opinion that the printing and publishing of the newspaper are equally manufacturing; that a newspaper is as much the result of manufacture as are books, or cards, or billheads; and that there is no legal distinction between the two lines of production. *Re Kenyon*, 1 Utah, 47, 6 Nat. Bankr. Reg. 238.

In so far as one is engaged in the business of printing and selling blank books, cards, billheads, notes, posters, show bills, and other printed matter, he is undoubtedly a manufacturer within the purview of the national bankrupt act; but, notwithstanding the contrary opinion expressed by the court in the last-cited case, the printer and publisher of a newspaper is certainly not. *Re Capital Pub. Co.* 3 Mac-Arth. 405, 18 Nat. Bankr. Reg. 319.

No definition of the word "manufacturer," said the court in that case, has ever included

the publisher of a newspaper, and the common understanding of mankind excludes it. The newspaper does not come within the popular meaning of the term "manufacture," unless, indeed, when its contents are slenderly endowed with truth, or when its articles appear to be made out of whole cloth. It gives employment to printing presses, types, and editors; and yet in the whole history of newspapers from the close of the 17th century this word "manufacture" has never been applied to them or appropriated by them in the entire range of English literature. No author has ever so used it, and it is never so applied by any statute or by any authority, except by way of opinion in the solitary case from Utah. *Ibid.*

This passage is, in substance, quoted in the New Jersey case just cited, and, in connection with it, the court remarked: We agree with the reasoning and the conclusion that the publisher of a newspaper is not in a legal sense a manufacturer. *State, Evening Journal Assn., Prosecutor, v. State Board*, 47 N. J. L. 36, 52 Am. Rep. 107, note.

A corporation carrying on the business, in New Jersey, of printing and publishing a newspaper (which is not manufacturing), and of printing and publishing books, and general job printing (which is manufacturing), is subject to a tax under the New Jersey tax law applying to corporations in general, but excepting from its operation manufacturing companies carrying on business in the state, in proportion to the investment of its capital stock in the newspaper department of its business, and is exempt in proportion to the remainder. *Press Printing Co. v. State Board*, 51 N. J. L. 75, 16 Atl. 173.

In Louisiana the printing and publishing of a newspaper are manufacturing. Under a statute imposing license taxes upon several designated kinds of business and "all other business not herein provided for;" and a constitutional provision exempting from license taxation manufacturers other than those of distilled liquors, tobacco, cigars, and cotton-seed oil,—the business of editing, printing, and publishing a daily newspaper is not subject to any tax, because it is manufacturing within the constitutional exemption clause. The court, by Fenner, J., deliberately chose to rest its decision upon the question whether the business was or was not manufacturing, rather than upon the question whether or not it was within the license tax law, unnamed, but embraced by the phrase, "all other business not herein provided for." *State v. Dupré*, 42 La. Ann. 561, 7 So. 727.

The conclusion was thus reasoned out: Defendants use valuable machinery and implements. Besides clerical and editorial, they employ mechanical, laborers,—type setters, engineers, pressmen, and their assistants; buy and use paper, ink, glue, etc. By machinery and mechanical labor they convert this raw material into a new and distinct article fit for use and in commercial demand, called a newspaper, which they sell directly to dealers and consumers. From a mechanical point of view this presents all the essentials of manufacture under every definition of the word. It also comes clearly within the reason and motive of the constitutional exemption which was to encourage enterprises furnishing employment to home labor in making things the people require. But, because the value of a newspaper comes not from the raw material or the mechanical labor expended upon it, and because it is a medium

for conveying ideas and information impressed upon it by the purely intellectual labor of editors, reporters, correspondents, and advertisers, it was concluded below that a newspaper is a product of the mind rather than of manual labor, and therefore not a manufactured article. This is plausible, but not sound. Such a view would deny the exemption to a book publisher or manufacturer of books; yet the Constitution expressly exempts manufacturers of stationery, a term covering blank books, account books, etc.; and it is difficult to conceive any reason or principle that denies to manufacturers of printed books an exemption expressly given to makers of blank and account books, when the former employ more elaborate machinery and more varied and extensive manual labor. Then the argument stands thus: If the maker of blank books and account books is a manufacturer under the express terms of the Constitution, the maker of printed books, employing similar processes with more machinery and labor, is also a manufacturer; and, if the publisher of books is a manufacturer, all the reasons on which the denial of the same status to a newspaper publisher rests absolutely fail. The fallacy of the contrary view has other illustrations. Who would deny that an establishment to make, with the aid of machinery and skilled workmen, optical instruments, such as telescopes and microscopes, would be exempt as a manufactory? Yet manifestly the value of such instruments is not derived from the brass, glass, and other component materials, nor from the mechanical labor expended thereon, but from the scientific skill and knowledge which, by adaptation and arrangement, convey to the eye visions of remote stars and minute atoms. Or, take the homelier and strictly analogous case of the manufacturer of artistic wall paper, who puts upon raw materials designs of grace and beauty invented and drawn by skilled artists. All manufacturers combine more or less mental and mechanical labor products, and in many articles produced the intellectual element confers the greatest and peculiar value. Such is a newspaper. And, since the making of newspapers is a business: since a newspaper is a new and distinct article of commerce; since machinery and manual labor, with physical raw materials, are essential and important factors in making it, constituting the larger part of the cost of producing it,—we can see no sound reason why such a business does not fall, even if newspaper publishing is not manufacturing according to the common usage of the term, within the letter and spirit of the constitutional exemption as that of a manufacturer. *Ibid.*

Two members of the court refused to concur in this reasoning. Poché, J., concurred in the result because he could find no provision in the revenue act to justify a license tax upon the business of printing and publishing a newspaper, but he would not assent to the proposition that such business was manufacturing in any sense of the word. *Bermudez, Ch. J., dissented toto*. The argument of the chief justice in dissent is very forcible, but lack of further space forbids outlining it here.

The New York court of appeals did not express an opinion upon the question when the opportunity to do so came to it. *People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 153 N. Y. 1, 49 N. E. 248.

The printing and publishing for sale of books and periodicals, and the making of stationery, the making and binding of blank books, for the

same purpose, is manufacturing, and a corporation organized for, and engaged in, that business is a manufacturing corporation. *Com. v. J. B. Lippincott Co.* 156 Pa. 513, 27 Atl. 10.

A corporation exclusively organized to and actually engaged in the manufacture of blank books and stationery, printing and lithographing, and selling its manufactured wares; but which has found it profitable, incidentally, to buy and sell some goods made by others,—is exempt from capital-stock taxation to the extent that it is engaged in manufacturing operations. *Com. v. Wm. Mann Co.* 150 Pa. 64, 24 Atl. 601.

Binding books and making blank books are manufacturing. *Seeley v. Gwillim*, 40 Conn. 106.

A bond and coupon register in the form of a book, with a page or pages spaced for each bond, and its coupons or any series of coupon bonds with the spaces numbered and designated to show what bonds and coupons they are for while any of them are outstanding, and for receiving them for safe keeping as vouchers when any of them are taken up and paid, is patentable as a new and useful article of manufacture. *Munson v. New York*, 18 Blatchf. 237, 3 Fed. 338.

Although a New York corporation whose authorized and principal business is printing and publishing books is a manufacturing corporation, and as such would be exempt from the franchise tax in said state if solely engaged in that business; yet, when its charter gives it, in addition, power to buy, sell, and deal in stationery and other articles, and to do any and all business appertaining to and connected with printing and book selling; and it does actually trade in foreign-made books of other publishers,—it loses such exemption, because it is not wholly engaged in carrying on manufacturing within the state. *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73.

While it is true that the printer and publisher of a newspaper is a manufacturer, and therefore exempt from license taxation in Louisiana because the Constitution exempts from such tax all manufacturers except certain named ones not inclusive, yet the capital, machinery, and property employed in printing and publishing a newspaper is taxable because the Constitution only exempts from such taxation certain classes of manufacturing not including newspaper publishing, unless the business is embraced by the terms "stationery, ink, and paper," which are not sufficiently broad. *Nicholson v. Parker*, 44 La. Ann. 76, 10 So. 403.

Neither does the constitutional provision exempting from taxation the capital, machinery, and property employed in manufacturing stationery, ink, and paper extend immunity to a printing establishment employed in making bill-heads, blank books, order blanks, and other commercial forms, for which the paper is bought ready to use and cut and folded into the required sizes. *Patterson v. New Orleans*, 47 La. Ann. 276, 16 So. 815; *Earle v. New Orleans*, 47 La. Ann. 277, 16 So. 816.

This conclusion was reasoned out substantially as follows: The Constitution uses the word "manufacture" in its ordinary sense. Its natural import is to produce an article and in its common application refers to changing the raw material into some new and useful form. The Constitution itself illustrates the significance of the word intended by the exemption. The 64 L. R. A.

exemptions extend to cotton mills, manufacturing of textiles, leather, furniture, and agricultural implements. Some of these deal with the article already changed from the raw material; others deal with the raw material; but all contemplate the production of an article not a mere addition or mode of use of an article already manufactured. The paper on which are printed bill-heads is manufactured to serve the purposes denoted by the printed headings made by the printing press. All recognize that the mill that brings the paper into existence by applying machinery to the proper material is a manufactory. None using language in its usual acceptation applies the word to the printer, on the paper, of simply the forms which express the uses to be made of it. To sustain the asserted exemption would make it depend, not on the manufacture, but on the use made of the article after it is manufactured. Stationery embraces ink, pens, writing paper, envelopes, and similar articles used in an office. Those who produce these articles are manufacturers embraced in the constitutional exemption. But we cannot extend that exemption to those who merely print on the paper bill-headings or similar forms that otherwise would be written by the pen. Nor do we think the mere folding or cutting the paper in the shapes required for letter or bill heads, or commercial books, constitutes the manufacture of anything. *Ibid.*

The reader will observe how much these two decisions run counter to those in the cases *ubi supra* in this subdivision.

c. Purveying.

In an early case in Ohio the court was "not prepared to say" that one engaged in the business of purchasing and slaughtering hogs, and packing pork for transportation and sale, was a manufacturer within the meaning of the tax laws of that state. *Jackson v. State*, 15 Ohio, 652.

But that decision was afterwards overruled by the supreme court of Ohio in *Engle v. Sohn*, 41 Ohio St. 691, 52 Am. Rep. 103. In overruling it the court said: The facts in that case appear to be very meagerly reported. We are, however, satisfied that, if the facts had been the same as in the case at bar,—if there had been in the year 1846 the same perfection in the art of packing and curing meats which has since been reached and now exists,—*Jackson* would have been held to be a manufacturer, and not a merchant.

The later case decided that the business of buying and slaughtering hogs and packing pork, in the operation of which the carcasses are subjected to certain processes and combined with other materials engaging skill, labor, and capital, and resulting in the production of lard and cured meats of added value, to be disposed of for profit; which employs a large number of hands, and is conducted in several departments each headed by an able and experienced foreman; which, in rendering lard, curing sides and shoulders, curing and encasing hams and bacon, and packing pork, makes use of raw materials of various kinds, such as salt, saleratus, saltpetre, sugar, molasses, flour, chrome yellow, linseed oil, canvas, wood, paper, tierces, barrels, and kegs, various tools, implements, and mechanical devices; and wherein are requisite several months for the curing process, a week or longer for the smoking and finally a wrapping and dipping of each article in a preservative covering

against air and insects; all conducted in one building under one management,—is essentially manufacturing, and is therefore taxable as manufacturing, and not as merchandising. *Ibid.*

Assuming that a foreign corporation which slaughters animals and prepares and preserves the carcasses for food, which treats the fat so as to convert it into oleo and stearine, and makes the scraps, blood, and entrails into a fertilizer, and sells the meat, hides, and horns, is a manufacturing corporation, its maintaining in the state of New York sales houses for meat elsewhere prepared for market; its doing in that state but one quarter of its slaughtering; its operating there of factories for oleo and stearine, a curing establishment, an ice plant, and refrigerators, and various kinds of machinery,—do not make it wholly engaged in carrying on manufacture in the state of New York, and, hence, do not entitle it to an exemption from taxation given in that state, for that reason, to manufacturing corporations. *People ex rel. Schwarzschild & S. Co. v. Roberts*, 11 App. Div. 449, 42 N. Y. Supp. 817, Affirmed in 158 N. Y. 690, 50 N. E. 1121, but on the authority of the case next below.

The purchasing of sheep and lambs, slaughtering them, chilling the carcasses to a point where decomposition is arrested, and shipping them in refrigerator cars to market; the pulling of wool from the hides and selling it; the selling of pelts; converting the offal, blood, etc., into fertilizers; rendering the fat into tallow; and producing some other by-products,—are not manufacturing; nor is a corporation, so engaged, and wholly so within the state of New York, entitled to any exemption from taxation in that state. *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53, Reversing 20 App. Div. 521, 47 N. Y. Supp. 123.

A maker of ice cream, notwithstanding he has an extensive establishment, operates considerable machinery, employs several hands, and makes use of different materials, is not a manufacturer so as to fall within a statute prohibiting municipal corporations from levying a tax on persons engaged in selling articles of their own manufacture, manufactured within the state. *New Orleans v. Mannessier*, 32 La. Ann. 1075.

We cannot, said the court, in thus deciding, assent to the proposition that a person making and selling ice cream is a manufacturer in the sense of the law, or in any other sense of the word. The attempt to magnify a confectionery which is defendant's business into a manufacture must fail. We are told that anyone seeing the steam engine, complicated apparatus, and large force needed to produce defendant's goods would at once conclude that he is a manufacturer. With as much force it might be said that anyone visiting the mammoth kitchen of a great hotel would at once magnify the cooks and pastrymen into manufacturers. Defendant's position is absolutely untenable. *Ibid.*

Very dogmatic, to be sure, but, is it sound?

A baker making and selling his own bread exclusively is not a manufacturer of bread so as to be exempt from the payment of a license tax, although bread is made from flour prepared by kneading dough, containing water, yeast, and salt in due proportions, and requiring considerable skill and experience properly to bake it. *State v. Eckendorf*, 46 La. Ann. 131, 14 So. 518. The court could not distinguish between bread

making and making ice cream, and, without independent reasoning, followed the ice-cream case.

But, decided the same court soon afterwards, a corporation making out of flour, crackers, biscuits, Italian soup and fancy paste in great variety (but no bread), employing several hundred hands, and whose method is a process whereby flour from the barrels passes through a powder sifter, thence into a powder mixer, from that to a dough box on rails, to be worked into different kinds of dough, which go to cutting machines and finally into the ovens, whence the baked articles are taken, and boxed and shipped, all the materials being handled by machinery,—is a manufacturer, and exempt as such from taxation. *State v. American Biscuit Mfg. Co.* 47 La. Ann. 160, 16 So. 750.

The court's way of distinguishing the instant case from the previous ones is, in substance, by saying: It will readily be perceived that the establishment is a manufactory in which raw materials are made into wares suitable for use. There are new shapes, new combinations, new qualities, given to the raw material by the process of manufacturing the article. In the *Eckendorf* Case the exemption was claimed for the production of baker's bread. The baker produced no new article from the original material; he only prepared the manufactured article, flour, for consumption by cooking it. In the other case the defendant was a confectioner, selling ice cream which he made. There is certainly no similarity between the business of the defendants and the confectionery of the defendant in the ice-cream case. Here the identity of the original material is lost in the new articles created in the change of shape, new qualities, and new combinations which enter into their composition, which render them suitable for use in an entirely different manner than that in which the original material could be used. Simply baking the flour in the manner employed by bakers would not make the crackers, the fancy paste, macaroni, vermicelli, etc. *Ibid.*

A constitutional exemption from taxation of capital, machinery, and property employed in the manufacture of chemicals does not confer any immunity upon the maker and bottler of soda water, vichy, seltzer, and other carbonated beverages. *Crescent City Seltz & Mineral Water Co. v. New Orleans*, 48 La. Ann. 768, 19 So. 943.

Here, again the reasoning to sustain this conclusion is worth outlining. The process, said the court, in substance, of manufacture of these waters is to subject carbonate of lime or bicarbonate of soda to the action of sulphuric acid, which frees carbonic-acid gas and forms sulphate of lime. The gas absorbed in water produces the carbonated drink ready for use. We cannot appreciate the reasoning by which these carbonated waters are to be deemed chemicals. It is argued that, as muriatic acid is produced by a similar process applied to other materials, and that is a chemical, therefore carbonated drinks are chemicals; and that, as property employed in manufacturing chemicals is exempt, and soda and similar drinks are chemicals, the property used in making them is exempt, because they are the result of a chemical process. We are not called upon to construe the meaning in its fullest extent of the word "chemicals" in the Constitution; but it is clear to us that the framers of the Constitution never intended by exempting property employed to

manufacture chemicals, to exempt all compositions or mixtures derived in part from the result of any and all chemical processes. That would be straining language, and a wide departure from the rigid interpretation applied to all tax exemptions. We think we are entirely safe in holding that soda, seltzer, and similar drinks are not chemicals, and that, if it had been the intent to exempt the making of such waters from taxation, it would have found plainer expression than can be, with any reason, deduced from exempting property employed to manufacture chemicals. *Ibid.*

The gates, filters, screens, shut-offs, cocks, and faucets, and distributing pipes of a water company, unlike the mains and meters of a gas company, are not to be classed as machinery employed in any branch of manufacturing, so as to be taxable, in Massachusetts, to a domestic corporation, instead of by assessment upon its stockholders in proportion to their shares. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183.

d. Collecting and distributing ice.

Cutting, storing, and selling at wholesale naturally formed ice are not manufacturing, so as to make, in Massachusetts, the stock of ice, the steam engine, boiler, machinery, tools, and implements of one engaged in that business taxable at the place where they are kept and used, instead of in the town where the owner resides. *Hittinger v. Westford*, 135 Mass. 258.

And a New York corporation engaged in cutting, gathering, preserving, and, when the season arrives, transporting and vending, ice naturally formed upon the surface of the Hudson river is not a manufacturing corporation, nor engaged at all in carrying on manufacture, and therefore is not entitled to the tax exemption accorded by the New York statutes to manufacturing corporations wholly engaged in manufacturing within the state. *People v. Kulckerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 689.

This conclusion was reached by substantially the same line of reasoning as that adopted in the case just cited from Massachusetts. No doubt, said the New York court, ice may be manufactured, and frigorific effects produced, by artificial means. Corporations exist for that purpose, and come literally within our manufacturing laws. Their methods in no respect resemble those of the defendant. Its tools and implements are, for convenience in handling and in marketing, a product, and not at all for making it. None of the cited cases, it was added, in substance, is so comprehensive as to include this; all that apply, require the production of some article, thing, or object by skill or labor out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added, to change its natural condition. *Ibid.*

But a majority of the supreme court of Michigan, in the case of *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311, agreed neither with the conclusions nor the reasoning in these cases. Speaking through Champlin, J., who personally did not assent, the court was of the opinion that a process of preparing natural ice for general consumption, whereby, after it forms, without artificial means, sufficiently thick upon the surfaces of a river and lake, any snow that may have fallen upon it is scraped and shoveled off by scrapers drawn by horses and shovels wielded by men; and then it is marked off into squares of equal area, the

enclosing lines of which are first cut a few inches deep, then plowed deeper by horse power, and finally sawed through by manual labor; after which the cakes, broken apart, are floated to a slide or elevator on the shore, hoisted into ice houses by a tackle operated by horse or steam power, packed in layers between and surrounded by nonconductors of heat, such as hay or sawdust; whence, when the season arrives it is taken in barges built for the purpose to points of distribution,—is certainly a process that reduces ice into form fit for use by both hand labor and machinery, and is, therefore, manufacturing. The writer of the opinion, although opposed to this view, makes a fair statement of the argument in support of it. He says: It is very likely that the garnering and preparation of ice fit for consumers of the article fall very near the line. True, its natural condition is not changed. The article itself is a natural product. It is ice when taken from the river and ice when it is delivered to consumers. It is reduced in size, and delivered in quantities to suit patrons. The form alone is changed. But it is not necessary to constitute a commodity a manufactured article that a chemical change should be wrought in the thing manufactured. Iron manufactured from iron ore remains iron. Cotton gathered from the ball and by means of complicated machinery manufactured becomes the cotton of commerce. Lumber is manufactured from logs or timber simply by changing its form. And it has been held that grinding bones to produce the bone dust of commerce was manufacturing within the meaning of the revenue laws of the United States, and that timber split into staves or long pieces designed for shovel handles was manufactured. *Ibid.*

But a law making machinery used for manufacturing cotton and woolen goods; yarns and other fabrics; machinery; agricultural implements and other articles not prohibited by law; manufactured products and the materials used therefor; manufactories and their machinery; and factory offices and warehouses exempt from all taxes, state and local, for a limited time,—does not embrace the property of a corporation whose business is manufacturing ice and bottling soda water by machinery. *Greenville Ice & Coal Co. v. Greenville*, 69 Miss. 86, 10 So. 574.

VII. Interpretations of laws.

The New Hampshire statute (G. L. chap. 53, § 10) authorizing towns, by vote, to exempt from taxation for a term not exceeding ten years any establishment therein, or proposed to be set up or operated therein, and the capital used in operating the same for the manufacture of fabrics of cotton, wool, iron, wood, or any other material; and providing that such vote shall be a contract for the term specified,—does not authorize a blanket vote exempting all capital of \$5,000 and upwards which may thereafter be invested for manufacturing purposes in the town. To be valid the vote must exempt particular enterprises, either *in esse*, or actually projected. *Cox Needle Co. v. Gifford*, 62 N. H. 503.

Such a vote confers no exemption upon an unnamed establishment, even when it is one in a line of business that is mentioned. Neither can the effect of such a vote be enlarged by parol testimony that it was meant to include such an establishment. *Franklin Falls Pulp Co. v. Franklin*, 66 N. H. 274, 20 Atl. 333.

Nor does such statute authorize any renewal

or extension of the term of exemption by a second vote beyond the ten year term once voted. *Boody v. Watson*, 63 N. H. 320.

But a vote of exemption, in virtue of such statute, of an establishment and the capital required to operate it, which might be set up by a specified manufacturing company, exempts the real estate necessarily occupied in the business of such establishment. *Franklin Needle Co. v. Franklin*, 65 N. H. 177, 18 Atl. 318.

A statute, reading: Shares of stock in banks, steamboat and transportation companies, trust companies, and other corporations, whether named in this section or not, except railroad corporations, shall be set in the list like other personal estate, to the owner thereof in the town where he resides if he resides in the state, otherwise in the town where the company has its principal place of business,—embraces manufacturing corporations. *Waite v. Hyde Park Lumber Co.* 65 Vt. 103, 25 Atl. 1089.

Under the Vermont statutory system of taxation, manufacturing corporations are taxable upon their credits due, as well as upon their real estate and machinery in the towns where they have their principal places of business; and the fact that their stockholders have been erroneously taxed upon their shares without excluding the corporate credits does not relieve the corporations from liability. *Ibid.*

When, throughout the entire legislative history of the state, the legislature's power to declare what property shall be exempt from taxation has been recognized and exercised, there has been given to a constitutional bill of rights requiring of every member of society a proportionate contribution to the expense of protecting life, liberty, and property a practical interpretation contemporaneous with the adoption of the Constitution, and so long practised and acquiesced in as to fix such construction as conclusively as would a judicial determination to the same effect. A statute, therefore, conferring upon towns the right to exempt manufacturing establishments from taxation by so voting must be held constitutional. *Colton v. Montpelier*, 71 Vt. 413, 45 Atl. 1039.

Nor does such a statute violate a constitutional provision declaring the people not bound by any law but such as they have by their own consent, or that of the representative body of the freemen, assented to for the common good; since it is not a delegation of legislative powers, but is perfected legislation in itself, merely leaving it to a town or city to say if it will avail itself of a privilege to encourage manufactures, the exercise of which privilege neither adds to, nor takes from, the law. *Ibid.*

A statute supplementary to an act authorizing the formation of corporations for manufacturing purposes, which extends its application to corporations organized to gather, store, and market ice, amounts to a legislative construction of the general act as one not broad enough to embrace such an ice company. *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669.

Here appropriately may be noticed an argument advanced by the New York court of appeals in the same line, as going to prove that a corporation formed under a special act to construct, use, and provide one or more dry docks or wet docks to build, raise, repair, and copper vessels was not a manufacturing company, because its purposes were in principle the same as those of a company constructing warehouses, elevators or residences; and that, as the legislature had enacted a statute to authorize the

formation of corporations for erecting buildings (a law for which there was no need if these could legally be formed under the general manufacturing act), it had interpreted the general manufacturing act as not embracing in its scope the building corporation. And then it added: "The same remarks would apply to the act under which the defendant was incorporated;" and that "the legislative interpretation was entitled to much weight in construing the act in question." *People v. New York Floating Dry Dock Co.* 92 N. Y. 487.

But it is well to remember, in weighing this argument in that case, that the corporation then before the court was incorporated under a special law enacted in 1843, while the general manufacturing act was passed in 1848, and the law for the formation of building corporations not until 1853. A special act passed before a general act can hardly be said to be an expression of the opinion of the legislature that its objects are not embraced in the latter.

A statute, however, taking out from a general exemption from taxation of manufacturing corporations certain kinds of corporations by name, thus making them taxable certainly and in any event, does not compel the conclusion that the corporations thus designated were necessarily, prior to the new enactment, either within or without the general exception. *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L. R. A. 708, 29 N. E. 808.

A general tax law imposing upon corporations a capital-stock tax, with a proviso against its application "to railway, canal, or banking corporations, or to savings banks, cemeteries, or religious corporations, or purely charitable or educational associations, or manufacturing companies or mining companies carrying on business in this state," does not exempt each entire class of the designated corporations, but only such of them as carry on their business within the state. Certainly, with no comma after the words "manufacturing companies," the phrase "carrying on business in this state" must be deemed to qualify manufacturing companies,—as much so, as it certainly does mining companies. *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Am. St. Rep. 394, 19 Atl. 733, Affirming (N. J. Eq.) 18 Atl. 581.

Raw material for the manufacture of paper, paper in process of manufacture, and manufactured paper are, in New Jersey, visible personal estate, and hence taxable under the act of March 19, 1891 (P. L. 1891, p. 189), in the township, ward, or taxing district where it is found, and not at the owner's domicile. *State, Warren Mfg. Co., Prosecutor, v. Dalrymple* (N. J. L.) 28 Atl. 671.

In the state of New York manufacturing corporations, like other corporations and individuals, are taxable upon their real estate where that is situated, and upon their capital stock as personal property, locally, at the places named in their respective certificates of organization, although their actual administrative offices may be elsewhere. *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Chesebrough Mfg. Co. v. Coleman*, 44 Hun. 545; *People ex rel. Knickerbocker Press v. Barker*, 87 Hun. 341, 34 N. Y. Supp. 269; *People ex rel. General Electric Co. v. Barker*, 91 Hun. 590, 36 N. Y. Supp. 842; *People ex rel. Edison Electric Light Co. v. Barker*, 91 Hun. 594, 36 N. Y. Supp. 844; *People ex rel. India Rubber & G. P. Insulating Co. v. Barker*, 16 Misc. 252, 39 N. Y. Supp. 58.

But after such a corporation has been assessed in a county where it has a business office, which is not the county named in its certificate, and it has appeared before the tax assessors and obtained a reduction of its assessment, filing, upon its application thus resulting, a statement that its principal office and place of transacting its financial affairs is in that county, it is too late for it to raise the question of a want of jurisdiction to assess it at all, and consequent invalidity of the tax, in a proceeding subsequent to default to enforce payment. *Re McLean*, 138 N. Y. 158, 20 L. R. A. 389, 33 N. E. 821.

Statutes authorizing a municipality to levy and assess an annual tax for city purposes on all goods, wares, and merchandise, and articles of trade or commerce, sold within the city, and to collect it of the vendors and, also, to levy, assess, and collect for city use, an annual business tax on the average quarterly business of forwarding and commission merchants, brokers, banks, etc., without expressly mentioning manufacturers,—justify a city ordinance imposing taxes on the business of a manufacturing corporation making and vending its products in the city. *Keystone Bridge Co. v. Pittsburgh (Pa.)* 6 Cent. Rep. 153.

The Pennsylvania statute abolishing taxes on manufacturing corporations laid by and under the revenue laws of the commonwealth, and repealing such laws so far as they relate to and affect manufacturing corporations, relieved such corporations only from the payment of state taxes, and not from those imposed for county, borough, school, and township purposes. *Hawes Mfg. Co's Appeal*, 1 Monaghan (Pa.) 353, 17 Atl. 219.

That statute was intended to, and does, operate simply on capital employed in manufacturing, and it relieves from taxation only that capital used in manufacturing, not all the capital, whether so used or not, belonging to manufacturing corporations. *Com. v. Lackawanna Iron & Coal Co.* 129 Pa. 346, 359, 18 Atl. 133, 1120.

A statute providing that any person engaging in manufacturing shall for ten years from the date of his investment be entitled to receive from the treasuries of the state, county, and municipality, respectively, sums equal to the aggregate amounts of state, county, and municipal taxes levied and collected upon the property or capital employed or invested directly in such manufactures or enterprises, except land taxes, does not warrant the refunding to a manufacturing corporation entitled to all the benefits of such statute of a sum paid by it as its proportion of a duly voted town subscription to the capital stock of a railroad company. *Carolina C. G. & C. R. Co. v. Tribble*, 25 S. C. 200.

A constitutional ordinance exempting from taxation for a term of years all factories for working cotton, wool, silk, furs, or metals, and all others manufacturing implements or articles of use in a finished state, which should be established after its adoption, or which, having theretofore been abandoned, should resume operations within two years, does not embrace a cotton mill actually operating when the ordinance was adopted. *Yacoma Cotton Mills v. Duke*, 71 Miss. 790, 15 So. 929.

A constitutional provision exempting from taxation manufactories and manufacturers is not retroactive, and does not afford immunity from taxes lawfully laid before it was adopted. *New Orleans v. L'Hote*, 35 La. Ann. 1177; *State* 64 L. R. A.

ex rel. Stern's Fertilizer & C. Mfg. Co. v. New Orleans, 40 La. Ann. 897, 4 So. 891.

A constitutional exemption from taxation of capital, machinery, and property employed in manufacturing furniture and other articles of wood confers no exemption upon that employed in making wire furniture. *Gast v. Board of Assessors*, 43 La. Ann. 1104, 10 So. 184.

The Louisiana constitutional exemption of capital, machinery, and property employed in certain enumerated lines of manufacturing does not entitle the refiner of sugar and molasses purchased in the crude state, and refined to sell again, to any exemption, because sugar and molasses refining are not included in the list of exempted industries. *State v. American Sugar Ref. Co.* 51 La. Ann. 562, 25 So. 447, Affirmed in 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

But the refiner of crude raw sugar and molasses is a manufacturer nevertheless, and in that state exempt from license or occupation taxes, because all manufacturers except those making alcoholic liquors, cigars, etc., and cotton-seed oil, are so exempt. *State v. American Sugar Ref. Co.* 106 La. 603, 32 So. 965, Overruling, in this respect the last-mentioned case.

Such constitutional exemption does not entitle the stockholders of corporations in the designated lines of manufacturing to any exemption from taxation upon their shares of stock as a part of their general property. *State ex rel. Mechanics' & T. Ins. Co. v. Board of Assessors*, 47 La. Ann. 1498, 18 So. 462.

A constitutional clause prohibiting the taxation of any article manufactured from the produce of the state otherwise than to pay inspection fees operates only to exonerate the article from taxation in the hands of the manufacturer, and does not inhibit the imposition of a privilege tax upon the business or occupation of selling it, even when followed by the manufacturer. *Kurth v. State*, 86 Tenn. 134, 5 S. W. 593.

VIII. Conclusion.

The decisions disclose many anomalies.

Why is cutting up trees into blocks of kindling wood for use in furnaces manufacturing, while cutting up ice into blocks for use in refrigerators is not? Why is making biscuits manufacturing, while making bread or ice cream is not? Why is printing and publishing books and magazines manufacturing, while printing and publishing newspapers is not? Why is putting the parts of a fountain pen together manufacturing, while the putting of the parts of a cask together is not? Why should the dried sap of the caoutchouc tree, if collected around a shoe last, be a manufactured article, while grass dried into hay is not? Many similar questions arise in one's mind, and find no answers when the cases are read together.

For a long time the state of New York was in an absurd position respecting the taxation of manufacturing corporations engaged in manufacturing within its borders. If such corporations chose to engage in trade in excess of their chartered powers, New York shut her eyes to the offense and gave them full exemption upon their manufacturing operations; but if, beside the power to manufacture, they took pains to obtain in advance power to trade as well, New York penalized them for obeying the law by taxing them in full upon their manufacturing operations. *Vide*, *People ex rel. Tiffany & Co. v. Campbell*, 144 N. Y. 169, 38 N. E. 990; *People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73; *People ex rel.*

Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 239.

But, at last, fortunately for her dignity, the legislature changed the verblage of the statute, so that hereafter when she ignores disobedience she will not punish obedience. The effect of the change will be understood when the cases of *People ex rel. Syracuse Improv. Co. v. Morgan*, 59 App. Div. 302, 69 N. Y. Supp. 263, and *People ex rel. Eastern Bermudez Asphalt Paving Co. v. Morgan*, 61 App. Div. 373, 70 N. Y. Supp. 516, are contrasted.

In *Benedict v. Davidson County (Tenn.)* 67 S. W. 806, the division of the court arose out of inability to define with precision the point where manufacturing began in the evolution of a manufactured article from a natural and direct product of the soil to its final form. The majority opinion logically required the placing of that point when the first stroke of the axe-man descended on the living tree in the forest, but it was content to say that manufacturing had begun, and consequently exemption at some indefinite time before the cut log reached the yard of the sawmill on its way to division into rough lumber. The minority judge denied this, but he conceded that manufacturing begins an appreciable time before the stage where the article takes on its ultimate form. It would appear as if the court might have avoided its difference had its members so chosen. The Tennessee Constitution contained two exemption clauses in point. One (art. 2, § 28) exempted the direct product of the soil in the hands of the producer and his immediate vendee, and the other (art. 2, § 30), every article manufactured of the produce of the state, except to pay inspection fees. The facts showed that the logs in question were cut from trees that grew in Tennessee on lands owned by the claimants of exemption, or those from whom they purchased, and that the tax resisted was not an inspection tax. If the logs were unmanufactured they were the direct product of the soil in the hands of the producer or his immediate vendee; if they were manufactured they were manufactured from the produce of the state. In either case they were exempt. There is no transition in *interregnum*. The exemption no sooner ceases under one clause than it immediately begins under the other.

Conceding the force of the rule of interpreting laws, that words are to be taken in their popular, rather than their technical, sense, the question presses, How is the popular sense of words in common use ascertained? Is there any reliable guide to the popular meaning of a word constantly used outside of the popular dictionaries? Does not everyone in cases of doubt make these his first resort and final arbiters? Yet courts are found ignoring the dictionary meanings of such words as "manufacturing" and "chemicals," and delving in their own minds for significations deemed "popular and ordinary."

In estimating the value of decisions of the Federal courts as to the dutiability of manufactured articles under tariff acts, in respect of exemptions from taxation of manufacturers under state laws, the reader should keep in mind the differing principles upon which the Federal courts proceed respecting customs duties from those deemed controlling in the state courts in reference to tax exemptions. Duties are never imposed upon vague or doubtful interpretations. *Powers v. Barney*, 5 Blatchf. 202, Fed. Cas. No. 11,361; *United States v. Isham*, 64 L. R. A.

17 Wall. 496, 21 L. ed. 728; *Adams v. Bancroft*, 3 Sumn. 384, Fed. Cas. No. 44. While taxation is the rule, and exemption the exception, the former never surrendered, the latter never allowed in doubtful cases, and every exemption law is to be construed *strictissimi juris*. (Vide cases cited in note on *Corporate taxation in the United States as affected by the contract clause in the Federal Constitution*, to *Adams v. Yazoo & M. Valley R. Co.* 60 L. R. A. 33, Div. III., a.)

In many cases it is necessary to discriminate between concerns employing their capital wholly in manufacturing, and concerns employing capital in wholly manufacturing. A corporation exempted because it is wholly engaged in manufacturing may be none the less so because it confines its work to a single stage in the evolution of the manufactured article; but a corporation which is exempt only when it entirely manufactures something must necessarily do everything required to make raw material into a finished product. A cooper who buys staves, headings, and hoops already fashioned, and puts them together in a complete barrel, may be wholly engaged in manufacturing, and yet not manufacture barrels. If all manufacturers are exempt, then he is; but if only manufacturers of barrels are exempt, then he may be taxable. While it is not altogether safe to formulate a rule for deciding when a corporation is to be deemed carrying on manufacture itself, when, either it lets out its work to contractors, or buys in open market, fully fashioned, the parts of the article it produces, and puts them together, it may be suggested, tentatively, that the following will be found very nearly accordant with the current of authority; to wit: Where the main part of the manufacturing is done by the corporation itself it may, without loss of privilege, have minor parts of its work done by outside contractors, as in the case of the book publishers (*People ex rel. Frederick A. Stokes Co. v. Roberts*, 90 Hun, 533, 36 N. Y. Supp. 73); and where the work of assembling and combining the parts requires a very high degree of skill and ingenuity, as in the case of the fountain-pen maker (*People ex rel. L. E. Waterman Co. v. Morgan*, 48 App. Div. 395, 63 N. Y. Supp. 76); or the locomotive builders (*Norris v. Com.* 27 Pa. 494),—no loss of privilege will follow the purchasing in the open market of the segregated parts of the completed work; if, however, unskilled or slightly skilled labor can put together ready-made parts into the complete article fitted for use, as in the case of nailing prepared shooks into plain wooden boxes (*Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837), the work does not rise to the dignity of manufacturing; and, probably, if the entire manufacturing business is turned over to an independent contractor, as in the case of the newspaper publisher (*People ex rel. Jewelers' Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248), the appropriation of the results of the contractor's operations is not carrying on manufacturing. The concluding part of the suggested rule is established in New York, but repudiated in New Jersey. *State ex rel. North American Phonograph Co. v. State Board*, 54 N. J. L. 430, 24 Atl. 507.

In other jurisdictions, therefore, it is open to debate. Should the rule thus suggested be generally adopted, it will still be difficult oftentimes to determine with fairness in which category a given case belongs.

J. B. G.

Carrie M. HENDRY

v.

Town of NORTH HAMPTON.

(.....N. H.....)

1. Imperfections in the surface of a highway which give a traveler on a bicycle an impetus which results in his falling over an adjoining unrailled and dangerous embankment cannot, as matter of law, be regarded as the cause of the resulting injury to him.
2. A bicyclist may hold a town liable for injuries caused by a defect making a highway unsuitable for ordinary travel, under a statute making towns liable for injuries to any person traveling upon a dangerous embankment upon a highway by reason of any defect or want of repair of such embankment, or defective railings, which renders it unsuitable for the travel thereon.

(December 31, 1903.)

EXCEPTIONS by defendant to rulings of the Superior Court for Rockingham County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. *Overruled.*

The evidence tended to show that while plaintiff was slowly riding a bicycle along a highway in the defendant town, and exercising due care, she ran into a mud puddle, and was thrown over a dangerous embankment which was not railled or guarded, and received injuries for which she brought this action.

The grounds upon which defendant relied to defeat the action sufficiently appear in the opinion.

Messrs. Page & Bartlett, for defendant:

A person riding a bicycle along the highway is bound to exercise the care required of one performing a dangerous act.—that is, the greatest care,—to avoid stones, holes, and puddles of water; and, when his view is unobstructed, and no excuse is shown for not looking ahead and seeing them, if he runs into them, it is clearly his own fault.

If plaintiff's own fault or negligence contributed in "any degree" to the accident, or if her damages were caused "in the least degree" by her own fault or negligence, she could not recover.

Farnum v. Concord, 2 N. H. 392; *Norris v. Lithfield*, 35 N. H. 271, 69 Am. Dec. 546.

NOTE.—As to right of bicyclists to recover for injuries caused by defective highway, see also note to *Taylor v. Union Traction Co.* 47 L. R. A. 289, and the later case of *Richardson v. Danvers*, 50 L. R. A. 127.

As to right of bicyclist riding on sidewalk to recover for injuries caused by defect therein, see, in this series, *Lee v. Port Huron*, 53 L. R. A. 308.

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What was the legal or proximate cause of the accident,—the cause which the law recognizes,—was a question for the jury under proper instructions.

Hendry v. North Hampton, 71 N. H. 26, 51 Atl. 283; *Ela v. Postal Teleg. Cable Co.* 71 N. H. 1, 51 Atl. 281.

The highway liability of towns being created by statute, the facts must bring each case within the statute in order to render a town liable.

Lovejoy v. Jones, 30 N. H. 170; *Rich v. Flanders*, 39 N. H. 304.

The question is whether the hole in the road, granting it to be a defect, was the prime, moving cause of the accident to the plaintiff, without the existence of which the accident would not have happened. If so, the accident was caused by a defect in the highway, and not by a dangerous embankment.

Littleton v. Richardson, 32 N. H. 59; *Stark v. Lancaster*, 57 N. H. 88; *State v. Manchester & L. R. Co.* 52 N. H. 528; *Ela v. Postal Teleg. Cable Co.* 71 N. H. 1, 51 Atl. 281.

Plaintiff cannot recover because she was neither walking upon the highway or using it as a traveler on foot, nor was she traveling upon it in a carriage within the meaning of the term "carriage" as used in the statute.

Richardson v. Danvers, 176 Mass. 413, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688.

Messrs. Emery, Simes, & Corey, for plaintiff:

Towns must use ordinary care to rail dangerous embankments, and are liable for such injuries as they, by the exercise of that care, may be held to have anticipated as likely to result from their neglect to do so.

The absence of the rail was the cause of the injury.

Winship v. Enfield, 42 N. H. 215; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Davis v. Hill*, 41 N. H. 329; *Palmer v. Andover*, 2 Cush. 600; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526; *Stark v. Lancaster*, 57 N. H. 88; *Hendry v. North Hampton*, 71 N. H. 26, 51 Atl. 283; *Ela v. Postal Teleg. Cable Co.* 71 N. H. 1, 51 Atl. 281; *Olney v. Boston & M. R. Co.* 71 N. H. 427, 52 Atl. 1097; *Littleton v. Richardson*, 32 N. H. 59; *Richardson v. Danvers*, 176 Mass. 413, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688; *Rust v. Essex*, 182 Mass. 313, 65 N. E. 307.

Remick, J., delivered the opinion of the court:

1. It is found by the superior court that there was evidence tending to prove that the

plaintiff was in the exercise of due care. Furthermore, we have examined the evidence for ourselves, so far as it is made a part of the record, and are of the opinion that it warrants the finding of the superior court in this particular. The defendant's motions for a nonsuit and verdict upon the ground that the plaintiff was not in the exercise of due care were therefore properly overruled. The defendant's requests for instructions upon this point, so far as they embodied a correct statement of the law, were given in substance; and no error appears either in the instructions given or in the refusal of those requested.

2. The contention of the defendant that, because the hole in the road gave to the plaintiff the impetus which carried her over the unrailed and dangerous embankment, therefore the hole, not the unrailed embankment, was, as a matter of law, the cause of her injury, is best answered by the authorities, which are so conclusive against the defendant's contention—at least in this jurisdiction—that to enter upon a discussion of the question would be a work of supererogation. *Littleton v. Richardson*, 32 N. H. 59, 63; *Stark v. Lancaster*, 57 N. H. 88; *Merrill v. Claremont*, 58 N. H. 468; *Ela v. Postal Teleg. Cable Co.* 71 N. H. 1, 51 Atl. 281; *Elliott, Roads & Streets*, § 617. According to the view contended for by the defendants, there could have been no recovery in *Norris v. Haverhill*, 65 N. H. 89, 18 Atl. 85; 163 Briefs & Cases, 159; and *Seeton v. Dunbarton*, 72 N. H. 209, 56 Atl. 197. An able and instructive discussion of the question may be found in *Sherwood v. Hamilton*, 37 U. C. Q. B. 410, where the conflicting authorities are exhaustively reviewed, and the New Hampshire rule adopted as being in accordance with the weight of authority and the better reasoning. The instructions given upon this point were in accordance with the principles established by the authorities cited, and the instructions requested were properly denied.

3. The defendant's next and last contention is that § 1, chap. 59, p. 47, Laws 1893, making "towns . . . liable for damages happening to any person, his team or carriage, traveling upon a bridge, culvert, or sluiceway, or dangerous embankments and defective railings, upon any highway, by reason of any obstruction, defect, insufficiency, or want of repair of such bridge, culvert, or sluiceway, or dangerous embankments and defective railings, which renders it unsuitable for the travel thereon," imposes no duty upon towns to build and maintain suitable bridges, culverts, sluiceways, or railings for the protection of persons riding bicycles, and no liability for injuries happening to such persons from defects in these particu-

lars. Under a statute providing "that any person or persons sustaining bodily injury upon any of the public highways or streets in this state by reason of neglect to keep such public highway . . . in reasonable repair and in condition reasonably safe and fit for travel," may recover just damages of the town in default, the supreme court of Michigan has held that a person injured while riding upon a bicycle by reason of a condition of the highway unsuitable for that mode of travel, but reasonably safe for travel in ordinary vehicles like wagons and carriages, cannot recover; that at the time the law was enacted bicycles were in use only to a limited extent, and the legislature did not intend to place upon townships and cities the burden of keeping their roads and streets in a safe condition for that kind of conveyance; that reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities. *Mich. Comp. Laws* 1897, chap. 91, § 1; *Leslie v. Grand Rapids*, 120 Mich. 28, 78 N. W. 885. Construing a statute of New York, which provided that "every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges," the court said: "It cannot be successfully claimed that a larger measure of duty on the part of the commissioners of highways is due to bicycle riders than to persons traveling upon the road in ordinary vehicles. It is apparent that a bicycle rider upon an ordinary country road is exposed to greater dangers than a person riding in a wagon, and the great increase in the number of persons using these vehicles has created a demand for better and safer roads; but under the present highway laws a road in a condition which is reasonably safe for general and ordinary travel is all that the commissioners of highways are bound to maintain." *N. Y. Rev. Stat.* § 16, p. 1596; *Sutphen v. North Hampstead*, 80 Hun, 409, 411, 412, 30 N. Y. Supp. 128. In Massachusetts it is provided that "if a person receives or suffers bodily injury, or damage in his property, through a defect, or want of repair, or of sufficient railing, . . . he may recover . . . the amount of damage sustained thereby." Construing this statute, the court said: "The statute . . . was passed long before bicycles were invented, but although, of course, it is not to be confined to the same kind of vehicles then in use, we are of the opinion that it should be confined to vehicles *ejusdem generis*, and that it does not extend to bicycles. . . . A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire. But this is

easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without having his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road, may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It may impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety." It was accordingly held that a road which is reasonably safe for ordinary travel is not defective merely because not fit for use by bicycles. *Mass. Pub. Stat. 1881, chap. 52, § 18; Richardson v. Danvers*, 176 Mass. 413, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688; *Rust v. Essex*, 182 Mass. 313, 65 N. E. 397.

Of the soundness of these decisions and their applicability to our statute we need not inquire, for they fall far short of deciding that a bicycle rider injured by reason of a defect in the highway rendering it unsuitable for ordinary travel is without remedy merely because when injured he was in the saddle of a bicycle instead of on a wagon seat, or a horse's back, or on his feet pushing a bicycle. In *Rust v. Essex* the court assumed that, if the highway could have been found defective for ordinary travel, the plaintiff "might have recovered for his injuries, notwithstanding the fact that he was riding upon a bicycle." The Michigan and New York cases convey the same idea. The defect complained of in the present case was an unrailed and dangerous embankment. We must assume from the instructions of the court and the verdict of the jury that it rendered the highway unsuitable, not only for traveling by bicycle, but for ordinary travel as well. This being so, we see no reason why the fact that the plaintiff was on a bicycle, instead of on horseback or on foot pushing his bicycle, should preclude her recovery. Common sense rejects the distinction. The statute furnishes no warrant for it, either in letter or spirit. It says: "Towns are liable for damages happening to any person . . . traveling," etc., without any expressed limitation as to the mode of conveyance. "A

traveler is one who travels in any way." "To travel is to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance." Traveling is "the act of making a journey; change of place; passage." The word "traveling," as used in some penal statutes, may have a narrow meaning; but, in order to maintain an action against a city or town for a defect in a highway, one need be a traveler only in the general sense above indicated. *Hardy v. Keene*, 52 N. H. 370, 377; *Hamilton v. Boston*, 14 Allen, 475, 483; Black, Law Dict. 1185; Century Dict. titles *Travel*, *Traveler*, *Traveling*. It should also be observed that the bicycle is recognized by the public policy of New Hampshire as a legitimate method of traveling upon the highway, and that it is in common use for that purpose, with general consent. Laws 1897, p. 51, chap. 61, § 1; *Id.* p. 89, chap. 93. Being a traveler upon the highway, both according to the literal meaning of that term and by the public policy of the state as clearly manifested by the legislation and general custom referred to, the plaintiff, notwithstanding she was riding on a bicycle, was entitled at least to a highway in condition suitable for ordinary travel, and to damages for injuries happening to her by reason of any unsuitableness of the highway for such travel. It follows that the instructions given upon this point were correct, and that those requested were properly denied.

The question discussed as to whether a bicycle is a carriage within the meaning of the statute seems quite immaterial to the present case, because the plaintiff claims nothing on account of damage to her wheel, and her right to recover for damage to her person is in no way dependent upon the means by which she was moving, so long as she was a traveler and in the exercise of due care. But, if the question were material, and the instruction that a bicycle is not a carriage erroneous, the error was entirely in the defendant's favor, and prejudicial to the plaintiff alone.

Exceptions overruled.

All concur.

ILLINOIS SUPREME COURT.

George R. COOPER, Guardian, etc., of Ben O. McLean,

v.

BOARD OF REVIEW OF MONTGOMERY COUNTY.

(207 Ill. 472.)

1. A claim on a policy insuring the

NOTE.—As to right to tax paid-up insurance policies, see, in this series, *State Board v. Holiday*, 42 L. R. A. 826.

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life of one who dies before the day on which property is to be valued for taxation is assessable under a statute providing for the assessment of claims due or to become due, although proof of death has not been made, and the insurer has sixty days after such proof in which to pay the demand.

2. For the purpose of taxation, the value of a claim on an insurance policy promising the payment of an amount certain within sixty days after

proof of death will be presumed to be measured by the face value of the policy.

2. The fact that the funds of a life insurance company are subject to taxation in its hands does not prevent the assessment of the value of an unpaid claim against the company in the hands of a representative of the assured,—at least, where the fund to meet the claim is to be raised by assessment, and it does not appear that the assessment has been made, or the fund collected at the time the tax is levied.

(February 17, 1904.)

CERTIFICATION by the auditor of public accounts for the opinion of the Supreme Court of a question as to the validity of an assessment upon a claim under a mutual benefit certificate. *Assessment upheld.*

Statement by Magruder, J.:

The board of review of Montgomery county assessed appellant, as guardian, the sum of \$4,330 on a total cash value of personal property, and appellant claims that said property was exempt from taxation for the year 1903. Appellant objecting to the assessment, and, claiming that the property was exempt from taxation, the board by its clerk thereupon certified a statement of the facts concerning said assessment to the auditor of public accounts. The auditor of public accounts, being satisfied that such property is liable to taxation, submits the question of its exemption from taxation to this court in accordance with the provisions of the 4th clause of § 35 of the revenue law of 1898 (4 Starr & C. Anno. Stat. 1902, p. 1118).

The facts certified are that Dr. S. H. McLean, the father of Ben O. McLean, died at Lincoln, in Logan county, on or about the 18th day of March, 1903, intestate; that at the time of his death he held a policy of life insurance in the Modern Woodmen of America for the sum of \$3,000, payable to said son, Ben O. McLean; that he also held a policy of life insurance in the Court of Honor, in which the said Ben O. McLean was a beneficiary, to the amount of \$1,333.33; that each of the above insurance companies is a fraternal beneficiary society; that their manner of paying policies is by an assessment levied upon the members of said society; that said Ben O. McLean is a minor of the age of seventeen years; that said George R. Cooper filed a petition in the county court of said county, asking to be appointed guardian of said Ben O. McLean, on March 23, 1903; that said petition states "that said minor has due him life insurance to the amount of about \$4,200; that said George R. Cooper was appointed guardian of said Ben O. McLean by the

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county court of Montgomery county on March 27, 1903, and duly qualified, and from thence hitherto has been acting as such guardian; that each of said policies of insurance required proof of death as a condition precedent to the payment thereof, and allowed sixty days in which to pay said policies; that on the 1st of April, 1903, proofs of death had not been made under either of said policies, nor had any assessments been made on the members of said societies, or either of them, for the payment of either of said policies; that on April 1, 1903, no money had been paid to said guardian under either of said policies, nor had he taken any steps whatever at that time to collect the same further than to be appointed guardian; that on May 9, 1903, said Cooper received, as such guardian, from the Court of Honor the sum of \$1,333.33, and on May 26, 1903, he received, as such guardian, from the Modern Woodmen of America the sum of \$3,000.

Messrs. Lane & Cooper, for appellant:

Money in the hands of the treasurer of a fraternal beneficiary society on the 1st of April is taxable in the township where such treasurer resides.

State Council O. K. v. Board of Review, 198 Ill. 441, 64 N. E. 1104.

The sovereign power of a state to levy taxes does not embrace life insurance policies.

Dutton v. Board of Review, 188 Ill. 391, 58 N. E. 953.

The taxation of rents before due is the taxation of something included in the taxation of the land.

Scully v. People, 104 Ill. 349.

Mr. H. J. Hamlin, Attorney General, for appellee:

The assessor is required to fix the value of property, and he may take any means within his reach to ascertain that value. The certificate would be presumed to be worth its face value.

Wedgbury v. Cassell, 164 Ill. 622, 45 N. E. 978.

Magruder, J., delivered the opinion of the court:

Upon the certificate of facts set forth in the statement preceding this opinion the board of review predicated the right to make the assessment, and it is contended by George R. Cooper, guardian of Ben O. McLean, that the assessment is illegal and contrary to law.

The value of the two policies of insurance was assessed against the guardian as of the 1st day of April, 1903. "All property subject to taxation shall be listed by the person at the place and in the manner required

by law, and assessed at the place and in the manner required by law with reference to the ownership, amount, kind, and value on the 1st day of April in the year, for which the property is required to be listed, including all property purchased on that day. The owner of property on the 1st day of April in any year shall be liable for the taxes of that year." 4 Starr & C. Anno. Stat. 1902, p. 1110; § 8, Revenue Act 1898. The father of the minor, Ben O. McLean, had died early in March, 1903, and Cooper was appointed his guardian on March 27, 1903, and qualified on that date. Was the guardian the owner of the policies on the 1st day of April?

By the terms of the 2d clause of § 1 of the revenue act, all "credits" shall be assessed and taxed; and by the 1st clause of § 6 of the revenue act, every person of full age and sound mind, being a resident of this state, is required to list all his "credits" and personal property for taxation. 3 Starr & C. Anno. Stat. 1896, 2d ed. pp. 3398-3406. In the 6th clause of § 292 of the revenue act "credits" are defined as follows: "Every claim or demand for money, labor, interest, or other valuable thing due or to become due, not including money on deposit." 3 Starr & C. Anno. Stat. 1896, 2d ed. p. 3520. Undoubtedly the claim of the guardian against the fraternal beneficiary societies who issued the policies or certificates to Dr. S. H. McLean in his lifetime comes within the statutory definition of "credits." It therefore follows that the claim was properly listed as the personal property of the guardian on April 1, 1903.

It is contended, however, on the part of the guardian, that a full and perfected claim for the amount due upon the certificates had no existence on April 1, 1903. The certificate of facts shows that each of said policies or certificates of insurance required proof of death as a condition precedent to the payment thereof, and also that each company had sixty days after the making of proof of death in which to pay the amount of the policy. It also appears from the certificate of facts that proofs of death had not been made under either of the policies on the 1st of April, 1903. It is claimed that the companies were not bound to pay the policies until proofs of death were submitted, and then not until sixty days had elapsed. The contention is that no valid claim existed against either of the said companies until proofs of death were submitted, and until the sixty days had passed, and that, therefore, the guardian was not the owner of any claim on the 1st day of April, 1903. The statutory definition of "credits" includes every claim or demand for money "due or to become due." The

fact that the claim for the insurance money against the companies was not due until after the lapse of sixty days would make no difference in view of the fact that under the statute a claim for money "to become due" as well as one for money already due is included within the definition of "credits." The certificate of facts states that Dr. McLean, to whom the policies were issued, had died, and the submission of proof of his death was an act to be performed by the guardian; and if the claim was one which was "to become due" it was such a claim as well because it had not matured on account of the delay in filing the proofs of death as because the period of sixty days had not yet expired. If the claim had been merely one which would be due in sixty days, it comes within the definition of "credits," which embraces claims "to become due" as well as claims "due," and it would equally come within the definition if it was not yet due because the proofs of death had not been made.

It is urged that the board of review could not determine what the value of the policies was on April 1, 1903, and therefore that their value should not be taxed. The policies were certainly evidence of claims of the beneficiaries, and what their value was was a question to be determined by the assessor or the board of review. The value of the policies was fixed at their face value or the amount due by their terms. This would appear to have been a correct mode of ascertaining their value, as on the 9th and 26th days of May, 1903, the companies paid the full amounts called for by their terms. In such cases the policies will be presumed to be worth their face value. *Wedgbury v. Cassell*, 164 Ill. 622, 45 N. E. 978.

It is furthermore contended that the money with which the policies were to be paid was in the hands of the companies and that therefore they constituted a fund which belonged to the companies and was taxable as the property of the companies. In support of this position the case of *State Council, C. K. v. Board of Review*, 198 Ill. 441, 64 N. E. 1104, is referred to and relied upon. In the latter case it was held that a fund in the hands of the treasurer of a benefit society was properly assessed as the property of the society although orders had before April 1st been issued against a portion of the fund to beneficiaries of deceased members, it being there said: "No part of the fund assessed had been paid out prior to April 1st, and it then became liable to the tax in the hands of the treasurer of the institution, who was its lawful custodian." Taking the ground that the amount due upon the policies here in controversy was a

fund which belonged to the companies, and was taxable on April 1, 1903, as the property of the companies, the objecting guardian contends that, if the claims are assessed against him as his property, there will be a double taxation of the same property. But there is no evidence here that the money was in the hands of the insurance companies on April 1, 1903. It appears from the certificate of facts that the manner of paying their policies by these companies is by an assessment levied upon the members of the society, and that on April 1, 1903, no assessment had been made upon the members of either of the societies for the payment of either of said policies. As, therefore, the funds were not in the hands of the societies on April 1, 1903, they could not be taxed as property belonging on that date to the societies or companies. If, therefore, the claims for the moneys due upon these policies are not taxed as the property

of the objecting guardian, they will escape taxation altogether for the year 1903.

Counsel for the guardian refers us to no authority supporting the conclusion that because the money in the hands of the insurance companies was taxable the evidences of indebtedness against the insurance companies could not be taxed. A debtor who has money in his possession on April 1st is subject to assessment upon that money, and a creditor who holds a note or other evidence of indebtedness against such debtor at the same time is subject to assessment on that credit according to its value, whether due or not.

We are therefore of the opinion that the action of the board of review in assessing these claims against the insurance companies or societies as being the property of the guardian on April 1, 1903, at their face value was correct, and *the decision of the board is approved.*

IOWA SUPREME COURT.

H. ENGBRETSON, *Appt.*,

v.

J. F. SEIBERLING *et al.*

(.....Iowa.....)

The insolvency of the debtor is sufficient to create an exception to the rule that acceptance of part of an amount due cannot effect the satisfaction of the whole debt.

(February 1, 1904.)

A PPEAL by complainant from a decree of the District Court for Winnecheik County in favor of defendants in a suit to enjoin the enforcement of an execution. *Reversed.*

Statement by McClain, J.:

Action to enjoin the enforcement of an execution held by W. H. Carter, assignee of J. F. Seiberling & Company, on the ground that the judgment on which the execution issued had been fully satisfied. On the trial plaintiff's petition was dismissed for want of equity, and judgment rendered for defendants, from which plaintiff appeals.

Mr. E. P. Johnson, for appellant:

Whenever the technical reason for the ap-

NOTE.—For part payment as accord and satisfaction in general, see *note* to Fuller v. Kemp, 20 L. R. A. 785; also the later cases in this series of Tanner v. Merrill, 31 L. R. A. 171; Clayton v. Clark, 37 L. R. A. 771; and Chicora Fertilizer Co. v. Dunan, 50 L. R. A. 401.

As to effect of part payment by third person as accord and satisfaction, see Marshall v. Bullard, 54 L. R. A. 862.

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plication of the rule that payment of a part of a claim will not operate as a satisfaction of the whole does not exist, the rule itself is not to be applied.

Kellogg v. Richards, 14 Wend. 116; *Larned v. Dubuque*, 86 Iowa, 177, 53 N. W. 105; *Ruddleedin v. Smith*, 36 Iowa, 669.

Insolvency of the debtor is sufficient to take the case out of the general rule.

Curtiss v. Martin, 20 Ill. 578; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105; *Ruddleedin v. Smith*, 36 Iowa, 669.

Mr. E. W. Cutting, for appellees:

By the most elementary principles the decision is correct.

Bender v. Been, 78 Iowa, 283, 5 L. R. A. 596, 43 N. W. 216; 1 Cyc. Law & Proc. 325, 326; *Marshall v. Bullard*, 114 Iowa, 462, 54 L. R. A. 862, 87 N. W. 427; *Stoutenberg v. Huisman*, 93 Iowa, 213, 61 N. W. 917; *Fentress v. Markle*, 2 G. Greene, 553; *Norris v. Slaughter*, 3 G. Greene, 116; *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52.

McClain, J., delivered the opinion of the court:

It appears from the allegations of plaintiff's petition, which are in accordance with the evidence introduced on the trial, that J. F. Seiberling & Company, being the owners of a judgment recovered by them against this plaintiff for \$256, accepted from such judgment debtor the sum of \$65 in cash and his promissory note for \$25 in full satisfaction of said judgment. J. F. Seiberling & Company subsequently assigned the judgment to W. H. Carter, who caused execution

to issue thereon. It is further averred and proved that at the time the agreement was made to accept the partial payment in full satisfaction Engbretson was insolvent. The sole question for our consideration is whether the acceptance from an insolvent debtor of part payment in full satisfaction of a claim is founded upon such consideration that the entire debt is thereby discharged. The general rule that an agreement to accept part payment in full satisfaction is invalid for want of consideration, and the usual exceptions to that rule, have been often considered by this court, and a general citation of authorities on the subject is unnecessary. See *Marshall v. Bullard*, 114 Iowa, 462, 54 L. R. A. 862, 87 N. W. 427; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. 105; *Stoutenberg v. Huismen*, 93 Iowa, 213, 61 N. W. 917; *Ruddledin v. Smith*, 36 Iowa, 669. But in none of these cases, nor in any others decided in this state, do we find an express exception, such as that insisted upon by the plaintiff in this case. We do, however, find suggestions in each of those cases indicating the existence of the thought that perhaps such an exception should be made in a proper case. In *Marshall v. Bullard* it is said: "If, however, such an agreement is supported by any new consideration, though insignificant or technical merely, if valuable, it will be upheld. Thus, if a part is to be and is paid before due, or at a place other than that at which the obligor was legally required to pay, or if payment is made in property, no matter what its value, or by the debtor in composition with his creditors generally, in which they agree to accept less than their demands, the consideration is held to be sufficient." And it was decided in that case that if the debtor, having no other way of obtaining the money which he was to pay in satisfaction of the debt, induced another to pay it for him, the acceptance of a less sum than the full amount of the debt thus procured to be paid by another would support an agreement to discharge the entire debt. In *Larned v. Dubuque* the court adverted to the fact that the defendant, relying on part payment in satisfaction of the entire indebtedness, might, in one sense at least, be said to have been an insolvent debtor, and the court in that case says that an agreement to accept part payment in full satisfaction of a judgment, if fully executed, is valid as a discharge of the entire judgment. And in *Stoutenberg v. Huismen* it is said, as a reason for sustaining the full release of a judgment on part payment, that "the settlement avoided litigation, settled the dispute, canceled the judgment, and secured the payment of \$75 from the insolvent debtor." In *Ruddledin v. Smith* this lan-

guage is used: "It is true that the amount realized by the judgment plaintiffs was less than half the amount of their judgment, but the defendant therein was insolvent, and the real property they had purchased under their execution sale was subject to a prior encumbrance." It cannot be claimed that these cases are by any means conclusive upon us in the determination of the question now for the first time squarely and clearly presented, but they certainly indicate a predisposition to regard the insolvency of the debtor as a matter which might be considered in determining the validity of an agreement to accept part payment in full discharge. There is some support for such a proposition in the decisions of other courts. In *Curtiss v. Martin*, 20 Ill. 557, the court, after stating the general rule, says (at p. 577): "But if the smaller sum be taken by way of compromise of a controverted claim, or from a debtor in failing circumstances, in full discharge of the debt, no reason is perceived why it should not be binding on the parties." In *Dawson v. Beall*, 68 Ga. 328, it is held that an agreement by a debtor not to go into bankruptcy, and thereby be discharged from the payment of the debt, furnishes a sufficient consideration to support a contract by the debtor to take less than the full amount thereof, and substantially the same conclusion is reached in *Hinckley v. Arey*, 27 Me. 362. So, in *Pettigrew Mach. Co. v. Harmon*, 45 Ark. 290, it was held that part payment by an assignee for the benefit of creditors, accepted in full satisfaction, was binding. In *Rice v. London & N. W. American Mortg. Co.* 70 Minn. 77, 72 N. W. 826, it was held that acceptance from the administrator of an estate of part payment in full satisfaction of a claim against the estate was binding, although it subsequently appeared that the estate was not insolvent. The only case which we have been able to find to the contrary is that of *Pearson v. Thomason*, 15 Ala. 700, 50 Am. Dec. 159, in which the court squarely holds that the fact of the debtor's insolvency can have no influence in determining whether the agreement of the creditor to accept a less sum than the entire debt in full satisfaction is without consideration; for it is said, whether the debtor is insolvent or not, the obligation to pay is not impaired, and the moral duty to make payment remains in full force. In view of the fact that, as indicated by the prior decisions on the question in this state, the rule that an agreement to accept part payment in full satisfaction is without consideration is purely technical, and subject to many exceptions which the courts have ingrafted upon it from time to time in order to avoid to some extent the injustice which

is recognized as frequently resulting from its strict application, we are led to adopt as valid and reasonable the exception which has been hinted at or suggested, rather than authoritatively announced, in the cases already cited. Our conclusion is therefore that plaintiff in this case had a good defense to the enforcement of the judgment against him, and that his action to enjoin the further enforcement of the judgment should not have been dismissed as being without equity.

Reversed.

STATE of Iowa
v.
Ed. EVENSON, *Appt.*
(.....Iowa.....)

One assaulted by citizens of a town for the purpose of compelling him to leave it is not bound to retreat to avoid a conflict in order to protect himself from liability to prosecution for assault, but he may repel force with force so long as he uses only such force as is necessary, short of killing his assailants, even though he provoked the attack by drunkenness and disorderly conduct.

(January 12, 1904.)

A PPEAL by defendant from a judgment of the District Court for Worth County convicting him of assault and battery. *Reversed.*

Statement by **Bishop, J.:**

The defendant was indicted for an assault with intent to inflict great bodily injury. He was found guilty of assault and battery, and from the judgment entered on the verdict he appeals.

Messrs. Blythe, Markley, & Rule and Olcott, Rule, & Keeler, for appellant:

If this defendant was assaulted the law did not require him to retreat before he should use force to repel such assault. He might stand his ground and repel force with force so long as he used only such force as was necessary, under all of the circumstances as they appeared to him, and retreated to the wall before he resorted to the extreme measure of taking his assailant's life.

The defendant was lawfully upon the street of the town of Joice when a crowd of men, in pursuance of a criminal conspiracy to assault him and drive him and his com-

NOTE.—As to extent of right of self-defense by use of deadly weapon in case of assault generally, see, in this series, *Drysdale v. State*, 6 L. R. A. 424; *People v. Pearl*, 4 L. R. A. 709; *Gutzman v. Clancy*, 58 L. R. A. 744; and *State v. Bartlett*, 59 L. R. A. 756. 64 L. R. A.

panions out of town, came upon him suddenly, and with whips in hand ordered him out of town. Even if the whips had not been used at once, the assault had been completed, and the defendant had been assaulted in such a manner as to give him the right to repel the assault with force.

An assault is "an attempt or offer, by force and violence, to do a corporeal injury to another."

McClain, *Crim. Law*, § 231; *State v. Wyatt*, 76 Iowa, 328, 41 N. W. 31; *State v. Goering*, 106 Iowa, 636, 77 N. W. 327; *Beard v. United States*, 158 U. S. 563, 39 L. ed. 1091, 15 Sup. Ct. Rep. 962; *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52; *Martin v. State*, 5 Ind. App. 453, 32 N. E. 594; *People v. Pearl*, 76 Mich. 207, 4 L. R. A. 709, 15 Am. St. Rep. 304, 42 N. W. 1109; *State v. King*, 104 Iowa, 727, 74 N. W. 691.

Where one advances on another in a threatening manner, the latter may strike, or use a sufficient degree of force to prevent the intended blow, without retreating.

Gallagher v. State, 3 Minn. 270; *Gil. 185*; *Com. v. Bouchet*, 5 Pa. Dist. R. 343; *Martin v. State*, 5 Ind. App. 453, 32 N. E. 594.

Every citizen may rightfully traverse the streets, or may stand in all proper places, and need not flee from everyone who chooses to assail him.

Com. v. Drum, 58 Pa. 21; *State v. Bartlett*, 170 Mo. 658, 59 L. R. A. 756, 71 S. W. 148; *State v. Sherman*, 16 R. I. 631, 18 Atl. 1040; *May*, *Crim. Law*, § 62; *Gallagher v. State*, 3 Minn. 270, *Gil. 185*.

Messrs. Charles W. Mullan, Attorney General, and **Lawrence DeGraff**, for respondent:

To give rise to the right of self-defense, whether of life, or of the person, or of property, there must be necessity for defense, and the acts done in defense, to be justifiable, must not go beyond the necessity. It is not a question of real necessity, but reasonably apparent necessity, and each case must be determined by the circumstances involved in the case.

1 *Clark & M. Crimes*, p. 184; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339; *Creighton v. Com.* 84 Ky. 103, 4 Am. St. Rep. 193.

A party who does not retreat, or attempt to shun a combat, but enters unnecessarily into it, does not act in self-defense.

State v. Shippey, 10 Minn. 223, *Gil. 178*, 88 Am. Dec. 70; *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760; 4 Bl. Com. 185; *State v. Tweedy*, 5 Iowa, 433; *State v. Jones*, 89 Iowa, 183, 56 N. W. 427; *State v. Shreve*, 81 Iowa, 615, 47 N. W. 899; *State v. Warner*, 100 Iowa, 260, 69 N. W. 546; *Roscoe*, *Crim. Ev.* p. 708; *State v. Donnelly*, 69

Iowa, 706, 58 Am. Rep. 234, 27 N. W. 369; *State v. McKinley*, 82 Iowa, 445, 48 N. W. 804.

One who is attacked without felonious intent must retreat unless retreat will endanger his safety.

Morrison v. State, 84 Ala. 405, 4 So. 402; *Hammil v. State*, 90 Ala. 577, 8 So. 380; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733; *State v. Sorenson*, 32 Minn. 121, 19 N. W. 738; *State v. Jones*, 89 Iowa, 187, 56 N. W. 427; *State v. Tripp*, 34 Minn. 26, 24 N. W. 290; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178.

One may defend a person with whom he stands in a family relation without being guilty of an assault, whenever, under the circumstances, he would have the right to defend himself, but not otherwise.

Clark, Crim. Law, 213; *People v. Shorter*, 2 N. Y. 193, 51 Am. Dec. 292; *Davis v. People*, 88 Ill. 350.

Whenever a person is assailed, and his life may be taken or great bodily injury suffered, whether or not a deadly weapon is used, he must retreat if he has reasonable opportunity to do so, if by so doing he does not enhance the danger to himself, before he can take the life of, or do great bodily injury to, his assailant.

State v. Jones, 89 Iowa, 183, 56 N. W. 427; *State v. Warner*, 100 Iowa, 261, 69 N. W. 546; *State v. Weston*, 98 Iowa, 125, 67 N. W. 84.

There is no reason why a person assailed by a simple assault should not be governed by the same rule.

State v. McKinley, 82 Iowa, 445, 48 N. W. 804; *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369.

Bishop, J., delivered the opinion of the court:

On the evening of December 15, 1902, the defendant, his brother, and two other young men were together on a side street of the town of Joice, in Worth county. They had been drinking intoxicating liquor, had indulged in much profane and obscene language, and there had been some fighting between them. After the fight was over, they moved to the main street of the town, where they stopped in front of a store. Here they continued their loud and boisterous talk, the same being more or less interspersed with profanity. In this situation a crowd of about a dozen citizens appeared on the scene, armed with horsewhips, and some one of them announced to defendant and his companions that they would give them five minutes to get out of town. The defendant responded that "if they did not leave him alone he would lay someone cold." The citizens at once began using their whips

on defendant and his companions, and when the whips were used up they resorted to their fists, one of the number also making use of a piece of board. Defendant and his companions were forced back up the street by the onslaught made upon them, defending themselves meanwhile by the use of their fists. As they passed a platform scale standing on the sidewalk, defendant took therefrom the weight hanger, and, swinging it around his head, told the crowd to keep back. At this juncture one of the citizens, named Bilstad, seized the brother of defendant about the body, and the two began to struggle, when defendant stepped up and struck Bilstad with the hanger, the blow being sufficient to fell Bilstad to the walk.

The court, on its own motion, gave an instruction to the jury as follows: "The inhabitants of Joice had no right to drive the defendant and his party out of town by the use of force merely because they were fighting or using bad language in the streets. If the defendant and his party had committed, or were committing, any public offense, the remedy which the law gave the inhabitants of Joice was to arrest them, and take them before a magistrate, or complain to a magistrate or peace officer. On the other hand, if the defendant and his party had a reasonable opportunity to leave the scene in safety and avoid a conflict with the town people when they approached with whips and threatened the use of force, then the defendant and his party should have taken that course, and avoided a conflict. But if the town people assailed the defendant and his party so that they had no reasonable opportunity, after their intentions were known, to retire or retreat in safety, then they had the right to meet force with force, and defend themselves as in the case of any other assault." This instruction is complained of as error, the contention of counsel for appellant being that under the law the defendant, when threatened with an assault and battery, was not bound to retreat, but might stand his ground, and repel force with force, so long as he used only such force as was necessary. We think the doctrine thus contended for is sound. The defendant was rightfully on the streets of Joice, subject only to a lawful arrest for any violation of law on his part. The instruction rightly holds that the citizens by whom defendant was attacked had no right to either order him to leave town or to make an assault upon him with intent to inflict punishment upon his refusal to comply with their demands. And this is true without reference to the offensiveness of the previous conduct of the defendant or those with whom he was associated. The law

makes provision for the punishment of those who violate any of its provisions, and the only right of the citizen was to invoke the process of the law in behalf of decency and good order. As applied to circumstances such as this record discloses, we do not understand it to be the law that one thus made the subject of attack is bound to retreat if there be time and opportunity to do so. In *State v. Goering*, 106 Iowa, 636, 77 N. W. 327, we said: "The rule is elementary that one unlawfully assaulted may in self-protection repel force with force. The extent to which he may go is to be measured by the character of the assault, but the right, as we have stated it, exists under any and all circumstances." In that case the defendant was being tried for an assault, and self-defense was urged in justification. In the course of an instruction the trial court told the jury, in substance, that the defendant had no right to defend himself unless it reasonably appeared to him that his life was in danger, or that he was likely to suffer great bodily harm from the assault made upon him. This was held to be error, and we are content with the holding. In effect, the language of the instruction condemned was equivalent to saying to the jury that when one is assaulted, and the character thereof does not involve life or great bodily injury, the person assaulted, if he does not choose to stand and submit to a battery, must retreat if any way is open to him. Such is not the law. See also *Gallagher v. State*, 3 Minn. 270, Gil. 185;

Com. v. Drum, 58 Pa. 21; *State v. Bartlett*, 170 Mo. 658, 59 L. R. A. 756, 71 S. W. 148; *State v. King*, 104 Iowa, 727, 74 N. W. 691; *McClain*, Crim. Law. We do not overlook the many cases wherein it is held that one may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that the same could have been avoided by making use of an avenue of escape open to him. But the principle thus declared upon has no application to a case where, as in the case at bar, one is wrongfully assaulted, and repels force by the use of like force. In the one case the law regards the liberty of the citizen to come and go as he pleases without molestation, save at the hands of the law, as the thing paramount. In the other case the law regards the temporary deprivation of the exercise of personal liberty on the part of one citizen as of less importance than is the life of another citizen, and this even though the latter is for the moment engaged in making an unlawful assault upon the former. Hence the injunction that a person assaulted must retreat, if he can do so in reasonable safety, before resorting to the extreme measure of taking the life of his assailant.

Conceding, therefore, that the provocation for the assault upon defendant was great, still, being wrongful, and the defendant having the right to resist in defense of himself and of his brother, it follows that the instruction given cannot be upheld.

The judgment is reversed, and the cause remanded for a new trial.

KANSAS SUPREME COURT.

Kenneth MEAD, *Plff. in Err.*,
v.

PHENIX INSURANCE COMPANY of
Hartford, Connecticut.

(.....Kan.....)

*1. A dwelling house, owned by a minor twelve years of age, was insured in his name. In May, 1894, it was destroyed by fire. The policy contained a condition that no suit or action for the recovery of any loss should be maintainable unless commenced within twelve months after the fire. In 1902, when the insured reached his

majority, he brought an action on the policy to recover the amount of his loss. *Held*, that the contract limitation controlled the general statute of limitations, and that the action was barred.

(February 6, 1904.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carroll, Monahan, & Warren, for plaintiff in error:

The action below was instituted and founded upon the unlawful conversion of plaintiff's policy, and, through a conspiracy and unlawful agreement between one C. C. Dail and defendant, said Dail surrendered to defendant the policy of plaintiff. All the

*Headnote by SMITH, J.

NOTE.—For a case in this series similar to the one above, holding that the minority of the beneficiaries in an accident insurance policy does not exempt them from complying with a stipulation requiring action on the policy to be brought within one year after right accrues, see *Sugra v. Travelers' Ins. Co.* 1 L. R. A. 847, 64 L. R. A.

allegations of the petition previous to the allegations of the conspiracy alleged therein are merely introductory to show the nature of the transaction about which the conspiracy arose.

Hayes v. Massachusetts Mut. L. Ins. Co. 125 Ill. 626, 1 L. R. A. 303, 18 N. E. 322; *Ætna L. Ins. Co. v. Swayze*, 30 Kan. 118, 1 Pac. 36.

Payment of any part of the amount due on a policy on its conversion by defendant is a waiver of the conditions thereof for the benefit of the minor.

May, Ins. § 464.

A father of infant plaintiffs, as such, has no right to demand the money of the infants, and when they reside out of the state a guardian should be appointed in order to make a valid demand.

Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; *Miles v. Kaigler*, 10 Yerg. 10, 30 Am. Dec. 425; Co. Litt. 184; *Dayley v. Tallferry*, 1 Eq. Cas. Abr. 300; *Strickland v. Hudson*, 3 Rep. in Ch. 165; *May v. Calder*, 2 Mass. 55; *Genet v. Tallmadge*, 1 Johns. Ch. 3; *Combs v. Jackson*, 2 Wend. 153, 19 Am. Dec. 568.

C. C. Dail as agent individually or jointly with Mary Mead on the appointment of the infant could not receive or compromise this claim of plaintiff against defendant.

Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; *Armitage v. Widoe*, 36 Mich. 124.

Plaintiff could not ratify this act,—an act absolutely void.

Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; *State v. State Bank*, 5 Ind. 353; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 234; *Fonda v. Van Horne*, 15 Wend. 631, 30 Am. Dec. 77; *Bell v. Cafferty*, 21 Ind. 416; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Home Ins. Co. v. Myer*, 93 Ill. 272.

Messrs. McNaney & Alden, for defendant in error:

The petition seeks to set up a cause of action on the policy itself. The action was brought almost eight years after the fire. An action could not be maintained at the time the suit was brought because the provision in the policy that suit must be brought within a year was absolute,—a matter of contract, and not of limitation.

2 May, Ins. § 482; *Riddlebarger v. Hartford F. Ins. Co.* 7 Wall. 386, 19 L. ed. 257; *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 1 L. R. A. 847, 9 S. W. 676; *O'Laughlin v. Union Cent. L. Ins. Co.* 3 McCrary, 543, 11 Fed. 280; 13 Am. & Eng. Enc. Law, 2d ed. p. 392; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *German F. Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467; 64 L. R. A.

Douglass v. Lowell, 55 Kan. 574, 40 Pac. 917; *Goodman v. Wilson*, 54 Kan. 709, 39 Pac. 704.

The acts and contracts of infants should be deemed voidable only, and susceptible of ratification or disaffirmance at their election when they become of age.

Tyler, Infancy & Coverture, § 10; 2 Kent, Com. 235.

A minor can give parol authority to transact business for him, and can ratify, on arriving of age, those acts appointing agents which were simply voidable.

Armitage v. Widoe, 36 Mich. 124; *Ward v. The Little Red*, 8 Mo. 358; *State ex rel. Stempel v. New Orleans*, 105 La. 768, 30 So. 97; 15 Am. & Eng. Enc. Law, 2d ed. p. 84; *Southwestern R. Co. v. Chapman*, 46 Ga. 557.

Smith, J., delivered the opinion of the court:

In March, 1894, Kenneth Mead was a minor twelve years of age, and the owner of two lots on which there stood a frame dwelling. The building was destroyed by fire on May 11, 1894, while insured for \$600 in the defendant in error company. Soon after the loss the mother of the insured settled with the company for \$475, through her attorney, C. C. Dail. On May 26, 1902, after Kenneth Mead became of age, he brought this action against the insurance company to recover the amount of the policy, with interest. The petition sets out the fact of the fire, notice of the loss to the company, and the date and number of the policy, and avers that plaintiff on his part had performed all of its conditions. The petition had attached to it as an exhibit a copy of the policy, with an allegation as follows: "The plaintiff further says that shortly thereafter, to wit, August 2, 1894, through and by a conspiracy between defendant and another person, one C. C. Dail, the said policy, No. 4,930, was surreptitiously obtained from this plaintiff, then still a minor, and for a small consideration from defendant to said Dail delivered unlawfully and wrongfully to defendant, and by it canceled so that, if the copy of said policy which is hereto attached marked 'Exhibit A,' and made part hereof, is not an exact copy, the failure thereof is attributable to the cancellation of the same by defendant. Plaintiff further says that at said time, nor until the year 1896, he did not have any guardian to represent his interests in that or any other respect, and that only on about the 15th day of May, 1902, did he, when he became of full age, acquire the right to do so himself, and, if any default has accrued in premises against him, he pleads his minority against the same." The

answer of the defendant below contained three defenses: First, a general denial; second, breach of covenant to give immediate notice of loss and make proof within sixty days; third, a failure to bring an action on the policy within twelve months after the fire. To these defenses plaintiff below replied that after the fire he had done all things required of him by the conditions of the policy, and that "through and by a conspiracy between said defendant and one C. C. Dail, for a small sum as in payment of said loss so covered by said policy, said defendant unlawfully and wrongfully obtained said policy from the said C. C. Dail, and converted said policy to its own use, and canceled the same, whereby it waived all the conditions of said policy required to be complied with by said plaintiff if they had not been complied with by him, which plaintiff asserts had been done." A trial was had before the court resulting in a judgment for the defendant below.

The policy contained this condition: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." It is clear that the action was based on the contract of indemnity to recover the loss. The allegation in the petition respecting a conspiracy between the company and Dail was made to excuse plaintiff in his failure to set up a true copy of the policy. The action was not founded on the conspiracy. It did not sound in tort. In the plaintiff's reply he alleged that the conditions precedent to a recovery by him had been waived by the insurance company in wrongfully obtaining the policy from Dail, thus confessing that he was bound by all the provisions in the insurance contract except the conditions pleaded in the answer. The action of plaintiff below was barred by the limitation of time fixed in the policy for the commencement of an action, which was twelve months from the time of loss. When the policy was issued and the loss occurred, the agreement limiting the time within which an action to recover on the insurance contract might be commenced was not illegal. *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478. By chap. 91, p. 182, Laws 1897, such contracts are no longer permitted. Gen. Stat. 1901, § 4446, subd. 7. The contract limitation in the policy controls the general statute of limitations, and is good even against minor beneficiaries. *Suggs v. Travelers' Ins. Co.* 71 Tex. 579, 1 L. R. A. 347, 9 S. W. 676; *O'Laughlin v. Union Cent. L. Ins. Co.* 3 McCrary, 543, 11 Fed. 280. See also *Riddlesberger v. Hartford F. Ins. Co.* 44 L. R. A.

7 Wall. 386, 19 L. ed. 257. In *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478, the dismissal of an action brought within the time required by the policy was held not to extend the time to begin another within a year, under § 4451, Gen. Stat. 1901.

The judgment of the court below will be affirmed.

All the Justices concur.

KANSAS CITY, FORT SCOTT, & MEMPHIS RAILROAD COMPANY, *Plff. in Err.*,

v.

B. F. BLAKER *et al.*

(.....Kan.....)

- *1. Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount paid by the insurance company, the insured may bring an action in his own name against the wrongdoer, and may recover the full amount of the loss.
2. A dealer in grain and lumber leased a portion of the right of way of a railroad company on which to build an elevator and warehouses, and it was stipulated that the railroad company should not be liable for the burning of property erected or stored on the rented premises. The lessee had other property connected with that on leased premises, which was destroyed by fire negligently set out by the railroad company on the rented premises, and which continued from there and burned property not on the right of way. *Held*, that the fact that the railroad company was exempt from liability for the burning of the property on the right of way, and which first caught fire, will not relieve it from liability for the negligent burning of the connected property.
3. The placing of structures on the right of way of a railroad company, and which are permitted to remain there with the consent of the company until they

*Headnotes by JOHNSTON, Ch. J.

NOTE.—As to liability of person whose sparks from his smoke stack set fire to a building, for loss of another building set on fire from an intermediate building, see, in this series, *Read v. Nichols*, 7 L. R. A. 130.

For a case in this series limiting the liability of one who negligently starts a fire, which spreads to lands of other owners, to the damage done on the abutting lands, see *Hoffman v. King*, 46 L. R. A. 672.

As to effect of negligence in piling wood near railroad track on liability of company for negligently setting it on fire, see *Boston Excelsior Co. v. Bangor & A. R. Co.* 47 L. R. A. 82.

As to negligence in placing near railroad track cotton which is set on fire by sparks from a locomotive, see *Louisville & N. R. Co. v. Marbury Lumber Co.* 50 L. R. A. 620.

are negligently set on fire by a passing locomotive, which fire extends to and burns other and adjoining property, does not constitute contributory negligence on the part of the owner, nor deprive him of the remedy given by law for the negligent burning of property not on the right of way.

4. The fact that fire which destroyed property originated in sparks from a passing locomotive may be shown by circumstantial evidence.
5. A person who has been employed as a locomotive engineer for a long time, and who is qualified by experience and observation to understand the operation and effect of spark arresters in locomotives, may give testimony as to whether a locomotive equipped with a spark arrester in first-class condition would prevent the escape of sparks or fire from a locomotive sufficient to ignite and burn property on or near the right of way.

(January 9, 1904.)

ERROR to the District Court for Miami County to review a judgment in favor of plaintiffs in an action brought to recover the value of property destroyed by fire through the alleged negligence of the defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. L. F. Parker and Pratt, Dana, & Black, for plaintiff in error:

Every action must be prosecuted in the name of the real party in interest.

Kan. Gen. Stat. 1901, § 4454.

A right of action against a party who negligently and wrongfully destroying property by fire is not assignable.

Kansas Midland R. Co. v. Brehm, 54 Kan. 751, 39 Pac. 690; *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Atchison, T. & S. F. R. Co. v. Kansas Farmers' Ins. Co.* 7 Kan. App. 447, 53 Pac. 607; *Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857; *Atchison, T. & S. F. R. Co. v. Neet*, 7 Kan. App. 495, 54 Pac. 134.

Under the terms of the lease there can be no recovery for anything placed by plaintiffs on the right of way, or for anything to which fire was communicated therefrom.

Such an agreement as the one in this case, to release from any damages by fire to property placed on the right of way of a railroad, has been frequently held to be good.

Griswold v. Illinois C. R. Co. 90 Iowa, 265, 24 L. R. A. 647, 57 N. W. 843; *Stephens v. Southern P. Co.* 109 Cal. 86, 29 L. R. A. 751, 50 Am. St. Rep. 17, 41 Pac. 783; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, 47 64 L. R. A.

N. E. 464; Wabash R. Co. v. Ordelheide, 172 Mo. 436, 72 S. W. 684; *Ordelheide v. Wabash R. Co.* 80 Mo. App. 357; *Hahn v. Missouri, K. & T. R. Co.* 80 Mo. App. 411; *Wabash R. Co. v. Ordelheide*, 88 Mo. App. 589.

There was no evidence of negligence on defendant's part in setting out the fire, if defendant did set it out.

Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; *Missouri, K. & T. R. Co. v. Garrison*, 66 Kan. 625, 72 Pac. 225.

The testimony of the expert was certainly incompetent.

Missouri & K. Teleph. Co. v. Vandevort (Kan.) 72 Pac. 771; *Erb v. Popritz*, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

Plaintiffs saw fit, in their petition, to make the specific charge against defendant that its spark arrester was defective. They were then bound by this allegation.

Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; *Missouri, K. & T. R. Co. v. Garrison*, 66 Kan. 625, 72 Pac. 225; *St. Louis & S. F. R. Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *St. Louis & S. F. R. Co. v. Snaveley*, 47 Kan. 637, 28 Pac. 615.

Mr. L. C. Boyle, for defendants in error:

The value of the property destroyed exceeded the amount of insurance paid. In such case suit should be prosecuted in the name of the assured.

Norwich Union F. Ins. Co. v. Standard Oil Co. 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 987; *Atchison, T. & S. F. R. Co. v. Home Ins. Co.* 59 Kan. 434, 53 Pac. 459.

B. F. Blaker & Company, under the terms of their lease, assumed the risk of fire on only that portion of the property located on defendant's right of way.

Rutherford v. Wabash R. Co. 147 Mo. 447, 48 S. W. 921.

The proximate cause of the injury was the wrongful escape of the fire from the defendant's engine.

Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252.

Negligence on the part of a railroad company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such cases that any particular act of negligence should be introduced.

Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 252; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602; *Atchison, T. & S. F. R. Co. v. Gibson*, 42 Kan. 34, 21 Pac. 788; *Pt. Scott, W. & W. R. Co. v. Karracker*, 46 Kan. 511, 26 Pac. 1027.

Ft. Scott, W. & W. R. Co. v. Tubbs, 47 Kan. 630, 28 Pac. 612; *Chicago, R. I. & P. R. Co. v. McBride*, 54 Kan. 172, 37 Pac. 978; *Walker v. Kendall*, 7 Kan. App. 801, 54 Pac. 113; *St. Louis, I. M. & S. R. Co. v. Lawrence* (Ind. Terr.) 76 S. W. 254.

It was perfectly competent to show that there was a device which would prevent sparks from escaping from an engine.

Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 254; *Atchison, T. & S. F. R. Co. v. Campbell*, 16 Kan. 204.

Whether a spark arrester will prevent the escape of fire is a subject of expert testimony.

Davidson v. St. Paul, M. & M. R. Co. 34 Minn. 51, 24 N. W. 324; *Elfelt v. Smith*, 1 Minn. 125, Gil. 101; *Rogers, Expert Testimony*, §§ 1, 5, 605; *Heald v. Thing*, 45 Me. 392; *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453; *Dickenson v. Fitchburg*, 13 Gray, 546; 1 Greenl. Ev. §§ 440, 440A; *Krippner v. Biehl*, 28 Minn. 139, 9 N. W. 671; *Taylor, Ev.* § 1275; 2 *Jones, Ev.* § 383.

Johnston, Ch. J., delivered the opinion of the court:

B. F. Blaker & Company recovered a judgment against the Kansas City, Ft. Scott, & Memphis Railroad Company for the destruction of their lumber yard at Fontana by fire, alleged to have been negligently started by an old and defective engine which the railroad company was operating. The fire started on the roof of an elevator owned by B. F. Blaker & Company, which was situate on the right of way of the railroad company, and had been placed there under a lease which had been several times renewed. The lease under which possession was held when the fire occurred, among other things, provided that "said second parties agree to use the above-described property for elevator and warehouse only, said premises and all buildings thereon to be used conjunctively for the purpose of receiving, storing, and holding freight and property received or transported over the lines of party of the first part," etc. There was a further provision in the lease that the railroad company "shall not be held liable for any loss or damage by fire communicated either by sparks from locomotives or otherwise to any property erected or stored upon said rented premises." Aside from the elevator, the fire destroyed lumber sheds and other structures wholly or partly on the right of way, but on account of the provision in the lease above mentioned no recovery was sought or given for the destruction of property situated on the right of way. The lumber yard, including structures and material, was insured in the Lumbermen's Exchange, a mutual insurance company, to 64 L. R. A.

the extent of \$3,000. After the fire that company paid B. F. Blaker & Company, as indemnity, \$2,980. An agreement was made between the insurance company and B. F. Blaker & Company that the latter should bring a suit in its own name, and prosecute it to judgment, and of the amount recovered the insurance company should get three fourths and B. F. Blaker & Company the remaining one fourth. In the pleadings and at the trial the railroad company insisted that the Lumbermen's Exchange was the real party in interest, but it was not made a party, and the action was prosecuted to judgment by B. F. Blaker & Company alone, who were awarded by the jury \$3,000 as damages, and there was a further award of \$400 as attorneys' fees.

It is contended here that the evidence did not establish a right of action in B. F. Blaker & Company, and that the court erred in not sustaining the railroad company's demurrer to the evidence. The fact that the insurance company was not a party plaintiff is the principal ground of this contention. The claim is that, as the insurance company had paid the greater part of the loss, it was a proper party, and in fact the only real party in interest in the result of the action. This question has already received the consideration of the court, and sanction has been given to the rule that, where the value of the property destroyed exceeds the insurance money paid, the action must be brought in the name of the owner, and not in the name of the insurance company. *Atchison, T. & S. F. R. Co. v. Home Ins. Co.* 59 Kan. 432, 53 Pac. 459. The rule proceeds on the theory that the insured sustains towards the insurer the relation of trustee, and is well supported by the authorities. *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96; *London Assurance Co. v. Sainsbury*, 3 Dougl. K. B. 245; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643. The rule stated is applicable here, as the value of the property destroyed exceeded the amount paid by the insurance company. In addition to the rule of law which holds the insured in such cases chargeable as trustee, there was a specific agreement between the insured and the insurance company that he should act and account in the capacity of a trustee to the insurance company, and the

recovery would necessarily conclude both parties, and effectively bar any other or further recovery against the railroad company for the loss.

It is next contended that no liability exists because the fire was communicated from the elevator to other structures not rightly on the right of way, and thus carried along to property not on the right of way. There was, as we have seen, a provision in the lease exempting the company from loss by fire of property situated on the rented premises. This exemption was not a license, however, to negligently set out fires which might burn the elevator and pass over the right of way, destroying other property. *B. F. Blaker & Company* assumed the risk of destruction by fire of property on the right of way which was rented, and nothing more. There was no release from liability for the negligent destruction of other property, although it may have been connected with that situated on the right of way. It is not necessary to a recovery that the fire should have been directly communicated to the property destroyed, nor will the fact that the fire passed over intervening land, in order to reach that destroyed, prevent a recovery. It was a continuous fire, negligently set out by the railroad company, as the testimony of the plaintiff below tends to show, and, under the authorities, appears to have been the proximate cause of the loss for which the action was brought. *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252. See also *Rutherford v. Wabash R. Co.* 147 Mo. 447, 48 S. W. 921. The other buildings near to or connected with the elevator cannot be regarded as an intervening and independent cause of the injury. There is a claim that, as there was a provision in the lease that the lessee should use the premises for elevator and warehouses only, the maintaining thereon of other structures, like lumber sheds, was unwarranted, and to some extent contributed to the injury. The lumber sheds and some other structures wholly or partly on the right of way may not be warehouses in the strict sense of that term, but the parties to the lease had given practical interpretation to the term, and had treated these structures as proper appurtenances. Most, if not all, of them were on the right of way when the lease was executed, and materials shipped over the railroad had been previously stored in them. Aside from that, their existence and location were recognized in the lease itself, where it was "agreed by parties of the first part that they will at all times leave open and unobstructed for the passage of wagons and vehicles a strip of ground 16 feet wide 64 L. R. A.

between their elevator and lumber sheds, parallel with the main track of said railroad." The lumber sheds referred to were manifestly located on the right of way, and the parties contemplated that they should remain there, and be used for the purpose of storing lumber and other material shipped over the railroad. If there had been no such express recognition of the lease, but the structures had been placed or maintained on the right of way with the consent of the company, and from them the fire was communicated to the other property, it would not constitute contributory negligence on the part of the lessees, nor deprive them of the remedy given by law for losses to property not on the right of way, the proximate cause of which was the negligence of the railway company. *Sherman v. Maine C. R. Co.* 86 Me. 422, 30 Atl. 69; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; 13 Am. & Eng. Enc. Law, 2d ed. p. 487.

It is contended that the evidence of negligence of the railroad company in setting out the fire was insufficient, and that some of that received was incompetent. It was mainly circumstantial, but we deem it to be sufficient to support the verdict. A heavy freight train passed the buildings destroyed shortly before the fire was discovered. It was running rapidly, working steam, and leaving a trail of smoke behind it. Within a few minutes after it passed persons in the neighborhood saw a patch of fire on the roof of the elevator. No fire was kept in the elevator at the time, as it had been locked up for two weeks before the fire occurred. The wind was blowing from the railroad track toward the elevator. As far as the testimony goes, no one saw sparks proceeding from the engine and lighting on the building, but there was nothing in the testimony to show that the fire could have arisen from any other source, and the facts recited, in the absence of proof of any other cause, tend to show that the fire was caused by the sparks from the engine, and whether the fire so originated was a proper question for the jury. The effect of circumstantial evidence of this character was before the court in the recent case of *Kansas City, F. S. & M. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876. After a full consideration and a review of the authorities it was there held that "the fact that soon after the passing of an engine a fire starts near a railway track in an inclosed field covered at the time with a growth of highly inflammable vegetation, and travels before a high wind in a direction away from the track, is sufficient to warrant a jury in finding that the fire was caused by the operation of the railroad, without its appearing that the engine emit-

ted sparks or live cinders, or was put to special exertion, and without further proof excluding other possible origins." A witness, who had been a locomotive engineer for sixteen years, was introduced to prove the character and operation of spark arresters. After describing them, he stated, in answer to an inquiry, that an engine equipped with a spark arrester in first-class condition would prevent the escape from the engine of sparks or fire that would ignite property on the right of way. There was no objection to this testimony on the ground that the witness was not qualified to testify on the subject, but it is that the testimony was upon an ultimate fact which it was the duty of the jury to determine. The witness was qualified, and the testimony related to a matter which is the subject of expert testimony, and one which inexperienced persons are not likely to understand. The operation of a spark arrester and its effect in arresting sparks and cinders passing through it, as well as the length of time that they would continue to burn, could be intelligently told by witnesses who had had special advantages and opportunities for observing the operations of engines and the effect of sparks issuing from engines equipped with the different kinds of spark arresters. The opinion, based as it was on experience and observation, was not an ultimate issue in the case, but was an important consideration in the determination of an ultimate issue, and was properly admitted.

The case appears to have been fairly submitted to the jury, and, although some of the rulings on the instructions are criticised, we find nothing in them which warrants special comment. What has already been said answers most of the objections which were made to the rulings of the court in charging the jury, and we see nothing in them or in other rulings which would warrant us in disturbing the verdict of the jury.

The judgment of the District Court will therefore be affirmed.

All the Justices concur.

N. McALPINE *et al.*, Plffs. in Err.,

v.

CHICAGO GREAT WESTERN RAILWAY COMPANY *et al.*

(.....Kan.....)

*1. A strip of land lying along the margin of a navigable stream was

*Headnotes by CUNNINGHAM, J.

NOTE.—As to abandonment of highway by nonuser, see, in this series, *Maire v. Kruse*, 26 L. R. A. 449, and *note*, 64 L. R. A.

included in the plat of a city and dedicated to the public by the use of the word "leave" written thereon. Several streets opened upon this tract, and many lots had no other means of ingress and egress, except over and along it. *Held*, that its dedication included its use as a street, as well as a landing place for boats.

2. Such strip of land is not abandoned by the public, so as to cause a reverter to the original dedicators or their representatives, because railroads have been permitted to lay their tracks and build depots upon it; nor because its use has been permitted for other unauthorized purposes; nor because river commerce has ceased, and boats do not land upon it; nor because approach to the river margin has become difficult.
3. Land dedicated to a public use does not revert to the dedicators because of misuse or nonuse, unless its use for the dedicated purpose has become impossible, or so highly improbable as to be practically impossible.

(January 9, 1904.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in favor of defendants in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sutton & Sutton, for plaintiffs in error:

Land dedicated to a particular public purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made, or when the dedication has spent its force by the use becoming impossible.

Dill. Mun. Corp. § 515; Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897; *Kent County v. Grand Rapids*, 61 Mich. 144, 27 N. W. 888; *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; *Rowzee v. Pierce*, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625, 23 So. 307.

A dedication is not a conveyance, it does not in this regard satisfy the requirements of the statute of frauds, nor can the public be a grantee.

Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

Statutes which provide that maps and plats of cities and towns shall be a sufficient conveyance to vest the fee of the land dedicated to the public in the city or county, "in trust for the use therein named, expressed, or intended, and for no other purpose," do not change the rule of reverter.

Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114; *Mahoning County v. Young*, 8 C. C. A. 27, 16 U. S. App. 253, 59 Fed. 96; *Kent County v. Grand Rapids*, 61

Mich. 144, 27 N. W. 888; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897.

Property dedicated in compliance with such a statute cannot be put to any other use than that named, expressed, or intended by the dedicator.

Board of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600; *Chicago v. Ward*, 169 Ill. 392, 38 L. R. A. 849, 61 Am. St. Rep. 185, 48 N. E. 927; *LeCleecq v. Gallipolis*, 7 Ohio, pt. 1, p. 217, 28 Am. Dec. 641; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 459.

The abandonment need not in its nature be such that under no circumstances could the use be resumed. It is sufficient to entitle the donor to resume possession that there is no reasonable probability of the use being resumed.

Kent County v. Grand Rapids, 61 Mich. 144, 27 N. W. 888; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593, 13 S. W. 897; *Board of Education v. Edson*, 18 Ohio St. 221, 98 Am. Dec. 114.

Messrs. J. W. Dana and M. J. Reitz, for defendants in error:

In order to work a reverter of the use, there must be shown an impossibility of the execution of the use.

All evidence of misuse, nonuser, or abandonment is incompetent, irrelevant, and immaterial to show that said use has become impossible.

Coffin v. Portland, 27 Fed. 412; *Barclay v. Howell*, 6 Pet. 498, 8 L. ed. 477; *Wyandotte County v. First Presby. Church*, 30 Kan. 620, 1 Pac. 109; *Wilgus v. Miami County*, 54 Kan. 605, 38 Pac. 787, 42 Kan. 467, 22 Pac. 615; *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. 1048.

The municipal authorities have passed no ordinance vacating said levee, or declaring it impossible to use it for levee purposes.

Possession of the levee by licensees, lessees, or trespassers is merely misuse, which may be terminated at any time.

Barclay v. Howell, 6 Pet. 498, 8 L. ed. 452; 2 Dill. Mun. Corp. 4th ed. § 653; *Coffin v. Portland*, 27 Fed. 412; *Wilgus v. Miami County*, 54 Kan. 605, 38 Pac. 787; *Wyandotte County v. First Presby. Church*, 30 Kan. 620, 1 Pac. 109; *Forbes v. Board of Education*, 7 Kan. App. 452, 53 Pac. 533; *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Chaffee v. Atkin*, 57 S. E. 507, 35 S. E. 800, 36 S. E. 3; *Osage City v. Larkin*, 40 Kan. 206, 2 L. R. A. 56, 10 Am. St. Rep. 186, 19 Pac. 658; *Webb v. Butler County*, 52 Kan. 375, 34 Pac. 973; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Ralston v. Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326; *Balti-* 64 L. R. A.

more v. Frick, 82 Md. 77, 33 Atl. 435; *Richardson v. Davis*, 91 Md. 390, 46 Atl. 964; *Holmes v. Cleveland, C. & C. R. Co.* 93 Fed. 101; *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 93 Fed. 113; *Giffen v. Olathe*, 41 Kan. 342, 24 Pac. 470; *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. 1048.

A levee may be used for a boat landing; it may be used for building dikes upon; it may be used for a public dump; it may be used to "cord wood upon," or for a "public park" or breathing place; finally, it may be used for a place to load and unload trains of cars.

Goode v. St. Louis, 113 Mo. 257, 20 S. W. 1048.

The fee of all real estate, when dedicated to public use by the proprietor of any town or city, rests absolutely in the county wherein such real estate lies, and the county forever afterwards holds the property in trust for such use.

Atohison & N. R. Co. v. Garside, 10 Kan. 564; *Wood v. National Waterworks Co.* 33 Kan. 597, 7 Pac. 233; *Armstrong v. Portsmouth Bldg. Co.* 57 Kan. 67, 45 Pac. 67; *United States v. Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971, 14 Sup. Ct. Rep. 1015; *Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co.* 165 U. S. 370, 41 L. ed. 749, 17 Sup. Ct. Rep. 359.

Plaintiffs are estopped from claiming any rights to said levee by reversion, even though there may be a misuser, abandonment, or diversion of said use, for the reason that the purchasers of the lots fronting on said levee have the right to believe and rely on the representations made by the original grantors that said levee would forever belong to the public, and remain an open means of communication from their premises to the river or to the railroads.

Wilgus v. Miami County, 54 Kan. 605, 38 Pac. 787; *Wyandotte County v. First Presby. Church*, 30 Kan. 620, 1 Pac. 109.

Messrs. Miller, Buchan, & Morris, Arthur F. Smith, Frank Hagerman, N. H. Loomis, R. W. Blair, and H. A. Scandrett also for defendants in error.

Cunningham, J., delivered the opinion of the court:

This action was one in ejectment for the recovery of a three-fourths interest in a tract of land lying between the platted portion of what is now Kansas City, Kansas, on the west, and the Missouri river, on the east. The plaintiffs are the heirs of the proprietors of the original plat of Wyandotte, now Kansas City, Kansas. This tract in dispute is of irregular form, and, as originally delimited upon the plat, was from 700 to 900 feet wide, and perhaps a mile long. Upon the plat it was designated and dedicated as

"levee." By reliction and alluvion, accretions have been added to the river margin, until now the tract is more than twice the size in width it was at the time of the dedication. The defendants are the city of Kansas City; several railroad companies who have received permission from the city to build upon this tract of land their tracks, depots, etc., and who are now using the same for such purposes; some private parties, who have erected and are now maintaining manufacturing plants of various kinds; and numerous persons who have squatted and built upon the same more or less temporary habitations, and who are now residing there, as it would appear, without permission from anyone, and as trespassers.

The evidence for the plaintiffs, in brief, shows that the Wyandotte City Town Company was a partnership; that the plat of the city was filed for record in 1859; that there were indicated thereon, by name, various streets and alleys as dedicated to public use, besides the tract in controversy which was named "levee;" that several of these streets, running at right angles with the river, opened at their eastern ends upon this levee; that quite a large number of lots have no other approach to them, save that afforded by this levee tract; that at the time of this platting the Missouri river was navigated quite extensively by both freight and passenger boats, and continued to be so navigated up to the year 1866, during which time the current of the river swept well up to the eastern line of the levee, and afforded ample natural landing place for such boats and the commerce brought by them; that after that time navigation fell off by reason of the fact that railroads were built to and from the town, affording easier and swifter communication, and also that the river became less navigable, and the landing less feasible, by reason of the fact that the current was diverted to the eastern or Missouri shore, the western shore receiving the accretions above noted, and leaving a wide, marshy, and comparatively untraversable alluvion between the river and the levee, as originally platted. It appeared, however, that occasionally pleasure and other craft had landed there at differing stages of water, up to five or six years ago, and that, with some improvements in the way of wharfs and roadways, easy and adequate communication could now be had to the point where navigable water might be reached.

At the conclusion of plaintiff's evidence, the court sustained a demurrer thereto, and they are now here asking a reversal of this action. Their claim is stated most fairly and frankly in their brief, and perhaps no better basis of the discussion here involved

can be found than a repetition of the statement. It is: "This suit proceeds upon the theory that this tract of land was dedicated to the public for a levee; that a levee is a landing place for boats and for commerce carried on by river; that this levee was never improved for such purpose by the city or other person or corporation; that no boats have landed at it for twelve years, and, in all human probability, will never again use it for a landing; that it has been permanently abandoned by the city authorities and the public as a levee, because (1) the decreased flow of water in the Missouri river makes the navigation of that river impossible; (2) the permanent change in the channel of the Missouri river from the Kansas to the Missouri bank would make impossible an approach by steamboats to the levee, if any should by chance appear upon the Missouri river; (3) the complete substitution of railroad carriage of freight and passengers for river transportation." Upon this premise the plaintiffs deduce the conclusion that abandonment of the use for which this tract of land was dedicated by the original proprietors has been shown, and that therefore the title thereto, and with it the right of possession, has reverted to the plaintiffs, as the representatives of such proprietors. We are therefore called upon to examine the soundness of their premise, and the correctness of the conclusions deduced.

What, then, we first inquire, was the purpose, as indicated by the word "levee," for which this tract was dedicated? Are we confined to the rather narrow definition which the plaintiffs would have us give to this word, and hold that it simply meant a landing place for boats and commerce carried on by river? Necessarily must be added to this the right to pass over, across, and along this tract for the hauling of such goods and passengers as should be there delivered by reason of such commerce. This implies its use as a highway or street, at least to some extent. Would that use be limited to vehicles used for the loading and unloading of river traffic, or does it not, as well, include the right of the general public to use the same as a street for all purposes? It is true, perhaps, that in the popular sense the more restricted meaning obtains, probably because of the fact that such tracts are most largely used in connection with water commerce, rather than because of an analytical examination of the question. It is equally true that it would greatly surprise the general public of cities where boats tie up at well-improved levees that no one other than those who came and went with goods in promoting "commerce carried on by river" were permitted to traverse the same. It

is clear that we may not here give to this word the restricted meaning which plaintiffs' definition contemplates, for, besides the suggestions already made, such a restriction would make each of the streets whose eastern terminus is upon this tract a mere cul-de-sac. Neither would the proprietors of lots abutting the levee have any method of ingress or egress thereto. Primarily the word "levee" has no such restricted meaning. The lexicographers tell us that it is derived from the same root as the word "lever," and means a rise of ground—specifically, "an embankment to prevent inundation, or the steep bank of a river;" and, used as a transitive verb, it is "to keep within a channel by means of levees." The law dictionaries but re-echo this definition, and say: "Levees are embankments to prevent the overflow of rivers." Discussing these various definitions, see *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 351, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 453; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Coffin v. Portland*, 27 Fed. 412-416; *New Orleans v. Morris*, 3 Woods, 115, Fed. Cas. No. 10,163; *Dill. Mun. Corp.* 4th ed. § 649; *Napa v. Howland*, 87 Cal. 88, 25 Pac. 247.

It may well be argued, in the light of recent disastrous experience, that portions of the land in dispute may be needed and used in pursuance of the primary meaning of the term, and that the city, to guard itself from floods, will need to raise embankments thereon. We therefore certainly question the soundness of the plaintiffs' major premise,—that a levee is only a landing place for boats. While a levee is a place for the landing of boats and commerce, it is much more than that; and, were we to grant the abandonment of the disputed tract for that purpose, we would not thereby grant that it was abandoned for all other purposes so as to revert.

Giving to the word "levee" the narrow construction contended for by plaintiffs, we pass to inquire if the conclusion that there has been an abandonment and consequent reverter is warranted by their facts. By their brief the rule as stated, and, we think, correctly, is: "Land dedicated to a particular purpose will revert to the dedicator when there has been a full and lawful abandonment of the use for which the dedication has been made, or when the dedication has spent its force by the use becoming impossible." That is, abandonment, to cause a reverter, is something more than a mere cessation of use. The fact that the use has become inconvenient or undesirable, to the extent that it has ceased entirely, will not constitute an abandonment on the part of the public, so as to cause a reverter; and 64 L. R. A.

this even though such nonuser has extended through a long series of years. In *Wilgus v. Miami County*, 54 Kan. 605, 38 Pac. 787, a plot of land dedicated as "Seminary square" was held not to have been abandoned through a nonuse of twenty-five years. A like rule is announced in *Wyandotte County v. First Presby. Church*, 30 Kan. 620, 1 Pac. 109, concerning a lot dedicated by the same plat that contains the land here in controversy, where nonuse had continued for an equal or greater period of time. In *Forbes v. Board of Education*, 7 Kan. App. 452, 53 Pac. 533, a block dedicated to the public use as "University square" was held not to be vacated after twenty-six years of nonuser. In *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101, it is held: "Mere nonuse of a street for any period of time will not operate as an abandonment of rights conferred by a proper dedication, and, until the time arrives when the street is needed for actual use, all persons in possession hold subject to such rights." In *Coffin v. Portland*, 27 Fed. 412, 416, 417, 420, it is held: "And when, as in this case, the dedication is unconditionally made to a public use, as a levee or landing-place, no formal acceptance of the same is necessary, nor does the existence or continuance of the easement depend on the extent of the use or improvement of the premises, or that they are used or improved at all; and it is even doubtful if the same can be lost by the adverse occupation of the premises by private parties for any length of time. 2 Dill. Mun. Corp. 3d ed., § 675. . . . Where the fact of dedication of a street or landing is in dispute, nonuser is evidence, more or less cogent, according to circumstances, against a dedication. But where, as in this case, the dedication is admitted, the evidence of nonuser is immaterial. The right to the use, once admitted, is not affected by it. *Barclay v. Howell*, 6 Pet. 505, 8 L. ed. 477. Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible, and, if such property is appropriated to an unauthorized use, a court of equity will compel a specific execution of the trust, by restraining the parties engaged in the unlawful use, or by causing the removal of obstructions or hindrances to the lawful one. *Barclay v. Howell*, 6 Pet. 507, 8 L. ed. 477. See also 2 Dill. Mun. Corp. 3d ed. § 653." In *Archer v. Salinas City*, 93 Cal. 43, 16 L. R. A. 145, 28 Pac. 839, the rule is stated: "Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it, or right to its use. . . . The property dedicated has become public prop-

erty, impressed with the use for which it was dedicated; and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest." In *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. 247, the rule is put: "Moreover, streets, levees, and the like are often laid out on land acquired for or dedicated to such purposes with reference to future as well as present requirements, and therefore it is not legitimate to assume that the property has been abandoned merely because it has not yet been used by the public. It may also be safely laid down as sound, both upon reason and upon consideration of public policy, that until the time arrives when a street, levee, or the like, is required for actual public use, and when the public authorities may be properly called upon to open or prepare it for such use, no mere nonuser for any length of time, however great, will operate as an abandonment." This court, in *Giffen v. Olathe*, 44 Kan. 350, 24 Pac. 474, quotes approvingly from the case of *Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269, as follows: "Until the time arrives when any street or part of a street is required for actual public use, and when the public authorities may be properly called upon to open it for use, no mere nonuser for any length of time will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public." The court further cites as supporting the same view a number of cases. Very many more cases could be cited announcing the same doctrine. Indeed, we hardly think, from the plaintiffs' argument, that they claim that mere nonuser will ever constitute an abandonment, but that there must be coupled with such nonuser the further fact that the use has ceased because it has become impossible. This we believe to be the rule of the authorities. In *Coffin v. Portland*, 27 Fed. 420, the rule is stated thus: "Property dedicated to public use does not revert to the donor, unless, it may be, where the execution of the use becomes impossible. In *Osage City v. Larkin*, 40 Kan. 206, 2 L. R. A. 56, 10 Am. St. Rep. 186, 19 Pac. 658, it is held that 'an alley retains its character as an alley although the lots on both sides thereof are owned by one person, and is so intersected by a railroad as to make it practically impassable.'" An extreme case is found in *Logansport v.* 64 L. R. A.

Shirk, 88 Ind. 563, where it is held: "The construction of a canal through a street by the city suspends, but does not destroy, the easement for a street, and such an easement revives on the abatement of the canal,"—with many cases cited in support thereof. Judge Dillon, in his work on Municipal Corporations, 4th ed. § 653, states the rule as follows: "Property unconditionally dedicated to public use or to a particular use does not revert to the original owner, except where the execution of the use becomes impossible. If the dedicated property be appropriated to an unauthorized use, equity will cause the trust to be observed or the obstruction removed." There is nothing to be found in the evidence which goes to show that the use of the tract in question, even were it limited to a boat landing, has become impossible. Indeed, the evidence shows to the contrary. As a matter of law, we know that the Missouri river is a navigable stream. Vast sums of money are expended by the general government for its improvement, and even though at the present but little, if any, commerce is being carried on over its waters, or during the immediate past has been, who shall say that the time may not come, possibly soon, when transportation conditions may so change that navigation may again be profitably resumed? That such a possibility exists may at least serve to exercise a restraining influence upon railroad rates. Certainly it cannot be said either that navigation upon the river has been permanently abandoned, or that by the improvements of wharfage and ways upon the levee it may not again be usable as a landing. That use is now being made of the levee by railroads, manufactories, and squatters counts for little. Such use, if unauthorized or unwarranted, could be prevented by proper action for that purpose. Certain it is that neither city nor county could give away the rights of the public in a tract of land dedicated to public use by authorizing its use for an unwarranted purpose.

We conclude that neither misuse nor nonuse alone will be sufficient to constitute an abandonment of land dedicated to a public use, so as to work as a reverter to the dedicators; that nonuse, to accomplish it, must have been the result of causes rendering use impossible, or at least so highly improbable as to closely approach the impossible; that in this case no such condition was shown by plaintiffs' evidence, even if we take the narrow view that the dedication was only for the purpose of affording a landing place for boats and for commerce carried on by river. We are farther of the opinion that this narrow view may not be sustained,—that the dedication was for other purposes

as well, —and it may well be doubted that a reverter would necessarily follow the complete drying up of the Missouri river.

The judgment of the trial court is affirmed.

All the Justices concur.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, *Plff. in Err.*,

v.

Herschel PALMORE.

(.....Kan.....)

*1. A card 5 or 6 inches square, tacked to the end of a wooden railway tie in a pile of ties loaded in a box car, discovered by a laborer engaged in unloading the ties for final use, bearing the printed words "Arkansas and Texas Tie Company," and the written words, "Creosote Treated Ties," is technically the best evidence of whatever information its inscription imparted; but, since it is obvious a card of that character is not intended to be preserved, and is not likely to be preserved, very slight evidence of its loss is sufficient to authorize parol proof of its contents, and a verdict will not be set aside because no other foundation for secondary proof than the foregoing facts is established.

*2. Before inscriptions upon a card of the character described can be offered in evidence as an admission of the truthfulness of their recitals, or as an admonition concerning the character of the ties, it must be made to appear that the party to be charged made the admission or had notice of the warning.

*3. In an action for damages for a negligent injury to the eyes, claimed to be permanent, a timely request for an expert physical examination of the injured organs in the usual and ordinary manner should be granted, although involving the use of drugs for dilating the pupils of the eyes, subject, however, to the limitation that the examination do not produce serious discomfort or any deleterious consequence.

(February 6, 1904.)

ERROR to the District Court for Sumner County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

*Headnotes by BURCH, J.

NOTE.—For other cases in this series as to right to compel physical examination, see *Alabama G. S. R. Co. v. Hill*, 9 L. R. A. 442; *McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466; *Graves v. Battle Creek*, 19 L. R. A. 641; *Lyon v. Manhattan R. Co.* 25 L. R. A. 402; *Carrico v. West Virginia C. & P. R. Co.* 24 L. R. A. 50; *Hall v. Manson*, 34 L. R. A. 64.

Messrs. A. A. Hurd and O. J. Wood, for plaintiff in error:

The trial court committed reversible error in its refusal to require the plaintiff to submit himself to an examination by medical experts.

Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 659; *Ottawa v. Gulliland*, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252.

The testimony as to the card and its contents was not the best evidence, was secondary evidence, was not competent, and was hearsay of the most flagrant kind, and should not have been admitted by the court. Its admission was reversible error.

St. Louis, L. & W. R. Co. v. Maddox, 18 Kan. 546; *Simpson v. Smith*, 27 Kan. 565; *Illinois C. R. Co. v. Langdon*, 71 Miss. 146, 14 So. 452; *Woodman v. Hunter*, 53 Kan. 393, 36 Pac. 713; *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Kansas P. R. Co. v. Pointer*, 9 Kan. 620; *Dodge v. Childs*, 38 Kan. 528, 16 Pac. 815; *Union P. R. Co. v. Fray*, 35 Kan. 700, 12 Pac. 98; *Stark v. Cummings*, 5 Kan. 85; *Tennis v. Inter-State Consol. Rapid Transit R. Co.* 45 Kan. 503, 25 Pac. 876; *Atchison, T. & S. F. R. Co. v. Wilkinson*, 55 Kan. 83, 39 Pac. 1043; *Atchison, T. & S. F. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286; *Cherokee & P. Coal & Min. Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691; *Maier v. Randolph*, 33 Kan. 340, 6 Pac. 625.

If the action of the court in overruling the demurrer to the evidence was based entirely upon this incompetent and flagrantly hearsay testimony, then, in considering the action of the court, this court ought to require to be done what the trial court ought to have done, and will treat this ruling on the demurrer to the evidence to the same extent and with like effect as though the incompetent and improper evidence had not been introduced.

Lee v. Missouri P. R. Co. (Kan.) 63 L. R. A. 271, 73 Pac. 110.

Mr. W. W. Schwinn, for defendant in error:

The railroad company owes the duty of inspecting its property with which its employees are set to work, to protect them from injury by reason of any defective or dangerous condition of the tools or property which they are handling.

Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; *Kansas City & P. R. Co. v. Ryan*,

A. 207; *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 36 L. R. A. 681; *O'Brien v. La Crosse*, 40 L. R. A. 831; *Jane v. Spokane Falls & N. R. Co.* 46 L. R. A. 153; *Stack v. New York, N. H. & H. R. Co.* 52 L. R. A. 328; *South Bend v. Turner*, 54 L. R. A. 896, and *Austin & N. W. R. Co. v. Gluck*, *post*, —

52 Kan. 637, 35 Pac. 292; *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149.

Burch, J., delivered the opinion of the court:

The plaintiff recovered a judgment for damages against the defendant resulting from personal injuries claimed to have been received by him while in the railroad company's employ. He charged that the defendant sent him into a box car to unload wooden ties which had been prepared for use by immersion in creosote, a virulent poison, the natural effect of which is to destroy the tissues of the human body with which it may come in contact; and that in handling the ties a fine light dust which had accumulated upon them, and which had become impregnated with the creosote, was disseminated in the air, and into his eyes, by means of which they were badly burned, and his vision was permanently impaired.

On the trial the only evidence offered to prove that the ties had been treated with creosote, or that the defendant had any knowledge of the fact that they had been so treated, was the following: I got in to unload the ties, and the only place for me to work was to get behind that pile of ties and shove them out. The other places were filled up. I was told to get into this separate car. The rest of my gang went to another car, all except one man; and I went to shove these ties out. There was dry stuff on top of the ties blew into my eyes and burned my eyes for fifteen minutes, so that I had to stop work for about that long, and I went to the door; and as I went to the door, after I got so that I could see again, I saw on the end of the ties a card about 5 or 6 inches square. . . .

Q. Now you may tell what you saw, Herschel.

A. I saw a card. At the heading of the card was printed, says, "Arkansas and Texas Tie Company;" in indelible blue pencil was marked, "Creosote Treated Ties."

Q. You say the card was printed on it "Arkansas and Texas Tie Company?"

A. Printed at the top, the heading of the card; and in blue pencil was marked "Creosote Treated Ties."

Q. Where was the card?

A. It was tacked on the end of a tie about the middle of the pile on that end. . . .

Q. And that was on one tie?

A. One tie, about the middle of the car.

The railroad company insists that the card itself should have been produced or accounted for. In strictness the card would have furnished the best evidence of whatever information its inscriptions imparted. Its affixature was so slight and temporary

that it was removable without effort. It was easily portable and preservable, and its description falls within that of a private document best provable by production. But, inasmuch as the card was casually discovered by a laborer when unloading the ties for final use, and inasmuch as it is apparent that the card was not intended to be, and was not likely to be, preserved, only very slight evidence was required to show its loss; and that is sufficiently furnished by the very statement of the circumstances, so that a verdict should not be overturned because a foundation for secondary proof was not sufficiently established.

A more serious objection to the proof of the language of the card is that the defendant was not shown to be cognizant of it or privy to it in any way. The card could be important only as an admission of the truthfulness of its recitals, or as an admonition concerning the character of the ties. Without some proof that the company made the one or had due information of the other, it could not be found. The fact that the plaintiff found the card tacked to the ties was wholly inadequate for either purpose. Any stranger to the company might have placed it there; and, if it were affixed without the authority of the officers or agents of the company, it was nothing more than the declaration of the person doing so, and of no binding effect without proof of facts showing it was intended as a means of conveying information concerning the character of the ties, and that the officers or agents of the company were, or should have been, apprised of it in time to notify the plaintiff. Unsupplemented as the evidence stood, it was not only insufficient to establish a liability on the part of the company, but should have been stricken out.

Before the trial began, the defendant made a request for an expert physical examination of the plaintiff's eyes in the usual and ordinary manner. No objection was made to the time or form or propriety of the request. On behalf of the plaintiff, it was stated that he consented that experts might examine his eyes by inspecting them, but that he protested against the court permitting experts or anybody else to put drugs into his eyes for the purpose of dilating them. No reason whatever for this protest was vouchsafed. On the part of the defendant it was suggested that in no instance could a proper examination of the eye be made without dilating certain of its parts, and the request was made that this feature of the examination be left to the experts themselves. Thereupon the court made the following order: "The plaintiff, by his consent, may subject himself to have his eyes examined, but the court will not permit any

drugs to be used in the examination without the consent of the plaintiff." On the trial the plaintiff himself testified to a great destruction of his eyesight. Two physicians produced by him detailed the results of superficial observations of the eyes, and pronounced his vision to be permanently impaired. One of them was twenty-five years of age, had been practising medicine but eighteen months, and had been without eye practice, except in a clinical way connected with his college work. The other was a physician of experience, but he was not interrogated concerning any special qualifications he might possess for the diagnosis of cases of this character. Two physicians called by the defendant stated they had inspected the plaintiff's eyes, and were able to describe the condition of the outer tissues, but they united in asserting that no superficial examination could discover the facts or test the truthfulness of the plaintiff's statements; that the true condition of his eyes could only be ascertained by an ophthalmoscopic examination of their deeper structures; that a dilation of the pupils by appropriate drugs for that purpose was essential, and that such was the usual and ordinary method of examining eyes by all specialists.

Upon the submission of the cause the jury returned the following remarkable special findings:

Q. If you find for plaintiff, what do you allow him for loss of time in the past?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for loss of time in the future?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for pain and suffering in the past?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for prospective pain and suffering?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for mental pain and anxiety?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for loss of ability to earn a livelihood?

A. Nothing.

Q. If you find for plaintiff, what do you allow him for permanent injuries?

A. \$5,000.

If, therefore, the ruling of the court upon the application for an examination of the plaintiff's eyes was erroneous, it was not cured by any subsequent circumstance of the trial.

It is a matter of common knowledge that,
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through the restriction of the energies of trained students and investigators to that single field, ophthalmology has been brought to a state of comparative perfection. Here, as in all other quests for truth conducted under the guidance of the scientific method, the first requirement is a full and accurate observation of the facts. The sages of old, from the *data* at hand proved that the flood of the Nile is caused by the tears of Isis shed for Osiris, until the eye of the explorer rested upon the melting snows of the mountain peaks of central Africa. The ancient method of establishing facts yet dominates some minds, but the modern scientific expert will be content with nothing short of a view of the facts where they can be seen. Therefore he has invented the ophthalmoscope for the exploration of the interior of the eye, the rhinoscope for the exploration of the nasal cavities, and other appropriate instruments for the exploration of other hollow organs of the body, and he will not attempt to bridge the chasm between ignorance and knowledge in any case where they may be of assistance until he has availed himself of their use. The question therefore arises whether or not the law, as a means of justice, will tolerate any other than the surest method of ascertaining truth; whether or not, with all the marvels of scientific achievement placed at its command, the rule of thumb shall be sufficient for its purposes; and whether or not in this case the timely application of the defendant for the production of the best evidence shall be granted before a transfer from the treasury of the defendant to the plaintiff of the sum of \$5,000 is ordered.

In the case of *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, an order of a district court denying an application requiring a plaintiff in a personal injury case to submit to an expert examination of his eyes was declared to be erroneous. Mr. Justice Valentine, speaking for the court, said: "The tendency of modern adjudications and of modern thought is to open the door as wide as possible for the introduction of all evidence that may throw light upon the particular subject then undergoing investigation. All attainable evidence and instruments of evidence, within certain limitations, may be presented to the jury for their inspection and consideration and all proper modes of investigation or inspection may be resorted to for the purpose of enabling the jury to arrive at just and correct conclusions. Many instruments of evidence, however, can be examined only by the aid of experts, and in all such cases the aid of experts is not only allowable, but may be demanded as a matter of right by the party needing such aid. It was shown in

the present case by the testimony of Dr. Williams that the nature, the extent, and the permanency of the injury to the plaintiff's eyes could not be determined with any reasonable degree of accuracy except by a careful examination, made by some oculist or person who had made diseases and affections of the eyes a special study; and we would naturally suppose that such would be the case, independent of the testimony of Dr. Williams. Hence it would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a personal examination by some such expert. Now, is such evidence to be lost, and justice possibly defeated, or may the court order that such an examination may be had? We favor the proposition contained in the latter portion of this alternative." It does not affirmatively appear from the statement of facts, however, if the examination of Thul contemplated the use of drugs, and in support of its opinion the court quotes from a decision of the supreme court of Iowa as follows: "To our minds, the proposition is plain that a proper examination by learned and skilled physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. The use of anæsthetics, opiates, or drugs of any kind should have been forbidden, if, indeed, it had been proposed; and it should have prescribed that he should be subjected to no tests painful in their character." This authority, however, is by no means conclusive. Drugs are of infinite shades of potency from the rankest poisonousness to absolute innocuousness. They may produce death, or an effect so fleeting and temporary that only the most skilled observer can be conscious of it; and reactions from them range from the utterly intolerable to the positively pleasurable. The question, therefore, is not if drugs shall be used, but if an examination shall be made without serious inconvenience and without deleterious effect. Any enforced examination is vexatious and embarrassing, and very frequently must involve some slight degree of that discomfort which is denominated pain; but an examination may nevertheless be made with due consideration of both the sensibilities of the

plaintiff and the demands of justice. Other adjudicated cases cast little light upon the question. In the case of *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616, the court held: "An order requiring the plaintiff in an action for personal injuries to submit to an examination by physicians, necessarily involving the use of anæsthetics, is properly refused." It is to be inferred, however, from the report of the case, that the physicians were there demanding the total subjugation of consciousness—a measure so extreme that the court might well refuse to consider it. In *Hess v. Lake Shore & M. S. R. Co.* 7 Pa. Co. Ct. 566, the court, in a speculative way, remarked: "The examination should, however, be conducted in such a manner as to avoid the infliction of pain, the subjection to indignity, or the endangering of health or life. No anæsthetics, opiates, or drugs should be administered." But it then proceeded to order an examination "by electric tests by means of a battery of such moderate power as is approved by medical authority in like cases, and as will not inflict pain or endanger the health or life of plaintiff, either or all." Just why degrees of potency should be recognized in the application of a powerful natural agent like electricity and rejected when considering vegetable or mineral substances is not obvious. In the case of *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89, 551, it is said: "That examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain." And in the case of *South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200, 60 N. E. 271, after reviewing the authorities to the date of the decision, the supreme court of Indiana drew the following conclusion: "The cases above cited as affirming the existence of the power establish the following propositions: . . . (4) That the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiff's life or health or the infliction of serious pain." In these two cases, however, the narrow question under consideration

was not independently discussed. So far as the intrinsic character of the agency employed is concerned, the law should not distinguish between dilations accomplished by mechanical and by medicinal means. In the case of *O'Brien v. La Crosse*, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81, the refusal of the plaintiff's physician to permit the use of a catheter in the course of an examination by physicians employed by the defendant was upheld, because it appeared that a dangerous inflammation was likely to result. In the case of *Louisville R. Co. v. Hartlege*, 25 Ky. L. Rep. 152, 74 S. W. 742, the supreme court of Kentucky adhered to the rule announced in *Belt Electric Line Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89, but affirmed an order denying an examination of the person of a woman which involved a mutilation and severe pain. But in the carefully considered cases of *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442, 24 Am. St. Rep. 764, 8 So. 90, and *Brown v. Chicago, M. & St. P. R. Co.* (N. D.) 95 N. W. 153, the examinations authorized neces-

sarily contemplated either an internal digital exploration or the use of the speculum. The conclusion to be drawn from these decisions therefore is that due precautions for the comfort and safety of the subject are the matters for primary consideration. With these provided for, the method and means employed should be left to the discretion of the expert making the examination.

From all this the conclusion must follow that the district court should have required an expert examination of the plaintiff's eyes to be made, subject to the limitation that it should not produce serious discomfort or any deleterious consequence; and, in order to insure the execution of its order according to the strict letter of its terms, the court should have approved, if it did not actually select, the experts appointed to make the examination.

The judgment of the District Court is reversed, with direction to proceed further in accordance with this opinion.

All the Justices concur.

GEORGIA SUPREME COURT.

C. P. BYRD, *Plff. in Err.*,
v.

James W. ENGLISH *et al.*

(117 Ga. 191.)

*A party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages for the negligent act of a third person, by which the performance of the contract was rendered impossible.

(February 11, 1903.)

*Headnote by CANDLER, J.

NOTE.—*Liability for damage to business by injuring tangible property of other party.*

That wrongful injury to business is as much an injury to a property right as an injury to tangible property, and as such the subject of an action, would seem to be so clear as not to need the support of decision; but, even if this were not so, such cases as *Curran v. Galen*, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; *Matthews v. Shankland*, 25 Misc. 604, 56 N. Y. Supp. 123; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Otis Steel Co. v. Local Union No. 218*, 110 Fed. 698; *Murdock v. Walker*, 152 Pa. 595, 34 Am. St. Rep. 678, 25 Atl. 492; *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163; *Cœur D'Alene Consol. Min. Co. v. Miners' Union*, 19 L. R. A. 382, 51 Fed. 260; and *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135, certainly establish the proposition.

In *Rigby v. Hewitt*, 5 Exch. 240, 19 L. J. 64 L. R. A.

ERROR to the City Court of Atlanta to review a judgment in favor of defendants in an action brought to recover damages for alleged injury to business caused by negligent acts of defendants. *Affirmed.*

The facts are stated in the opinion.

Mr. Vasser Wooley for plaintiff in error.

Messrs. Spencer R. Atkinson and Rosser & Carter, for defendants in error:

The efficient, proximate cause of the injuries and damage, of which the plaintiff complains, was not the excavation which it was alleged was the act of the defendants,

Exch. N. S. 291, the court said that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct.

A fire company from an adjoining city had laid its hose across a railroad track in order to throw water upon the plaintiff's building, which was on fire. It was combatting the fire with success, and would probably have extinguished it with little damage to the plaintiff, when a train upon the defendant's railroad severed the hose and prevented the further efforts of the firemen. *Metallic Compression Casting Co. v. Pritchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689. It was decided that the plaintiff might maintain an action against the railroad company for its loss subsequent to the cutting of the hose. In this case the contention was that, assuming that the hose was properly laid across the track, the plaintiff had no cause of action, because the hose was not its property, nor were the men who had

but the failure of the electric company to perform its contract to deliver power to the plaintiff's plant; and the breaking of the wires and conduits, by means of which the plaintiff was supplied with electrical power, if wrongful at all, was the tort, of which the electric company alone could complain, and not one out of which a cause of action could arise in favor of the plaintiff in error.

Cooley, Torts, 2d ed. p. 75; 21 Am. & Eng. Enc. Law, 2d ed. p. 486; *Southern R. Co. v. Webb*, 116 Ga. 152, 59 L. R. A. 109, 42 S. E. 395; Watson, Damages for Personal Injuries, §§ 33, 58, 71; *Macon v. Dykes*, 103 Ga. 847, 31 S. E. 443; *Central R. Co. v. Price*, 106 Ga. 176, 43 L. R. A. 402, 71 Am. St. Rep. 246, 32 S. E. 77; *Central R. Co. v.*

Edwards, 111 Ga. 528, 36 S. E. 810; Hopkins, Personal Injuries, §§ 14-16.

The mere fact that the injury would not have occurred but for the defendant's act is not the test of proximate cause.

8 Am. & Eng. Enc. Law, 2d ed. p. 572; 1 Jaggard, Torts, §§ 26, 130a, b, pp. 245, 372-374; 1 Addison, Torts, §§ 10-12, pp. 12, 13.

The law cannot undertake to trace back a chain of causes indefinitely, for it is obvious that this would lead to inquiries far beyond human power and wisdom, in fact, indefinite in their scope.

Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 215; *Georgia R. Co. v. Hayden*, 71 Ga. 518, 51 Am. Rep. 274.

To obviate a recovery against an indefinite number of wrongdoers upon precise-

the possession of it its servants. In response to this argument, the court said that while this was true, and it was also true that their services were voluntary, and if they had gone away and taken the hose and engine with them the plaintiff would have had no legal claim against them, those circumstances were immaterial as matter of fact. The men and engine were in fact furnishing water to the plaintiff, and were thereby extinguishing the fire; that they were rendering the same service to the plaintiff as if they were hired and were using the plaintiff's hose; that the defendant cut off the supply of water, and this was as really an interference with the plaintiff's possession as if it held the possession under a deed, and as if the men were laboring under a contract; and that the interference was tortious.

The reasoning in this case is very difficult to get away from, and, if it is correct, it would seem to indicate that *BYRD V. ENGLISH* cannot be deemed a well-considered case. In other words, that it is no business of the wrongdoer how another obtains his right; if the wrong injures it, he is liable, no matter what its source.

But in *Mott v. Hudson River R. Co.* 1 Robt. 593, which was also a case where the hose in use by firemen in extinguishing a fire which was burning the plaintiff's dwelling was cut by the defendant's railroad train, it was said that the act of the defendant was not the immediate cause of the injury to the plaintiff; that it was only immediately the cause of destroying the instruments used to prevent injury, and that, although they were then actually in use, the same principle must govern as if they were just being prepared for use, or on their way, or even kept in readiness for use. That it was the same as if the hose cart were on its way to the fire and were interrupted by illegal obstructions in the street, or injured by a locomotive,—the plaintiff might have lost the benefit of it; or if any one negligently lost the key of its house, so that it could not be got out in time; or if anyone, having contracted to repair the hose within a certain time, failed to do so; that in all these cases the negligence of the delinquent party might more or less contribute to the result of the destruction of the plaintiff's property, yet, as a result of the negligence, the consequences would be too remote to make him liable for damages. 64 L. R. A.

This reasoning does not appear to be as satisfactory or convincing as that of the Massachusetts case. Besides the court had just held that the cutting of the hose by the train was an accident, and was not the result of negligence on the part of the railroad company, and was due mainly to the neglect of the firemen and the plaintiff to station persons at a proper distance on either side of the place where the hose crossed the track to warn those under whose management the train was, and stop the train.

An action may be maintained against a district council for the negligence of a contractor employed by the defendant to construct a sewer for them, by reason of which negligence a gas main was broken and the gas escaped into the house in which the plaintiffs (husband and wife) resided and an explosion took place by which the wife was injured and the husband's furniture was damaged. The explosion which took place was the direct consequence of the act of negligence complained of, and occurred in the ordinary course of events attendant thereon, as would be known to anyone of intelligence who cared to think about the matter. *Hardaker v. Idle* [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69. In this case the court said, on the subject of the remoteness of damage, that the nature of the gas, its certainty to escape, and to find its way wherever it can get, and explode if it escapes in large quantities and comes into contact with fire, all render the breaking of a gas main very dangerous if houses are near; and that such an accident as that which actually happened was one that might have been reasonably expected. In principle may not the same thing be truly said of a negligent act which severs a sub-way containing the wires by which electricity is transmitted for the purpose of light and power?

In *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603, the declaration alleged that the plaintiff, a blacksmith and horseshoer, had obtained the patronage of a person, and on one occasion had shod a certain mare of his customer in a good and workmanlike manner; and that the defendant, maliciously intending to injure him and impair and destroy the work, without the knowledge of the owner loosed a shoe that the plaintiff had recently put on the mare so that it would come off easily, and thus make it appear that plaintiff was an unskilful

ly the same cause of action, the plaintiff is remitted to the person supplying the nearest efficient link in the chain of causation.

Ashley v. Harrison, 1 Esp. 48; *Vickars v. Wilcocks*, 8 East, 1; *Dale v. Grant*, 34 N. J. L. 142; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571; *Anthony v. Slaid*, 11 Met. 290; *Kahl v. Love*, 37 N. J. L. 5.

Candler, J., delivered the opinion of the court:

The petition filed by the plaintiff in the court below makes substantially the following case: The plaintiff was engaged in the printing and publishing business in the city of Atlanta, maintaining a large establishment, in which many workmen were employed. In the operation of his machinery and the lighting of his place of business he was dependent upon electric power supplied

by the Georgia Electric Light Company, a corporation, and this power was conveyed by means of wires contained in conduits which were laid down under the ground. On a named day the defendants were engaged in constructing a building which was to be located on the same street as that on which the plaintiff's place of business was situated, and, as incident to the work of construction, were excavating the lot of the defendant English, on which the building was to be constructed, for the purpose of inclosing a basement. In doing this they also excavated the earth under the sidewalk adjoining the lot. This was done without authority of law, and in violation of an ordinance of the city of Atlanta. By the negligence of the employees of the defendants, a wall of earth was allowed to fall in on the conduits containing the electric wires over which power was conveyed to the plaintiff's plant. The wires were broken, and for several hours he was without the means of conduct-

and careless horseshoer, and thus deprive the plaintiff of the patronage and custom of his customer. The second count charged the defendant with driving a nail in the foot of the horse after it had been shod by the plaintiff, with the same design. Upon the argument the contention of the defendant was that the wrong was done to the customer; that it was his horse whose shoe was loosened and whose foot was pricked, and that the immediate injury and damage were to him, and consequently the damages of the plaintiff were too remote. But the court held: That this contention involved a misapplication of the legal principle, and could not be sustained. That the illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and that such hurt was the natural and almost direct product of such cause. That such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. That the defendant was conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. That the act had a twofold injurious aspect,—it was calculated to injure both the customer and the plaintiff; and, as each was directly damaged, the court could perceive no reason why each should not repair his losses by an action. To be sure the court afterwards said that the action of the defendant was, in effect, a defamation of the plaintiff in his trade, but it is difficult to perceive why, if one, by injuring the tangible property of another, may, by defaming the character of the plaintiff in his trade or profession, thus damage his occupation or business, the same may not be done when the injury to the tangible property of the third person is in its nature a trespass, or the result of unwarranted negligence.

The case of *Dale v. Grant*, 34 N. J. L. 142, is cited in the opinion of *BRAD v. ENGLISH* as a case in point illustrating the principle governing that case. But this can hardly be correct.

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The decision in *Dale v. Grant* was that one having a contract to take from a manufacturing corporation all of its manufactured products cannot maintain an action against a person who interferes with the machinery by which the manufacturing corporation operates its plant, and thus prevents it from furnishing its goods to the plaintiff under such contract, for the profits which the plaintiff claims to have lost by reason of such wrongful interference by the defendant with such machinery.

In *BRAD v. ENGLISH* the negligent act of the defendant was a direct injury to the business of the plaintiff, immediately arresting its operation, while in *Dale v. Grant* the direct injury was to the business of the corporation which furnished its goods to the plaintiff. The cases would have been similar if, instead of the plaintiff in *BRAD v. ENGLISH* having brought the action, the latter had been instituted by one of his customers.

In *Tarleton v. McGawley*, Peake N. P. Cas. 205, 3 Revised Rep. 689, plaintiff's vessel was trading with the natives on the coast of Africa. The defendant was with his vessel near by, engaged in the same business. As a boat was returning to the shore from plaintiff's vessel, where it had been for the purpose of establishing a trade, the defendant, maliciously intending to hinder and deter the natives from trading with plaintiff, fired from his ship a canon loaded with gunpowder, and shot at the canoe, and killed one of the natives, whereby the natives of the coast were deterred and hindered from trading with plaintiff, and plaintiff thereby lost the trade. It was held that an action therefor could be maintained.

In *Cue v. Breeland*, 78 Miss. 864, 29 So. 850, which was an action for damages done to a county bridge, the plaintiff was connected with the bridge only in this way: He erected the same under a contract with the county, and bound himself to the county, by his contract and a bond, to maintain the bridge for five years after its erection. It was held that the defendant, by the negligence and wilfulness of whose servants, engaged in the floating of logs down the stream, the bridge was destroyed, was

ing his business, by reason of which fact he suffered damage set out in the petition. By amendments it was alleged that the plaintiff had a right to demand of the Georgia Electric Light Company the electric power which it had been furnishing him; that, but for the tort complained of, that company would have furnished him with power, and he would not have been damaged as set out; that the conduits of the electric light company were placed in the street by authority of the city of Atlanta, and in the exercise of the right of eminent domain in the company; that the plaintiff was under a contract with the Georgia Electric Light Company, by virtue of which that company furnished him with electric power, and under the terms of which he could not recover from it for damage occasioned by an accidental interruption of the current such as this was; that at the time of the commission of the tort complained of there was no other company or person in Atlanta offering to

furnish electric current from whom the plaintiff could have secured service during the interval of interruption caused by the breaking of the wires; that it was impracticable to change the motive power used by the plaintiff during that interval; that the injury done was remedied at the earliest possible moment, and that everything possible was done to reduce the amount of damages sustained by the plaintiff. The court sustained a general demurrer to the petition as amended, and the plaintiff excepted.

In the brief of counsel for the defendants in error considerable stress is laid upon the argument that the plaintiff cannot recover because the negligence of the defendants (conceding that they were negligent as alleged in the petition) was not the proximate cause of the injury done to the plaintiff. In view of the decision of this court in the case of *Southern R. Co. v. Webb*, 116 Ga. 157, 59 L. R. A. 109, 42 S. E. 395, we are not prepared to say that the failure of the

liable. It was claimed that, as the bridge was not the property of the plaintiff, but of the county, the action could not be maintained; but the court said that the wrong was done to the plaintiff, and not to the county, and consisted in putting the plaintiff in a situation where he was bound to rebuild, and it was the cost of the rebuilding that was the measure of his damages, and with the damages thus sought to be recovered the county had nothing to do.

The advent of electricity as a motive power, and the means of its transmission as such, are comparatively recent, but large industries which could scarcely have existed but for it, in which vast interests are involved, are in successful operation by means of it. In view of which, what was said by the judge who delivered the opinion of the court in *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 63 L. R. A. 289, 88 Am. St. Rep. 298, 48 S. W. 429, would seem not to be inappropriate in connection with the subject here considered, *viz.*: "As the population of the country increases, as the business and commercial industries multiply, . . . thus facilitating the conduct of the business, the pursuit of occupations and callings, and the promotion of the social and political intercourse of the world, courts are called upon to apply familiar principles to new questions; if none seem to be applicable, to enunciate a just rule, suited to the state of facts before it, and for future application to similar facts. It can never be said that the novelty of a complaint is an objection to the action."

The statement by the court in *BYRD v. ENGLISH*, that it was "not prepared to say that the failure of the power in the plaintiff's place of business was not such a result as was reasonably to be anticipated from the alleged tort of the defendants in so excavating the lot on which they were at work that the conduits containing the electric wires were broken, and the current interrupted,"—would seem to be an admission that the defendants were bound to know that the effect of their negligence would be just what it actually was,—the destruction of the plaintiff's power and the consequent

stoppage of, and, therefore, injury to, his business; and also, indirectly that the cause of such injury was proximate and direct. How and where the power was obtained, by whom and under what circumstances it was furnished, and the nature or character of the contract by which it was furnished, can hardly be said to be of concern to the wrongdoer,—its negligent destroyer. If the wrongdoer was negligent in breaking the wires, and was thereby made liable to their owner for the resulting injury to his property interests therein, and if he could reasonably have foreseen that the result of his negligence would be, not merely the breaking of the wires and the damage to their owner, but the interruption of the business to which they supplied power and the consequent damage to its owner, he must be equally liable to each of the parties so damaged, unless he owed a duty to the one which he did not owe to the other. But the duty which he owed to the owner of the wires was only the ordinary duty to use reasonable care to avoid injuring another's property, and there can be no basis in reason for contending that this duty was not owed to the owner of the business as much as to the owner of the wires.

The ownership of the wires does not seem to be a material fact with respect to the duty which the wrongdoer owed to the people damaged by his act. If the proprietor of the business in which the electricity was used had owned the wires the only difference would have been that the trivial cost of mending or replacing the broken wire would have been added to his damage. It is not easy to see how the duty of the wrongdoer to avoid causing injury to his property and business would have been in any degree changed. Again, the proprietor of the business, though he did not own the wires, might, by his contract, be obliged to keep them in good repair and replace them when necessary; so that, even with respect to the broken wires themselves, he would be the only party injured. In any such case it seems plain that it would be the duty of the negligent wrongdoer to avoid injury to either of the per-

power in the plaintiff's place of business was not such a result as was reasonably to be anticipated from the alleged tort of the defendants in so excavating the lot on which they were at work that the conduits containing the electric wires were broken, and the current interrupted. There is another view, also presented by counsel for defendants in error, which, if correct, settles beyond doubt that the court below was right in sustaining the general demurrer to the petition. It will be borne in mind that this is not an action for an injury to the person or property of the plaintiff. It is not claimed that the defendants have violated any contractual duty owed to the plaintiff. Their duty to the public in performing the work in which they were engaged was to do it in such manner as not to negligently injure the person or property of anyone. According to this petition the damage done by them was to the property of the Georgia Electric Light Company, who were under contract to the plaintiff to furnish him with electric power, and the resulting damage done to the plaintiff was that it was rendered impossible for that company to comply with its contract. If the plaintiff can recover of these defendants upon this cause of action, then a customer of his, who was injured by the delay occasioned by the stopping of his work, could also recover from them, and one who had been damaged through his delay could in turn hold them liable, and so on without limit to the number of persons who might recover on account of the injury done to the property of the company owning the conduits. To state such a proposition is to

demonstrate its absurdity. The plaintiff is suing on account of an alleged tort by reason of which he was deprived of a supply of electric power with which to operate his printing establishment. What was his right to that power supply? Solely the right given him by virtue of his contract with the Georgia Electric Light Company, and with that contract the defendants are not even remotely connected. If, under the terms of his contract, he is precluded from recovering from the electric light company, that is a matter between themselves, for which the defendants certainly cannot be held responsible. They are, of course, liable to the company for any wrong that may have been done it, and the damages recoverable on that account might well be held to include any sums which the company was compelled to pay in damages to its customers; but the customers themselves cannot go against the defendants to recover on their own account for the injury done the company. A case in point, which well illustrates the principle governing the one now under consideration, is that of *Dale v. Grant*, 34 N. J. L. 142, where it was held that "a party who, by contract, is entitled to all the articles to be manufactured by an incorporated company, he (such party) furnishing the raw materials, cannot maintain an action against a wrongdoer, who, by a trespass, stops the machinery of such company, so that it is prevented from furnishing, under said contract, manufactured goods to as great an extent as it otherwise would have done." In the opinion (p. 149, 34 N. J. L.) the court says: "The law does not attempt to give full rep-

sons whom he could see that his act would directly and necessarily damage.

The proposition that one who causes injury to the property rights of two or more other persons at the same time, by the same act, is equally liable to each of them for the resulting damage to his property, if the damage to each of them must have been equally foreseen and was in each case the direct and proximate result of the negligent act, seems so clearly reasonable and just as to need no argument. A great variety of cases may easily be suggested in which the law unquestionably holds that a liability for negligence which exists toward one of several injured persons extends to each of the others, although they may have stood in different relations to the particular thing on which, or through which, the wrongful act operated, if their damages could have been equally foreseen, and were equally a direct and proximate result of the negligence. For instance, if one negligently frightens a horse, causing a runaway which damages the horse and a vehicle containing several persons, who are injured at the same time, it can hardly be questioned that liability for his negligence will extend, not only to the owner of the damaged horse and conveyance, but also to each of the persons injured, though one may be the owner, another a friend riding with him 64 L. R. A.

by invitation, and still another a passenger for hire. If that be true, the defendant in the case above was justly liable to the owner of the business which was injured, as much as to the owner of the broken wires. The proposition stated above is not controverted or considered in the case of *BYRD v. ENGLISH*. The court in that case proceeded on the assumption that the injury to the plaintiff's business was not a direct result of the defendant's negligence, and that this damage resulted indirectly by preventing the performance of a contract by which the owner of the wires agreed to supply the electricity for the business. This assumption seems to be clearly erroneous. The contract itself contained an exemption from liability for accidental interruptions to the supply. There was, therefore, no breach of contract, but a direct injury to the business by cutting off its supply of light and power. The same tort damaged the property of the owner of the wires by breaking them, and damaged the property of the proprietor of the business by cutting off its supply of light and power. If, as the court intimates, the latter result, as well as the former, was reasonably to be anticipated by the wrongdoer, it seems clear that the ordinary and simple principles of the law of negligence should create a liability for damages equally to each of the parties injured. P. H. V.

aration to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs, who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate. The more remote comes under the head of *damnum absque injuria*." So, also, in *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571, it is held that, where one person has contract relations with another, an injury to the latter, which affects disastrously those relations, does not constitute a legal injury to the former. From the opinion delivered by Storrs, J., we quote the following very pertinent remarks: "Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man in business and in matters of money and property, that rarely is a death produced by human agency which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known." To the same effect, see *Anthony v. Slaid*, 11 Met. 290; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Fowler v. Athens City Waterworks Co.* 83 Ga. 220, 20 Am. St. Rep. 313, 9 S. E. 673. It follows from what has been said that the plaintiff's petition did not state a cause of action, and that the general demurrer thereto was properly sustained.

Judgment affirmed.

All the Justices concur except Lumpkin, P. J., absent on account of sickness.

John DOE *ex dem.* J. A. STEWART *et al.*,
Plffs. in Err.,
v.

H. W. GARRETT, Impleaded, etc.

(.....Ga.....)

*One who purchases a lot in a public

*Headnote by TURNER, J.

NOTE.—For another case in this series as to right to maintain ejectment to recover burial lot, see *Hancock v. McAvoy*, 18 L. R. A. 781, with note as to what title or interest will support action of ejectment.
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cemetery for burial purposes, though the right of interment therein be exclusive, does not acquire any title to the soil, but only a mere easement or license, which will not support an action of ejectment.

(January 15, 1904.)

ERROR to the Superior Court for Muscogee County to review a judgment in favor of defendant in an action of ejectment to recover possession of a cemetery lot. *Affirmed.*

The facts are stated in the opinion.

Messrs. Reese Crawford and McNeill & Levy for plaintiffs in error.

Mr. Charlton E. Battle, for defendant in error:

The purchaser of a lot in a cemetery, though under a deed absolute in form, does not take any title to the soil. He acquires only a privilege or license to make interments in the lot purchased, or an easement in the property exclusively of others, so long as the ground remains a cemetery.

Civil Code, § 3083; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; *Perley, Mortuary Law*, pp. 177, 178, 187; 6 Cyc. Law & Proc. p. 717; 5 Am. & Eng. Enc. Law, pp. 787-789; *Hancock v. McAvoy*, 151 Pa. 460, 18 L. R. A. 781, 25 Atl. 47, 31 Am. St. Rep. 774; *Kincaid's Appeal*, 66 Pa. 411, 5 Am. Rep. 377; *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. 565; *Hollman v. Platteville*, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119.

Such a deed or right to a burial lot in a public cemetery will not support an action of ejectment.

Hancock v. McAvoy, 151 Pa. 460, 18 L. R. A. 781, 25 Atl. 47, 31 Am. St. Rep. 774; 6 Cyc. Law & Proc. p. 717, note 50; 5 Am. & Eng. Enc. Law, p. 786, note 1; *Perley, Mortuary Law*, pp. 177, 178, 187; *Adams, Ejectment*, *16; *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. 173.

The rule is not altered by the circumstance that the right of burial is conveyed with the common formula of heirs and assigns forever.

5 Am. & Eng. Enc. Law, 2d ed. p. 788; *Hook v. Joyce*, 94 Ky. 450, 21 L. R. A. 96, 22 S. W. 651; *Jacobus v. Congregation of Children of Israel*, 107 Ga. 521, 73 Am. St. Rep. 141, 33 S. E. 853.

Such an owner of a cemetery lot, while not having a fee to the soil, but only an easement therein, has such an interest as

As to adverse possession of burial lot, see, in this series, *Hook v. Joyce*, 21 L. R. A. 96, and *Roumillot v. Gardner*, 53 L. R. A. 729.

will support an action of trespass *quare clausum fregit*, since such an action will lie at the instance of one who, though not the holder of the legal title to the fee, has a usufructuary interest in land.

Jacobus v. Congregation of Children of Israel, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; 6 Cyc. Law & Proc. pp. 621, 720; *Wright v. Hollywood Cemetery Corp.* 112 Ga. 884, 52 L. R. A. 621, 38 S. E. 94.

Turner, J., delivered the opinion of the court:

This bill of exceptions was founded upon an action of ejectment brought in the superior court of Muscogee county, for a lot in a cemetery in the city of Columbus, known and distinguished in the plan of said cemetery as lot No. 184 in section or extension of C of said cemetery, "the said tract or parcel of land being a cemetery lot for burial purposes." The action was founded on the several demises of James A. Stewart and others, also of "the city of Columbus," and also of "the mayor and council of the city of Columbus," these two latter demises being framed to cover the different names by which the municipality was designated in the acts of the general assembly. To the petition in this case an abstract of title was appended, the particulars of which need not be set out in full. The defendant filed a general demurrer, the substance of which may be stated in the language of the fourth ground thereof as follows: "Because the petition shows upon its face that the land sued for is a cemetery lot contained in the public cemetery in the city of Columbus, known as 'Linwood cemetery,' and, said tract or parcel of land being, as described in said petition, a cemetery lot for burial purposes, the right and title of the plaintiffs, if any, in such property, is not of such a character as will support an action of ejectment, the right of burial in such cemetery lot being merely a license, or at best an easement, in said property, and ejectment will not lie for the recovery of a license or an easement." The court below sustained the demurrer and dismissed the case. The plaintiffs excepted in due form, and brought the case to this court.

The question is whether an action of ejectment will lie for the recovery of a tract or parcel of land averred to be a cemetery lot for burial purposes. The courts in many of the states have held that the purchaser of a lot in a public cemetery, though under a deed absolute in form, does not take any title to the soil, but that he acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery. See the cases collected in 6 Cyc. Law & Proc. p. 64 L. R. A.

1717. And there would seem to be good reason for holding that, when a cemetery lot is conveyed for burial purposes, it cannot be devoted to any other use, whatever may be the form of the conveyance. In the case of *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, the same being styled an "equitable petition," this court held that even punitive damages could be recovered for an unlawful interference with a cemetery lot; and Mr. Justice Fish, reasoning upon the case, used this language (p. 521, 107 Ga., p. 43, 73 Am. St. Rep., p. 854, 33 S. E.): "As a general rule, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only the easement or license of burial therein." The opinion then proceeds to cite an array of authorities to the effect that damages may be recovered from any person who wrongfully trespasses upon, desecrates, or invades the burial lot of another. And, in a proper case, the courts will, by injunction, restrain a trespass upon a burial lot. See 6 Cyc. Law & Proc. 720, and authorities cited.

The case of the *New York Bay Cemetery Co. v. Buckmaster*, 49 N. J. L. 449, 9 Atl. 591, cited by counsel for the plaintiffs in error, on examination does not seem to support his view that one who has the right of burial in a cemetery lot can maintain an action of ejectment against another who wrongfully enters thereon. While the deed under consideration in that case recited that the premises were to be had and held for the uses of sepulture only, and for no other uses whatever, the law of New Jersey (P. L. 1850, p. 194) required the cemetery company to grant the fee to the purchasers of lots, and for that reason the court held that an action of ejectment would lie for the recovery of the lot. We have also examined the other cases cited by the able counsel for the plaintiffs in error, but we have not found them sufficient to overcome the great weight of authority which supports the view which we have adopted.

In the present case the parcel of land sought to be recovered being averred to be a cemetery lot for burial purposes, any conveyances upon those terms would carry only a limited use or an easement. Such a use is also sometimes called a mere license. To recover such an easement or license, an action of ejectment will not lie. *Adams, Ejectment*, *16; *Perley, Mortuary Law*, pp. 177, 178, 187; 6 Cyc. Law & Proc. p. 717, note 50; 10 Am. & Eng. Enc. Law, 2d ed. p. 474; *Union Petroleum Co. v. Bliven Petroleum Co.* 72 Pa. 173; *Hancock v. Mo-Avoy*, 151 Pa. 460, 18 L. R. A. 781, 31 Am. St. Rep. 774, 25 Atl. 47. If for any public reason the disestablishment of a cemetery is

necessary, the police power is adequate. It may be added that, while the action of ejection has its uses, its quaint fictions and devices do not seem appropriate to the ascertainment of any right in a burial lot. If any fiction is pardonable in a case of this kind, it would be fitter to hold that the fee in these sacred premises belongs to the dead. Within these hallowed precincts no court would desire to send the sheriff with a writ of possession. This instinct of humanity is loyalty to a statute impressed upon all

hearts. Its influence is not confined to the weak and ignorant. The plaintive appeal which marks the grave of Shakespeare is said to have been inspired by his fear of a removal of his bones to a charnel house:

"Good friend, for Jesus' sake forbear
To dig the dust enclosed here."

Judgment affirmed.

All the Justices concur.

LOUISIANA SUPREME COURT.

Alicia HEBERT

v.

LAKE CHARLES ICE, LIGHT, & WATER-
WORKS COMPANY, Limited, Appt.

(.....La.....)

*1. A wire of an electrical company, detached from the poles and lying in the streets of a town, is, of course, out of place, and those having control of it and charged with the legal duty of taking due care of it have the burden of accounting for its being found in that condition and situation, and to show that it was not due to its negligence.

2. It is the absolute duty of an electric light company conveying electricity by overhead wires strung through the streets of a city to keep its wires constantly insulated so as to be prepared to guard against the effect of objects coming in contact with them regardless of the facts and causes which may bring about the contact.

3. The facts that a telephone company may have strung its wires above those of the electric light company already in position, and should have taken no steps to guard against the coming in contact of the wires of the two companies at the crossing points, and that in stringing its wires it did so, so negligently and loosely that one of its wires fell, in a storm, upon an uninsulated wire below, causing it to burn and fall on the street, are no excuse to the electric company in not having performed its own duty of additional and special precau-

tions in the premises. A fault on the part of the telephone company did not relieve it from the consequence of its own fault. The falling of the telephone wire on the wire below would have been attended with no disaster but for the uninsulated condition of the latter, and that condition is to be attributed as the proximate cause of the death of the husband and father of the plaintiffs.

(November 16, 1903.)

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Calcasieu in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of her husband. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Pujo & Moss, for appellant:

As between an electric light company and another electrical company, prior authority to occupy, or prior occupation of, the streets will not confer upon such company an exclusive right. A subsequent licensee is under duty so to maintain its wires and lines as not to interfere with the rights of the prior occupant of the streets, properly to maintain and operate its lines and to transact the business it is authorized by its franchise to transact.

Joyce, Electric Law, § 516.

The proximate cause of the injury was the falling of the telegraph and telephone wire upon the live trolley wire.

*Headnotes by NICHOLLS, Ch. J.

NOTE.—For other cases in this series as to presumption of negligence in case of injury from broken or fallen electric wires, see *Denver Consol. Electric Co. v. Simpson*, 31 L. R. A. 536, and note; *Snyder v. Wheeling Electrical Co.* 39 L. R. A. 499; *Boyd v. Portland General Electric Co.* 57 L. R. A. 619; and *Newark Electric Light & P. Co. v. Buddy*, 57 L. R. A. 624.

As to liability for injuries by electric wires in highways generally, see *City Electric Street R. Co. v. Conery*, 31 L. R. A. 570; *Western U. Teleg. Co. v. State*, 31 L. R. A. 572; *Mitchell v. Charleston Light & P. Co.* 31 L. R. A. 577; *McKay v. Southern Bell Teleph. & Teleg.* 64 L. R. A.

Co. 31 L. R. A. 589; *Huber v. La Crosse City R. Co.* 31 L. R. A. 583; *Suburban Electric Co. v. Nugent*, 32 L. R. A. 700; *Atlanta Consol. Street R. Co. v. Owings*, 33 L. R. A. 798; *Newark Electric Light & P. Co. v. Carden*, 37 L. R. A. 725; *Bergin v. Southern New England Teleph. Co.* 39 L. R. A. 192; *Gannon v. Laclede Gaslight Co.* 43 L. R. A. 505; *Mooney v. Luzerne*, 40 L. R. A. 811; *Brush Electric Light & P. Co. v. Lefevre*, 49 L. R. A. 771; *Boyd v. Portland General Electric Co.* 52 L. R. A. 509; *Thomas v. Maysville Gas Co.* 53 L. R. A. 147.

Albany v. Watervliet Turnp. & R. Co. 76 Hun, 136, 27 N. Y. Supp. 848.

The storm was the proximate cause of the damages sustained, and defendant is not liable.

Keasbey, *Electric Wires*, § 236; Crowell, *Electricity*, § 250, p. 220; Joyce, *Electric Law*, § 450; *Boyd v. Portland Electric Co.* 37 Or. 567, 52 L. R. A. 511, 62 Pac. 378; *Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 578, 22 S. E. 767.

When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion.

Lafayette v. Morgan's L. & T. R. & S. S. Co. 40 La. Ann. 861, 4 Sp. 875; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L. R. A. 617, 22 Am. St. Rep. 403, 25 Pac. 702.

Messrs. McCoy & Moss, for appellee:

Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it. The survivors may recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be.

Civil Code, art. 2315; *Clairain v. Western U. Teleg. Co.* 40 La. Ann. 178, 3 So. 625.

Electricity is the most dangerous force known to man, and those who make merchandise of it are bound to use the utmost degree of care in the construction, maintenance, and operation of plants generating that deadly agency, consistent with the practical operation of a lawful business.

Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43, 32 Am. St. Rep. 348, 11 So. 51; *Potts v. Shreveport Belt R. Co.* 110 La. 1, 34 So. 103; *Mitchell v. Raleigh Electric Co.* 129 N. C. 166, 55 L. R. A. 398, 85 Am. St. Rep. 735, 39 S. E. 801; Joyce, *Electric Law*, § 445; *Fitzgerald v. Edison Electric Illuminating Co.* 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161; *Jones v. Union R. Co.* 18 App. Div. 267, 46 N. Y. Supp. 321; *Caglione v. Mount Morris Electric Light Co.* 56 App. Div. 191, 67 N. Y. Supp. 660; *Wittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 410, 62 N. Y. Supp. 297; *Schweitzer v. Citizens' General Electric Co.* 21 Ky. L. Rep. 608, 52 S. W. 830; Keasbey, *Electric Wires*, §§ 238-254.

Where an individual or a corporation owns and operates an electric-light plant, generating a high tension current of electricity, conveying it by means of overhead wires along the streets of a town or city, and it is shown that a traveler upon one of the streets came in contact with one of its wires lying upon the sidewalk and was killed thereby, he being without contributory fault, 64 L. R. A.

the burden of proof is thrown upon defendant to show that the wire was in the street without negligence on its part. Otherwise it will be liable for damages. *Res ipsa loquitur*.

Boyd v. Portland Electric Co. 37 Or. 567, 52 L. R. A. 509, 62 Pac. 378; 2 Jaggard, *Torts*, 864; Joyce, *Electric Law*, § 606; Keasbey, *Electric Wires*, 2d ed. § 271; *Western U. Teleg. Co. v. State*, 82 Md. 293, 31 L. R. A. 572, 51 Am. St. Rep. 464, 33 Atl. 763; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Moran v. Corlies Steam Engine Co.* 21 R. I. 396, 45 L. R. A. 267, 43 Atl. 874; *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 38 L. R. A. 637, 64 Am. St. Rep. 592, 37 Atl. 730; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 64 Am. St. Rep. 922, 28 S. E. 733; 21 Am. & Eng. Enc. Law, 2d ed. pp. 512, 513, notes; Bigelow, *Torts*, 596; Wharton, *Neg.* § 241; Cooley, *Torts*, 799; Shearm. & Redf. *Neg.* 5th ed. § 60; *Clairain v. Western U. Teleg. Co.* 40 La. Ann. 182, 3 So. 625.

Where two corporations are shown to have caused, or contributed by their combined negligence to, the commission of a tort they are liable *in solido* for damages flowing therefrom.

Cline v. Crescent City R. Co. 41 La. Ann. 1031, 6 So. 851; *Cline v. Crescent City R. Co.* 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 So. 122; *Nebraska Teleph. Co. v. New York Gas & Electric Light Co.* 27 Neb. 284, 43 N. W. 126; Shearm. & Redf. *Neg.* § 122; *Kain v. Smith*, 80 N. Y. 458; *Roberts v. Johnson*, 58 N. Y. 613; 21 Am. & Eng. Enc. Law, 2d ed. p. 466.

The primary object of insulation upon overhead electric wires is protection to life and limb, and economy in operation is a secondary object.

Potts v. Shreveport Belt R. Co. 110 La. 1, 34 So. 103.

Electric-light plants must be maintained at all times in such a sound and safe condition as to withstand such violent storms as may be reasonably anticipated.

1 Am. Elec. Cas. 168; Keasbey, *Electric Wires*, § 230.

If damage is caused by the defendant's negligence and some other cause for which he is not responsible, including the "act of God" or superior human force directly intervening, the defendant is, nevertheless, responsible, if his negligence is one of the proximate causes of the damage.

Shearm. & Redf. *Neg.* 5th ed. § 39, notes; *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699; *Baltimore & O. R. Co. v. Sulphur*

Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; *Delisle v. Bourriague*, 105 La. 77, 54 L. R. A. 420, 29 So. 731.

A jury's verdict of \$8,000 for death of a man twenty-one years of age, earning \$32.50 per month where his wife and child are dependent upon his earnings for support, is not excessive, and should not be disturbed.

Curley v. Illinois C. R. Co. 40 La. Ann. 817, 6 So. 103; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 970, 7 L. R. A. 172, 17 Am. St. Rep. 436, 6 So. 799; *Le Blanc v. Sweet*, 107 La. 369, 90 Am. St. Rep. 303, 31 So. 766.

Nicholls, Ch. J., delivered the opinion of the court:

The plaintiff, in her own behalf, as widow of Rosalie Hebert, and as tutrix of their minor child, seeks to obtain judgment against the defendant for \$28,031 as damages to herself and to her said child arising from the death of her deceased husband, Rosalie Hebert, occasioned, it is charged, by the fault of the defendant corporation.

She charges that her deceased husband, about 8 o'clock on the evening of December 1, 1901, was standing near the southeast corner of the intersection of Ryan and Mills streets, two public thoroughfares in the city of Lake Charles, and that a slight wind and rain coming up suddenly caused him to seek shelter under the open shed just north of the building occupied by the Lake Charles Carriage & Implement Company, Limited, at the northwest corner of the intersection of said streets; that the darkness being very great while crossing Ryan street in a northwesterly direction, just as he reached the sidewalk on the west side of said street and in front of said building he came in contact with a wire hanging from an electric light pole and lying along the ground, charged with electricity in a careless and negligent manner, and was instantaneously killed thereby; that said wire was a part of the electric-light system owned and operated by the defendant, the Lake Charles Ice, Light, & Waterworks Company, and the wire which electrocuted her husband was carrying and charged with a current of electricity generated by said company; that it was at that time in a rotten and decayed condition, and was stripped of insulation to such an extent as to leave it practically bare; that said dangerous and defective condition existed throughout the said electric-light system,—all of which were facts well known to defendant corporation and its agents, servants, and employees at that time and long prior thereto; that said corporation had been and was at that time guilty of the grossest negligence, and was actively violating its charter and contract with the city of Lake Charles 44 L. R. A.

and the ordinances of said city, in that it had constructed and was then operating and maintaining its electric-light plant in a careless, improper, and dangerous manner; that said dangerous and defective condition of said wires and system and the gross negligence of the defendant company as set forth were the direct, proximate, and sole causes of the death of her husband, and he was not guilty of any act of contributory negligence.

After so charging, plaintiff made allegations usual to such actions, and prayed for trial by jury and judgment.

Defendant answered, pleading, first, the general issue. It admitted that it was the owner of an electric-light system in the city of Lake Charles which it maintained and operated, by means of which it supplied both public and private illumination. It averred that its wires were strung by virtue of the terms of its franchise with the city of Lake Charles, granted in 1891, and its poles located at the direction and under the supervision of the city engineer. That long after the stringing of its wires at the place designated in plaintiff's petition the Cumberland Telephone & Telegraph Company, in extending its telephone system in the said city, strung its wires at said point above and over those of defendant. That on the night in question, at the place mentioned in plaintiff's petition, one of the wires was burned in two by coming in contact with a wire of said telephone and telegraph company, which caused the severed ends to fall to the ground. Defendant specially denied that the deceased, Rosalie Hebert, came to his death by electrocution therefrom. That on the night it was alleged Hebert came to his death there was a severe tornado or cyclonic disturbance in the city of Lake Charles, which resulted in the loosening and unfastening of a great portion of the wires of the telephone and telegraph company's system, one of them falling upon and coming in contact with the smaller wire of defendant, thereby cutting it in two; and, if any one was responsible for the alleged death of said Hebert, it was the Cumberland Telegraph & Telephone Company, and not respondent.

Defendant specially denied that its electric system was in the condition mentioned, but, on the contrary, it averred that its wires were new, properly insulated, and in good condition. It averred that the claim of the plaintiff was inflated and unfounded in law, even should defendant be responsible, as she sought to recover judgment based upon the earning capacity of the deceased on a life expectancy of forty years, making no allowance for the loss of a day, or for costs of subsistence, illness, or any of the ordinary, usual, and fixed charges of a life, and to that extent plaintiff was endeavoring

to enrich herself at the expense of the defendant company; that plaintiff's claim was extortionate and extravagant, inasmuch as defendant's plant had been recently valued at \$30,000 by an expert. That defendant's company officers bore no malice against the deceased, and were not even acquainted with him, and his death, if chargeable to defendant, could not be made the basis for exemplary or punitive damages, which, though not declared upon in plaintiff's petition, apparently constituted the item of damages asked. That the night when Hebert came to his death was stormy, dangerous, and tempestuous, and, if he was electrocuted in the manner and form charged,—which was specially denied,—his death was due to his own contributory negligence in being out in the streets and moving from place to place under dangerous conditions, which contributory negligence defendant pleaded in bar of the action.

The jury returned a verdict in favor of the plaintiff individually for the sum of \$4,000 and in her capacity as tutrix for \$4,000.

The court rendered judgment in conformity to the verdict. After an unsuccessful application for a new trial, defendant appealed.

There can be, in view of the evidence adduced, no contention as to the fact that the deceased, Rosalie Hebert, came to his death by coming in contact with one of the copper wires attached to defendant's electric plant in the town of Lake Charles, which at the time of his doing so was lying in one of the streets of the town, and charged with electricity generated at defendant's power house, which was sufficient in strength to kill, and which in fact did kill, him. Such a wire of an electric company, detached from the poles, and lying on the streets of a town, is, of course, out of its proper place, and those having control of it and charged with the legal duty of taking due care of it were bound to account for its being found in that condition and situation. See *Maus v. Broderick*, 51 La. Ann. 1153, 25 So. 977.

The defendant company was not only charged by general law with the duty of seeing that its wires were so placed and so kept, as to injure no one, but it was accorded by the town authorities the privilege or right of stringing its wires on its streets upon the express condition that it should use the utmost precautions in this respect. An examination of the issue in this case must commence with the recognition of an absolute duty on the part of the corporation of protection to the public from things belonging to it or in its custody by due care. The obligation we here refer to is especially emphasized in the case of the owners of buildings and in a more general

manner referred to in articles 666, 667, and 670 of the Civil Code, and in the legal maxim, *Sic utere*.

Plaintiff's counsel contends that, where an individual or corporation owns and operates an electrical-light plant generating a high current of electricity, conveying it by means of overhead wires along the streets of a town or city, and it is shown that a traveler upon one of the streets came in contact with one of its wires lying upon the sidewalk and was killed thereby, he being without contributory negligence, the burden of proof is upon it to show that the wire was without negligence on its part (*res ipsa loquitur*); and in support of that proposition they refer the court to *Boyd v. Portland Electric Co.* 40 Or. 126, 57 L. R. A. 619, 66 Pac. 576; 2 Jaggard, Torts, 864; Joyce, Electric Law, § 606; Keasbey, Electric Wires, 2d ed. § 271; *Western U. Teleg. Co. v. State*, 82 Md. 293, 31 L. R. A. 572, 51 Am. St. Rep. 464, 33 Atl. 763; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Moran v. Corliss Steam Engine Co.* 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 661, 39 L. R. A. 499, 64 Am. St. Rep. 922, 28 S. E. 733; 21 Am. & Eng. Enc. Law, 2d ed. pp. 512, 513, and notes; Bigelow, Torts, 596; Wharton, Neg. § 241; Cooley, Torts, 799; Shearm. & Redf. Neg. 5th ed. § 60; *Clairain v. Western U. Teleg. Co.* 40 La. Ann. 182, 3 So. 625.

We are of the opinion that this proposition is conservative and correct. The owners of electrical machinery are in a much better position to know and be informed as to its situation, when such a condition of things takes place, than would be an entire stranger to its affairs, who, being lawfully upon the street, should have been injured by its wires.

Defendant insists that it has in this case shown everything in defense which it could be called upon to show. It claims that, if there be legal liability to plaintiff by anyone, it is by the Cumberland Telephone Company; that the latter company, when it erected its own poles and strung its wires, found defendant already in position under legal authority, and upon it was imposed the duty of doing everything that should be necessary for the protection of life and property; that it should have strung its wires below that of the defendant, or, if it strung it above them, it should have availed itself of every instrumentality in its power and under its control to guard against the cause of the injury in this case, which it ascribes to the falling of one of the wires of

the telephone company upon one of its own and burning it so as to make it fall.

For the purposes of this case it may be conceded that defendant correctly states the duty of the Cumberland Telephone Company under the circumstances, but it would by no means follow as a legal consequence that the existence of that duty relieved the defendant company from its own duty in the premises. It should have taken steps itself to relieve the situation from danger, and not have remained inactive simply because some other company had come to have legal obligations to the public imposed upon it. If, after the defendant company placed its poles and strung its wires, new facts or conditions arose, making, in view of them, its first existing status dangerous to the public, it was a mistake on its part to suppose that the changed situation would carry with it no new or increased obligations on its part to the public by way of remedy. If the situation was such as would have enabled it (defendant) to have forced the Cumberland Telephone Company to perform the duty imposed upon it, it should have made use of its power in that direction, or, failing that, it should have applied some proper remedy itself.

The expert witnesses testify that there was an easy remedy at hand for preventing the wires of the two companies coming in contact with each other at the points of crossing; one of which was to erect an extra pole, known as a "span pole," at the point of intersection, and attaching the wire or wires to it by placing upon either one of the wires a piece of insulating material known as "waterproofed wood." Granting that this was exacting on its part more than ought to be called for, the defendant should certainly have placed its own lines in perfect order at the crossing point. If, as appears from evidence adduced by its own witnesses, the lines of the defendant company below this point had the insulation upon it worn off or taken from it by the dragging by the telephone company of its wires over them in the process of its construction or repairs, the injured lines should have been at once repaired, and not allowed to have remained in that dangerous condition. The wires should have been insulated independently of the cause of the defect or the quarter from which it arose. The fact that there were other lines above their own had the effect of increasing their obligations, not of lessening them. One of defendant's witnesses (who did not pretend to be an expert, however) testified that the object of insulation was to prevent the escape of electricity, and that it afforded no protection to life. This is in direct opposition to expert testimony in the record, and to *Potts* 64 L. R. A.

v. Shreveport Belt R. Co. 110 La. 1, 34 So. 103, where it was stated by this court that the principal object of its use was for that very purpose. If, as the defendant urges, there was danger to its own lines from the presence of the telephone company's lines above and the danger of their falling, it was gross carelessness on its part to have allowed its wires to have remained just below without insulation as long as it did. If the telephone company had a duty to perform, the defendant had one also to perform, and both failed to perform it, and as a consequence of such failure a life was lost. Both corporations were bound *in solido*, and the fault of one is no excuse for the fault of the other. Defendant seeks to avoid the consequence of its fault by urging that the immediate, direct, and proximate cause of Hebert's death was a most unusually violent storm, which it had no reason to anticipate, which threw down a wire of the telephone company.

Defendant's counsel quote from *Keasbey on Electric Wires*, 2d ed. § 236, to the following effect: "Where, however, the proximate cause of the injury is an external force for which the company is not responsible, the question of liability will depend on whether the force was one that might reasonably have been anticipated, whether there was negligence in not having the materials strong enough or sound enough to resist it, and whether the injury was the natural and probable consequence of the negligence." An electric light company that has erected its poles and wires in the streets of a municipality with the consent of the proper authorities, is not an absolute insurer against accident therefrom. It is only bound to exercise care and diligence in the erection and maintenance of the system proportionate to the danger, and when it has fulfilled this obligation it has discharged its entire duty, and its liability ceases. In support of this position they cite *Croswell, Electricity*, § 236; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499; *Boyd v. Portland Electric Co.* 37 Or. 567, 52 L. R. A. 511, 62 Pac. 378. They quote the supreme court of South Carolina as saying in *Mitchell v. Charleston Light & P. Co.* 45 S. C. 146, 31 L. R. A. 577, 22 S. E. 767, that "the company is charged with so placing its wires and so keeping them in repair as to withstand the ordinary weather,—rain, heat, cold, and wind. It is alleged on the part of the company that its wire was broken in consequence of a severe wind-storm. Was it an ordinarily windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone that could not be

anticipated or reasonably foreseen was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then under those circumstances it would not be liable."

In the case at bar the defendant was in default as to the condition of its wires at the point where the accident took place not only as respects extraordinary storms, but as to events likely to happen at any moment from the simplest causes. It was failing, and had for a long time before failed, to have placed matters in such a condition as was required of it affirmatively to do for the public safety, not only by the general law, but as the condition upon which it had been granted the right or privilege of stringing its wires in the public streets. Had its wires been in fact in such a condition as they were required to be at the time of an extraordinary storm, a different case would have been presented to us. The defendant was not required to take extraordinary precautions to meet possible extraordinary future events, but it was expected, if an extraordinary storm should arise, that its wires would protect the public as far as possible,—at least against the effect of the storm. The care and true caution required at the hands of the defendant were not simply the ordinary care of a reasonably prudent man. In the case of *Fitzgerald v. Edison Electric Illuminating Co.* the supreme court of Pennsylvania laid down as the rule applicable to a company like the defendant making use of such a dangerous agency that it was bound to know, not only the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them. The defendant (the court said), in accord with the common practice of electric companies, recognizes this obligation by insulating its wires; but the duty was not only to make the wires safe by proper insulation, but to keep them so by constant oversight and repairs. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161. The same view was taken in *Mitchell v. Raleigh Electric Co.* 129 N. C. 166, 55 L. R. A. 398, 85 Am. St. Rep. 735, 39 S. E. 801, where it was said: "Its association [of such a company] is with [apparently] the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence. Vision cannot detect it. It is without color, motion, or body. Latent, and without sound, it exists, and, being odorless, the only means of its discovery lie in the senses of feeling

communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." To the same effect are the expressions of this court in *Potts v. Shreveport Belt R. Co.* 110 La. 1, 34 So. 103, and also *Joyce on Electric Law*, § 445.

Plaintiff maintains that, if damage is caused by the defendant's negligence and some other cause for which he is not responsible, including "the act of God," or superior human force directly intervening, the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage. Also, where the negligence of a defendant contributes so directly to the plaintiff's damage that it is reasonably certain that the other cause alone would not have been sufficient to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force, which, concurring with his own negligence, produced the damage; that, negligence of a defendant resulting in damage to the plaintiff having been shown to exist prior to the existence of a storm, the burden is upon it to show that the damage would have occurred even had there been no negligence on its part; that, to escape liability under a plea of *vis major*, the defendant must show that it is free from contributory fault. In support of this position the court is referred to *Shearn & Redf. Neg.* 5th ed. § 39, and cases there cited; *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699; *Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist.* 96 Pa. 65, 42 Am. Rep. 529; *Delisle v. Bourriague*, 105 La. 77, 54 L. R. A. 420, 29 So. 731.

Granting, in the case at bar, that the storm which occurred on December 1, 1902, at Lake Charles, was of such unusual severity as to have caused most unexpectedly the falling of one of the wires of the telephone company, what would have been the effect of the storm, and the result of such falling, under existing circumstances, had defendant's wires been insulated? The testimony adduced goes to show that the telephone wire would have lain in contact with defendant's wire perfectly harmless, and the plaintiff's intestate would have been alive to-day, but that the telephone wire falling upon defendant's uninsulated wire burned it almost immediately in two, and instantly killed plaintiff's husband.

We cannot give, under the existing conditions, to the storm referred to, the defensive

force which defendant attaches to it. We think that notwithstanding the storm, and notwithstanding the falling of the telephone wire, Hebert would not have been killed had not at the moment of his death the telephone wire come in contact with a live wire of the defendant company which had been negligently left by it for some time before without proper insulation; and therefore the defendant company must bear the consequence of not only its negligence, but of its fault. The case was tried by a jury of the vicinage. Their verdict was sustained by the district judge. The jury, the judge, and the attorneys all viewed the place at which the accident occurred, and were in position to apply the evidence to the situation much better than this court could. We would not be justified in setting the verdict aside unless we were satisfied it was clearly wrong; and that we are not.

Defendant urges upon us that the amount of the verdict is too large, and it presents to us for our consideration the fact that the corporation has paid no dividend, and is heavily in debt. The extent of its indebtedness is not disclosed, but the value of its property is shown to exceed \$125,000.

The plaintiffs are entitled to be paid from that property, to the extent that they have a legal claim, as fully as any other creditor, and they should not be postponed on account of others. So far as the want of means may have been advanced in extenuation of the failure of the defendant to have placed and kept its wires in legal condition, the position is not well founded. A corporation undertaking to carry on a business as dangerous as that in which the defendant is engaged must be prepared to meet the legal requirements of the situation from the beginning. It cannot be permitted to work its way forward to a safe condition, and in the meantime subject the public to danger to life and limb. The state does not guarantee the stockholders of a corporation that their investment shall be a paying one, nor does it protect a corporation from being forced, either by direct authority of the state, or indirectly through the execution of judgments of courts, to place the property in the condition which safety and the rights of the public demand, even though the effect of so

doing will be to cause loss to the parties in interest. It is entitled to exact justice, with discrimination neither for nor against it.

The deceased was about twenty-one years of age. He had been married about eighteen months. He left a widow, who, so far as the record shows, is without means of support. She has one child, issue of the marriage, born after the father's death. The deceased was a man of small means, gaining his livelihood partly by farming upon a small tract of rented land, partly as a laborer in the field. His earnings are shown not to have exceeded \$40 per month. He was a man in good health, sober and industrious. His expectancy of life under the mortality tables was forty years. In addition to want of actual support for the future for herself and child, she has lost the companionship and affection of her husband. The elements which go to fix the *quantum* of damages in such a case are difficult of ascertainment, but it is none the less the duty of the court to fix the amount as best it may in the exercise of a sound discretion. The mortality tables are simply an assistance to the court by way of estimate or approximation. They have no absolute probative force. They may properly be referred to by insurance companies in making their contracts, but judgments of court cannot be based absolutely upon them. The earning power of the deceased would have had to be exercised throughout a long number of years, and under numberless contingencies. We think, in consideration of all the facts of this case, that the verdict of the jury was for too large an amount. It should be reduced to the sum of \$3,000 in favor of the plaintiff individually and \$3,000 in her capacity as tutrix.

For the reasons herein assigned the amount of damages awarded by the jury is hereby reduced to \$6,000. The judgment of the court rendered on the verdict is correspondingly reduced to \$6,000 as above stated. *As so reduced and amended, the judgment appealed from is affirmed*, at the costs of the plaintiff and appellee.

Petition for rehearing overruled January 18, 1904.

MARYLAND COURT OF APPEALS.

BALTIMORE UNIVERSITY of Baltimore
City, *Appt.*,

v.

George S. COLTON.

(.....Md.....)

1. A law school cannot dismiss a student, or refuse to permit him to graduate, for irregularity in attendance, where its custom, as understood at the time of his matriculation, was that all that was necessary for graduation was payment of the required fees and completion of the work, to accomplish which the student might take such time as was needed.
2. Mandamus will lie to compel the reinstatement of a student wrongfully expelled from a law school without notice.
3. An action for breach of contract is not an adequate remedy for the wrongful expulsion of a student from a law school, thereby depriving him of the opportunity of obtaining a diploma and degree to which, under his contract, he is entitled.
4. The existence of an equitable remedy will not defeat a right to a writ of mandamus.

(February 19, 1904.)

A PPEAL by defendant from an order of the Baltimore City Court awarding a writ of mandamus to compel the reinstatement of petitioner as a student in the defendant University. *Affirmed.*

The facts are stated in the opinion.

Messrs. George A. Solter and Albert S. J. Owens for appellant.

Mr. S. Gross Horwitz, for appellee:

When there is a uniform and well-established usage, it shapes the contract of the parties, and it serves as a guide to its true meaning and understanding.

Lyon v. George, 44 Md. 300.

A usage, or habit of trade, of an individual or a corporation, known to a third party, is of binding force and effect, in all contracts between them.

Merriam v. Hartford & N. H. R. Co. 20 Conn. 354, 52 Am. Dec. 344; *Loring v. Gurney*, 5 Pick. 15; *Norris v. Fowler*, 87 N. C. 9; *Knapp v. United States & C. Exp. Co.* 55 N. H. 348; *Fowler v. Brantly*, 14 Pet. 318, 10 L. ed. 473; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166; *Bank of Columbia v. Magruder*, 6 Harr. & J. 180, 14 Am. Dec. 271; *Montgomery & E.*

R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; 2 Greenl. Ev. § 251; *Corbett v. Underwood*, 83 Ill. 324, 25 Am. Rep. 392; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 81, 9 Am. Rep. 439.

It would be quite competent for the university to agree that, in consideration of \$100, instruction should be delivered to the petitioner for the entire residue of his life. The court will never concern itself with the adequacy of the consideration for a contract.

Foster v. Ulman, 64 Md. 526, 3 Atl. 113; *Citizens' Trust & Deposit Co. v. Tompkins*, 97 Md. 182, 54 Atl. 619.

Had the university engaged to allow the petitioner both to attend classes until he should be able to graduate, and also to postpone payment of the tuition fees until he had passed in all branches, there would be no such indefiniteness or want of mutuality as to avoid the contract.

Pistel v. Imperial Mut. L. Ins. Co. 88 Md. 552, 43 L. R. A. 219, 42 Atl. 210; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Bagby v. Walker*, 78 Md. 247, 27 Atl. 1033.

The contract in this case does not fall within that class of contracts in which non-payment of an instalment of money by one party entitles the other party to declare the contract rescinded.

Curtis v. Gibney, 59 Md. 131; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent.

Ritchie v. Atkinson, 10 East, 306; *Fothergill v. Walton*, 8 Taunt. 582; *Carpenter v. Cresswell*, 4 Bing. 411; *Davidson v. Gwynne*, 12 East, 389.

In this contract the covenant to pay in instalments is an independent covenant, a breach of which affords, not the right to rescind, but only the right to sue.

Franklin v. Miller, 4 Ad. & El. 605.

Failing to rescind during the nineteen months in which the money was to be paid,

NOTE.—For a case in this series holding that mandamus will lie to reinstate a pupil in school if the action of the officers by whom a pupil was refused continuance in the school was arbitrary or capricious, see *Jackson v. State*, 42 L. R. A. 792.

As to right of court to review question of guilt 64 L. R. A.

or innocence of pupil expelled from public schools, see *Board of Education v. Booth*, 53 L. R. A. 787.

As to right to exclude, suspend, or expel pupils generally, see *note* to *Board of Education v. Purse*, 41 L. R. A. 593.

the university obviously elected to hold the petitioner to the contract, and could not rescind afterwards.

Powell v. Bradlee, 9 Gill & J. 220.

Matriculation, or admission to membership in a university, confers certain franchises. It entitles the student to contract for such lectures as he may desire to attend. He is not obliged to attend in any mode other than may be agreeable to his own pleasure. He may remain forever at the university if he desires, and he may attend only such lectures as he pleases. The interpretation of the word "matriculate" is for the court.

Uphur v. Baltimore, 94 Md. 748, 51 Atl. 953.

No expulsion can be decreed until after charges are preferred and an opportunity given to the member to defend.

Denver Chamber of Commerce v. Green, 8 Colo. App. 424, 47 Pac. 140; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141.

Mandamus is the true remedy.

Rea v. Askew, 4 Burr. 2186; *Conner v. Groh*, 90 Md. 684, 45 Atl. 1024; *Hardcastle v. Maryland & D. R. Co.* 32 Md. 35.

Having in four years passed in all subjects, two only excepted, petitioner is entitled to his diploma upon passing in the two subjects remaining; and mandamus is the proper remedy.

People ex rel. Cecil v. Bellevue Hospital Medical College, 60 Hun, 107, 14 N. Y. Supp. 490, Affirmed in 128 N. Y. 621, 28 N. E. 253; *Jackson v. State*, 57 Neb. 183, 42 L. R. A. 792, 77 N. W. 662; *Com. ex rel. Hill v. McCauley*, 3 Pa. Co. Ct. 77; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 251; *King v. University of Cambridge*, 1 Strange, 557; *Com. v. Pennsylvania Beneficial Inst.* 2 Serg. & R. 141; *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248; *Hardcastle v. M. & D. R. Co.* 32 Md. 35; *People ex rel. Gray v. Medical Soc.* 24 Barb. 570; *Ang. & A. Priv. Corp.* § 420; *Clarke v. Bishop*, 2 Strange, 1082; *Weber v. Zimmerman*, 23 Md. 45.

Fowler, J., delivered the opinion of the court:

George S. Colton was a student at the law school of the Baltimore University. The faculty notified him at the close of the session of 1900-1901 that they would not permit him to take the final examinations, and refused to consider him as a candidate for graduation, whereupon he filed in the Baltimore city court a petition for mandamus against the Baltimore University. The petition alleges that the defendant university duly organized and established the

law school, and that the rules adopted for the government and regulation of said school provided that no preliminary examination should be required for matriculation; that students should be admitted without distinction of sex; that the matriculation fee should be \$5; that the course of study should be divided into branches, junior and senior; that a diploma fee of \$20 should be payable on graduation, and that the degree of Bachelor of Laws should be conferred on those students who should pass the intermediate and final examinations, submit the usual theses, and pay the said fees and all tuition fees; that the school was intended to offer special inducements to young men who should desire to occupy themselves in business during the day, and therefore lectures were given wholly during the evening hours; that in the year 1896 the petitioner was a young man, entirely without means, obliged to support himself and assist in the support of his sister by his daily exertions; that, having aspirations for the bar, he resolved to enter the said law school of said university, and to pursue his studies as diligently as the discharge of his other duties might permit; that he did enter said school, was duly matriculated, and attended lectures; that the nominal duration of the course of instruction was two years, but that out of regard to the tax on the time of students busily engaged during the day there was the privilege of attending classes during such length of time as might be required by them to pass in all branches; that the only cash payment was the matriculation fee, and that a uniform usage of the university entitled students to postpone payment of the other charges until graduation; that Howard Bryant, the secretary and treasurer of the said school, notified the petitioner that the entire tuition charge would be \$100, which he might pay at any time before graduation; that the sum of \$47 on account of tuition fees had been paid by him on the faith of said representations, and that the same had been accepted by said school, the last of said payments being on the 3d of June, 1899; that the petitioner had attended the lectures, and had, down to the year 1900—a period of four years—passed in all subjects there taught except two; that during the session of 1900-1901 a complete change took place in the faculty, but that he continued to attend lectures under the new faculty until May, 1901, when, as we have seen, he was informed he would be no longer recognized as a student, and would not be allowed to graduate; that he made application to the faculty to reinstate him, and offered to pay any sum they might

think due by him, but, although no charges had been made against him, his application was refused on the ground that he had not attended lectures, and the faculty did not know him. The defendant answered this petition, admitting that no charges had ever been made against the petitioner; that he had always borne himself courteously and becomingly as a student; that he had offered to pay all sums which might be due by him; that he had been denied the privileges of the law school because he was not known to the faculty, had attended few of their lectures, and had not been regarded by them as a student. The answer denies the existence of the general usage set up in the petition, but admits that it is true that the payment of the tuition fee is sometimes deferred at the request of deserving impecunious students, in the discretion of the faculty, and denies that this privilege was ever afforded to the petitioner. The answer further alleges that the petitioner entered the law school five years ago, and failed to pass the examination; that it was never contemplated by the university that students should pursue their studies piecemeal, and extending over such a long period; that the petitioner abandoned the course of study for several years, and, having failed to pass examinations, and not having paid the tuition due, the writ should not issue. Issue was duly joined, and the case was tried before a jury. After all the evidence was in on both sides, the defendant submitted a prayer asking the court to withdraw the case from the jury. This prayer was refused, and the prayer of the plaintiff was granted. The judgment was against the defendant, and the writ was ordered to issue as prayed. The defendant has appealed.

The defendant excepted to the refusal of its prayer asking the court to withdraw the case from the jury, and it excepted generally and specially to the granting of the plaintiff's prayer, and finally excepted to the overruling of its motion *non obstante veredicto* not to direct the issuing of the writ. But all these exceptions present substantially the same questions. We will therefore consider the first exception in order, and in doing so we will be compelled to examine all the testimony offered by the plaintiff to ascertain if it is legally sufficient to entitle him to recover. The first witness on the part of the plaintiff was Mr. Howard Bryant, who testified that he was one of the professors of the law school, and its general agent for the purpose of transacting business with the law students and applicants to become such. He was also a director and secretary and treasurer. The plaintiff was matriculated in 1896, and

his name appears in the catalogue of the university. The school was for needy young men. If the students did not have the money, and wanted indulgence, that indulgence was given. Student would not be turned away if he failed to graduate in two years, and had the right to remain until he succeeded in passing. Tuition fees were \$100, \$5 for matriculation, and \$20 for diploma. At one time students were allowed, if they could pass all examinations, and had paid all fees, to graduate in one year; but later students were required to attend two years at least. Fees were not increased if the student remained longer than two years. That he, as treasurer, received from the plaintiff in June, 1899, two payments, amounting to \$37, on account of tuition. That the old faculty, of which he was a member, resigned in 1900, and the same year the new faculty was appointed; and that, if the plaintiff had passed his examination, and paid the balance of the fees, and was otherwise qualified, we would have graduated him. On cross-examination he said that, if a student matriculated for three years, and did not pass during the three years, he could go on for another year, or possibly two years. "How long he could go on I do not know. There was no rule, but it was understood by the faculty, and the students understood it, I think." The petitioner testified that he matriculated in October, 1896; at that time he was working for the Baltimore Bargain House; that he had nothing except what he worked for; supported himself and afflicted sister; that, wishing to become a lawyer, he called on Mr. Bryant, the agent, etc., of the law school; was informed by him it would cost \$125; told him he did not have the money, and he said that was not necessary, just so the money was paid before graduation, and "it made no difference whether I graduated in one, two, or three years, or whenever I graduated; attended lectures up to 1900; had then passed eighteen subjects out of twenty, and had paid \$47 on tuition and \$5 matriculation fee; then there was trouble and the faculty resigned, and having paid \$47, and gone so far through the school, I called on Dr. Biedler, secretary of the university; told him what examinations I had passed, and how much I had paid; he said that was all right, just to remain with the school, and that he would give me credit for my marks and what I had paid, and told me to tell the other students what he had told me, and not to let any of them go to any other school, if possible; gave me a paper that new professors would be appointed; when new professors were appointed and the school opened, went down

and started in; received notice from one of the professors, which gave me access to bar library;" attended lectures on subjects on which he was deficient, and also a number of other lectures; at the end of the term was about to take his examination, when one of the professors refused to recognize him, and then, on the 18th May, 1901, received the note from the secretary of the law school informing him that he was not a student of the school; that the usage with reference to duration of the course of studies was that, if you were able to do so, you could graduate in one year, or you could take as long as you wanted; the usage in regard to payment of tuition charges was that they had to be paid before you graduated; that a letter from Mr. Clendinen (which was read) was addressed to the plaintiff to the effect that the former students of the university who continued to prosecute their studies with the then present faculty will be allowed credit for all the marks theretofore awarded, and also credit for all money paid by them to the former faculty. There are several other witnesses who testified as to the usage to allow students to remain until they had graduated. Mr. Fluegel testified that in his class, he being a graduate of the law school, there were some who remained four and four and a half years, and that the usage with reference to the payment of the fees was that the matriculation had to be paid at once, but that the remaining fees could be paid at any time before graduation, because the students were supposed to be men of little means, working in the daytime and studying at night.

During the examination of the plaintiff the defendant produced one of its books containing an agreement signed by the plaintiff, agreeing to become a member of the University Law School for the session 189-, and promising to pay as tuition the sum of \$100 and \$5 for matriculation. This entry also shows that the plaintiff, at the time he entered, paid the matriculation fee and \$5 on account of tuition. The balance of tuition was to be paid at the rate of \$5 per month, and all payable before graduation. That is all. There is nothing in reference to the duties to be performed by the school. What it actually did we learn from the testimony,—namely, that the usage was not to exact the payments as prescribed.

If the foregoing testimony be true,—and for the purposes of the question we are considering, namely, its legal sufficiency, that is conceded,—there can be no doubt we think, that the plaintiff was entitled to a verdict. It shows that he became a duly matriculated member of the university; that, although there was an agreement on

his part to pay the balance of his tuition (\$95) in monthly instalments, yet, not only in his case this agreement was waived, but a general usage was established permitting any students to pay at the time of graduation. Not only so, but while it appears that a term consisted of two sessions of nine months each, yet, if a student did not or could not graduate in that time, a general usage was established extending the term three, four, four and a half years, and even longer. The plaintiff testified that one of the faculty said this term might continue ten years, and we find no contradiction of this testimony, although there was ample opportunity to do so; but, whether contradicted or not, its truth is conceded. It was conceded also, by the defendant that it dismissed the plaintiff without making any charges, and without giving him a chance to make any explanation, because he had not been regarded by them as a student, had attended few of the lectures, and was not known to the faculty. The evidence of the plaintiff, however, which is conceded to be true, is that he not only attended all the lectures it was possible for him to attend, but that one of the new professors gave him a card recognizing him as a member of the school, and that he had paid and the defendant had received his money, that no further sum had ever been demanded, but that he had offered to pay any sum the defendant might think he owed. There is nothing, even if we include the testimony of the defendant, to show that irregularity in attending lectures was a cause for expulsion or dismissal. Indeed, the school seems to have been regulated for the convenience of impecunious but ambitious young men who had to work elsewhere during the day, and often at night. And for this reason the usage was established allowing the term to extend three, four, and four and a half, and more years, instead of two years, as originally fixed. It follows, therefore, we think, that the plaintiff was wrongfully dismissed.

Under such circumstances, has he a right to mandamus to be restored to the rights and privileges of membership of the law school, to which, it must be conceded, he was once entitled, and of which he has, it is conceded, been deprived without notice? Of course, if one voluntarily becomes a member of an incorporated society or association whose by-laws provide for expulsion for specified causes, the right of amotion is clearly established in the corporate body and may be duly exercised in the manner and for the purposes prescribed. High, Extr. Legal Rem. 3d ed. § 292. But here there is not only an expulsion without notice, but it does not appear that the de-

defendant corporation has ever enacted any by-laws on the subject, or that, if any, they were complied with. Want of notice has always been regarded as sufficient ground for invoking the aid of mandamus in cases of membership in corporations organized for the purpose of business or profit. High, Extr. Legal Rem. § 295. And now it is generally held that the same rule also applies to the restoration to membership in a private corporation when no pecuniary interests are involved (Merrill, Mandamus, §§ 158-167), so that, whether the law school or university be regarded as organized for profit or not, in either case mandamus is the proper remedy. But, in addition to this, it is clear the plaintiff has no other adequate remedy at law. He asks and seeks not damages, but a restoration to his right to attend the school, listen to the lectures, and, finally, to pass the required examinations, and thus obtain a diploma, with the degree of Doctor of Laws. An action for breach of contract cannot, therefore, be considered an adequate remedy. Nor can he have, as suggested, a bill for specific performance, so long as he has an adequate remedy at law, to wit, the writ of mandamus. It is not, however, a sufficient answer that the plaintiff might have redress in a court of equity. *Hardcastle v. Maryland & D. R. Co.* 32 Md. 35.

From what we have said it follows that the plaintiff's prayer was properly granted, for it merely instructs the jury that, if they believe the testimony, which we have rehearsed in the former part of this opinion, the plaintiff is entitled to a verdict; and, as we have already said, mandamus is the proper remedy.

The motion *non obstante* rests upon the same grounds the defendant relied on to support its demurrer to the evidence, and these we have already considered.

Order affirmed, with costs to the appellee.

Harry P. DALE, Admr., etc., of Peter W. Dale, Deceased, *Appt.*,
v.

Huldah Jane BRUMBLY.

(.....Md.....)

1. A fund which has, under the order of the court, been deposited with the clerk does not become subject to attachment by the determination of the one who is enti-

NOTE.—As to garnishment of property in custody of law, see, in this series, *Dunsmoor v. Furstenfeldt*, 12 L. R. A. 508, and *note*; *Re parte Hurn*, 13 L. R. A. 120; *Holker v. Hennessey*, 39 L. R. A. 105; and *Allen v. Gerard*, 49 L. R. A. 351.
64 L. R. A.

pled to receive it, and an order of the court that it be paid to him.

2. A clerk of court is a public officer, within the rule that money is not subject to attachment in the hands of such officers.

(January 15, 1904.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Wicomico County dissolving an attachment which had been laid upon the funds in the hands of the clerk of court to satisfy a claim against defendant. *Affirmed*.

The facts are stated in the opinion.

Mr. James E. Ellegood for appellant.

Messrs. N. T. Fitch and E. P. Graham, for appellee:

The fund being in the hands of the clerk of the court as such, it is contrary to public policy to permit his being (in the character of garnishee) subjected to annoyances and responsibilities inconsistent with his duties as a public officer.

Wilson v. Ridgely, 46 Md. 235; *Baltimore v. Root*, 8 Md. 100, 63 Am. Dec. 692.

While the fund was in the hands of the clerk as a public officer, it was nevertheless "money paid into court," and in *custodia legis*, and not liable to attachment.

Mattingly v. Grimes, 48 Md. 105; 3 Am. & Eng. Enc. Law, p. 212.

In any event, the fund in question, being the proceeds of the endowment certificate to which the appellee is entitled as beneficiary, is exempt from attachment by virtue of the provisions of § 143, act 1894, chap. 295.

Dale v. Brumbly, 96 Md. 674, 54 Atl. 655.

Jones, J., delivered the opinion of the court:

In this case it appears that the appellee is the widow of William Brumbly, and, as such widow, became entitled to a share in the proceeds of an insurance upon the life of the said William Brumbly in the Improved Order of Heptasophs. This insurance money was, in the course of equity proceedings affecting its distribution, in the circuit court for Wicomico county, by an order of that court, deposited with the clerk thereof. The appellant held a judgment against the said William Brumbly and the appellee to the amount of \$878.30, with interest from July 3, 1894, and costs. In the progress of these equity proceedings in which the order of the court was passed for the deposit of the money above referred to, an auditor's account was stated, in which there was distributed to the appellee the sum of \$922.88.

This auditor's account was ratified by the circuit court for Wicomico county on the 10th day of April, 1903; and on the following day, April 11, 1903, the appellant had issued upon the judgment held by him

against the appellee and her deceased husband an attachment, and procured the same to be laid in the hands of the clerk of the court, James T. Truitt, to bind the sum of \$922.88 awarded by the auditor's account to the appellee. The order of court ratifying the auditor's account was in these words: "The above audit and distribution is hereby ratified and confirmed, and the clerk of this court is directed to pay over the fund accordingly, dated April 10, 1903," and was duly signed by the judge. Upon motion of the appellee, through her counsel, and after answer to the said motion by the appellant, and hearing upon an agreed statement of facts, in substance the same as those herein set out, the court below, on the 6th of July, 1903, quashed the attachment issued against the appellee, and gave judgment for her for costs. From such judgment this appeal was taken.

Upon behalf of the appellee it is claimed that, at the time of the attachment laid, the money attached was in *custodia legis*, and exempt from attachment. It is not disputed, as we understand, that money paid into court, as the funds in this case were, pending the adjudication of questions made as to who were entitled to be paid the same, cannot be attached. This was enunciated as the law in the case of *Farmers' Bank v. Beaton*, 7 Gill & J. 421, 28 Am. Dec. 226 (see p. 428, 7 Gill & J., 28 Am. Dec. 230), and we conceive that to be settled. It is contended on the part of the appellant that this principle or rule of practice does not apply in the circumstances of this case, because, after the rights of the parties had been adjudicated as respected the fund in court, the shares of the several parties in interest ascertained and fixed, the auditor's account by which this was made to appear ratified, and the clerk had been directed to pay out the money accordingly, the share of any distributee of the fund is liable to attachment as if the funds were in the hands of a trustee in equity under a like state of facts. In the case of *Mattingly v. Grimes*, 48 Md. 102, where real estate was sold by a trustee under the decree passed in the cause, and an auditor's account distributing the funds had been stated and ratified, and an attachment was laid in the hands of the trustee to affect the share of one of the distributees in the fund, it was held expressly that the funds were not liable to the process of attachment, because they had, prior to the attachment, been paid into court under an order to that effect. It then comes back to this: Where was the custody of the fund in controversy here when the attachment in this case was laid? To this there would seem to be but one answer. The custody was certainly with the court up to the time

of its direction to the clerk to pay it out. Such direction to the clerk did not, and was not meant to, change the custody of the fund. Any particular part of the fund that the clerk was to pay out was not separated from the whole fund until it was actually being paid over. Until then it was not distinguishable from the whole fund, as respected the custody. The direction to the clerk to pay out the fund did not put it into his possession and control further than it had been prior to such direction. He was to pay it out from the custody in which it was. In other words, he was merely, figuratively speaking, the hand of the court. He may be likened to the official of a bank, who, upon the authorization, either general or special, of the bank, pays out money to a customer who presents a check indicating the amount to be paid. The money is paid from the custody of the bank, and the custody is with the bank until the money paid out is actually segregated from the general funds therein and paid over. The funds to be distributed in a case like this are not held and distributed as are those in the hands of a trustee for a like purpose, and which are paid out under the authority of a decree or decretal order which the court itself cannot change except in some recognized mode of legal procedure. We cannot doubt the authority of the court in such a case as this to recall, if it sees fit, any authorization given to the clerk to pay out the money, and direct the payment in some other mode or by some other agent, or, in case of the temporary disability of the clerk by sickness, or his temporary absence, if it best served the convenience of parties in interest, to recall the direction to the clerk to pay, and direct another mode of payment. We must hold that at the time of the laying of the attachment in this case the money attached was in court, and not liable, therefore, to the process. But more than this, the clerk was a public officer; and while the duty he was in this case performing in respect to the funds in question is not specifically defined in the law as one of his official duties, yet it was by reason of his relations to the court as a public officer that the duty was imposed upon and assumed by him. The case is therefore clearly within the reason of the law which exempts funds in the hands of public officers—if we assume that here the funds in question were in the hands of the clerk—from the process of attachment. In the case of *Wilson v. Ridgely*, 46 Md. 235, it was held that an attachment laid in the hands of the treasurer of Prince George's county was properly quashed on the ground of his being a public officer, if it were shown that the funds attached were held by him as treasurer. The

law creating the office of treasurer for that county provided (Pub. Local Laws, art. 16, § 49, as enacted by Acts 1872, chap. 294, p. 481), that, upon a sale of property being made by the treasurer to enforce the payment of taxes, he should, out of the proceeds of sale, pay the amount of taxes due, etc., "and to pay surplus, if any, to the owner thereof." The attachment in the case was laid in the hands of the treasurer to affect the surplus of the proceeds of sale of certain real estate sold by him for the payment of state and county taxes. The court there adopted the reasons for exempting public officers from the process of attachment given by Mr. Justice Sergeant in the case of *Bulkley v. Eckert*, 3 Pa. St. 368, 45 Am. Dec. 650, as follows: That "great public inconvenience would ensue if money could be thus arrested in the hands of officers, and they be made liable to all the delay, embarrassment, and trouble that would ensue from being stopped in the routine of their business,—compelled to appear in court, employ counsel, and answer interrogatories, as well as take care that the proceedings are regularly carried on. . . . If a precedent of this kind were set, there seems no reason why

the state or county treasurer, or other fiscal officers of the commonwealth or of municipal bodies, may not be subjected to the levying of attachments, which has never been attempted, nor supposed to come within the attachment law." This reasoning most clearly applies to the position of the clerk of the court in a case like this. It must be conceded that counsel for appellant has produced authorities which are not in harmony with the foregoing views. See *Dunlop v. Patterson F. Ins. Co.* 74 N. Y. 145, 30 Am. Rep. 283; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 12 L. R. A. 508, 22 Am. St. Rep. 331, 28 Pac. 518. To follow these, however, would place us in conflict with the governing principle of the decisions of our own court to which reference has been made.

It will be unnecessary to discuss other questions suggested in the argument and the briefs of counsel, since what has been said disposes of the appeal in this case. In addition to this, the facts appearing in the record are not sufficient to clearly or distinctly present such questions.

The judgment of the court below will be affirmed. *Judgment affirmed, with costs to the appellee.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Louis DELORY

v.

Warren K. BLODGETT *et al.*

(185 Mass. 126.)

1. An expert machinist employed by a machine company and sent to make repairs upon plants of other persons at their request as his services may be needed, and who is, while so employed, subject to the direction of the one seeking his services as to what shall be done, although in his method of work he acts upon his own judgment, is, during the time so employed, the servant of the latter and the fellow servant of his employees, although he receives his wages from his own employer, who collects the pay for his time from those seeking his services.
2. A master is not shown to be negligent in employing an engineer by evidence that he had been known to drink intoxicating liquor, where there is nothing to show that the master knew it, or that he had ever been intoxicated.

(February 25, 1904.)

NOTE.—As to which of two or more persons is the master of another who is conceded to be the servant of one of them, see also *note to Hardy v. Shedden Co.* 37 L. R. A. 33, and the later case in this series of *Brady v. Chicago & G. W. R. Co.* 57 L. R. A. 712.
64 L. R. A.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County, made during the trial of an action brought to recover damages for personal injuries for which defendants were alleged to be responsible, which resulted in a verdict in favor of defendants. *Overruled.*

The facts are stated in the opinion.

Messrs. Walter A. Buie and William J. Miller, for plaintiff:

The plaintiff and the defendants' employees were not engaged in working together to a common end. Plaintiff was subject to the general direction and control of the American Tool & Machine Company and he was not, as to the manner of doing the work, under the direction of the defendants, or their agents or servants.

Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; *Mills v. Thomas Elevator Co.* 54 App. Div. 124, 66 N. Y. Supp. 398, Affirmed in 172 N. Y. 660, 65 N. E. 1119; *Hoadley v. International Paper Co.* 72 Vt. 79, 47 Atl. 169; *Murray v. Dwight*, 161 N. Y. 301, 48 L. R. A. 673, 55 N. E. 901; *Brennan v. Berlin Iron Bridge Co.* 74 Conn. 382, 50 Atl. 1030; *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676; *Sherman v. Delaware & H. Canal Co.* 71 Vt. 325, 45 Atl. 227.

Two persons having different masters, though engaged in a common employment, are not fellow servants; and, if one is injured through the negligence of the other, the injured person is not precluded from recovering for his injury from the master whose servant caused the harm, merely because both servants were engaged upon the same work or enterprise.

Burrill v. Eddy, 160 Mass. 198, 35 N. E. 483; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Kelly v. Johnson*, 128 Mass. 530, 35 Am. Rep. 398; *Johnson v. Lindsay* [1891] A. C. 371; *Cameron v. Nystrom* [1893] A. C. 308; *Louisville, N. O. & T. R. Co. v. Conroy*, 63 Miss. 562, 56 Am. Rep. 835; *Svenson v. Atlantic Mail S. S. Co.* 1 Jones & S. 277; *Eckman v. Lauer*, 67 Minn. 221, 69 N. W. 893; *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025; *Melvin v. Pennsylvania Steel Co.* 180 Mass. 196, 62 N. E. 379; *Welch v. Maine C. R. Co.* 86 Me. 552, 25 L. R. A. 658, 30 Atl. 116.

Only those persons who are engaged in the same common pursuit under the same general control, and receive compensation from the same source, are fellow servants.

Kelly v. Johnson, 128 Mass. 530, 35 Am. Rep. 398; *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635.

The mere act of the defendants' superintendent in calling the plaintiff up into the sheave house and requesting him to adjust the wire rope so that it would run true in the groove of the sheave, while the superintendent stood by and looked at the plaintiff doing the work, was not such an exercise of control over the plaintiff as would make him the fellow servant of the defendants' servants (the superintendent and engineer).

Morgan v. Smith, 159 Mass. 570, 35 N. E. 101.

Samuelian v. American Tool & Mach. Co. 168 Mass. 12, 46 N. E. 98, is inconsistent with other decided cases in this commonwealth, and is against the current of decisions in other jurisdictions.

Louisville, N. O. & T. R. Co. v. Conroy, 63 Miss. 562, 56 Am. Rep. 835; *Pollock, Torts*, 6th Eng. ed. 100, 101; *Johnson v. Lindsay* [1891] A. C. 371; *Cameron v. Nystrom* [1893] A. C. 308; *Ward v. New England Fibre Co.* 154 Mass. 419, 28 N. E. 299.

It is the duty of the master to select fit and competent persons for his service, just as it is his duty to provide reasonably safe machinery; and neither duty can be so delegated as to relieve the master from liability for a failure of a subordinate to exercise proper care in its discharge.

Gilman v. Eastern R. Corp. 10 Allen, 233, 87 Am. Dec. 635, 13 Allen, 443, 90 Am. Dec. 210; *Baltimore & O. R. Co. v. Henthorne*, 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 64 L. R. A.

634; *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. Rep. 228, 23 N. E. 228; *Hills v. Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 878; *Western Stone Co. v. Whalen*, 151 Ill. 472, 42 Am. St. Rep. 244, 38 N. E. 241; *Carson v. Canning*, 180 Mass. 461, 62 N. E. 964.

Messrs. Carver & Blodgett and F. H. Smith, Jr., for defendants:

There was no evidence that the engineer was incompetent, or that the defendants were negligent.

Gilman v. Eastern R. Co. 13 Allen, 433, 90 Am. Dec. 210; *McDermott v. Boston*, 133 Mass. 349; *Tarrant v. Webb*, 18 C. B. 797; *Buckley v. Gould & C. Silver Min. Co.* 8 Sawy. 394, 14 Fed. 833; *Spring Valley Coal Co. v. Patting*, 30 C. C. A. 168, 58 U. S. App. 575, 86 Fed. 433; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 97 Fed. 245; *Gilmore v. Mittineague Paper Co.* 169 Mass. 471, 48 N. E. 623; *McPhee v. Souilly*, 163 Mass. 216, 39 N. E. 1007; *Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92; *Hodges v. Scott*, 118 Mass. 530; *Hopkins v. Damon*, 138 Mass. 65.

Whether a servant, in performing or in not performing a certain duty, resulting in injury to a coworker, is thereby acting as a fellow servant merely, or as a representative of the master, is a question of law, and not of fact.

Johnson v. Boston Tow Boat Co. 135 Mass. 209, 46 Am. Rep. 458; *McGinty v. Athol Reservoir Co.* 155 Mass. 183, 29 N. E. 510.

All servants employed by the same master in a common service are fellow servants, whatever may be their grade or rank.

Rogers v. Ludlow Mfg. Co. 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; *Barstow v. Old Colony R. Co.* 143 Mass. 535, 10 N. E. 255; *Mellor v. Merchants' Mfg. Co.* 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100.

A general servant of one master may become the servant of another for some special service.

Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; *Coughlan v. Cambridge*, 106 Mass. 268, 44 N. E. 218; *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; *Samuelian v. American Tool & Mach. Co.* 168 Mass. 12, 46 N. E. 98.

Knewlton, Ch. J., delivered the opinion of the court:

The plaintiff, while repairing machinery in the defendants' shop, was injured through the negligence of one Whippen, the defendants' engineer, in starting the machinery. The plaintiff rests his claim for damages on two propositions: First, that he was not a servant of the defendants, and therefore that Whippen was not his fellow servant;

and, secondly, that, if Whippen was his fellow servant, the defendants were negligent in employing him, because he was an unfit person to be intrusted with the management of an engine.

The plaintiff's relations to the defendants appear from his testimony, as follows: He said he was a millwright and carpenter in the general employment of the American Tool & Machine Company as a jobber; that jobbers were sent to do any kind of work, and were supposed to go wherever they were sent, and work until the work was done; that he and another man were directed by telephone to go to the defendants' place; that he had been there two or three times before; "that what he was sent to do, first, was to tighten up the pulley;" that afterwards, while he was in the engine room washing his hands, the defendants' superintendent, Alden, came down and said to him, "Hurry upstairs; there is something wrong with the belt;" that he went upstairs with the superintendent, and started to work and adjusted the tightener; that when he got through that the superintendent said to him, "Come over and see if the wire is leading in the center of the sheave;" that when he first came upstairs it was at the request of Mr. Alden, the superintendent; that when he went up to go to work on the tightener Mr. Alden went with him; that after he got through with the tightener he asked Mr. Alden if there was anything else to do, and that Mr. Alden called his attention to the rope that ran over the sheave. The plaintiff's undisputed evidence shows that he was an expert workman lent to the defendants by his general employer to make repairs upon their machinery. It appears that the American Tool & Machinery Company was accustomed to render bills to the defendants for labor and materials furnished, the labor being charged and paid for at a price per hour.

The law in regard to persons working in this way has often been considered by this court. In *Hasty v. Sears*, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759, Mr. Justice Barker quoted, as a true statement of the principle, this language from Cockburn, Ch. J., in *Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205-209*: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." In *Coughlan v. Cambridge*, 166 Mass. 268-277, 44 N. E. 218, 219, Mr. Justice Merton says: "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direc-

tion and control of his master, or becomes subject to that of the party to whom he is lent or hired." In *Ward v. New England Fibre Co.* 154 Mass. 419, 28 N. E. 299, it was held that on the question whether work was done by the general master of the servant under a contract which gave him the right to control the business as it was going on, and to complete it without any right of interference or control by the person for whom it was being done, the fact that the payment was to be made at the usual prices for labor and materials, instead of by giving a round sum, was not conclusive. The mode of payment in such a case is usually very significant; but it is possible for a proprietor to contract for the performance of certain work on his property in a way which will give the contractor a legal right to furnish the whole work, and to direct all details, without interference by the proprietor, and to receive at the end a price to be determined by the current rates for labor and materials. In such a case, if the proprietor should prevent the performance of the contract by the contractor, he would be liable in damages; and, so long as the work was going on, the workmen would be servants of the contractor, under his direction and control. This fact was also referred to in *Morgan v. Sears*, 159 Mass. 570, 35 N. E. 101, but in each of the cases the true principle was recognized, as stated by Mr. Justice Lathrop in the latter case, as follows: "There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow servant of the servants of the person under whose control he comes, and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." It makes no difference whether the proprietor to whom a servant is lent actually exercises his right of control and direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill for the result. This was decided in *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. As was said in *Samuelson v. American Tool & Mach. Co.* 168 Mass. 12, 46 N. E. 98: "The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their machinery." The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has

done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant. The rule applied when one furnishes for hire or lends to another a team of horses, with a driver, is simply an application of this principle. The circumstances are often such that, while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that, as to the particulars of the management of the horses, he is the servant of his general employer, in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver a right of control. This is the ground of the decisions in *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; and *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922. In the present case the plaintiff's testimony shows that he was not only legally subject to the direction and control of the defendants, but that the control was exercised by the defendants' superintendent by a series of directions. The plaintiff was a servant of the defendants, and a fellow servant of Whippen, the engineer.

There was no evidence that the defendants were negligent in employing an unfit or incompetent servant. There was testimony from two witnesses that at some times Whippen had been known to drink intoxicating liquor, but there was no evidence that he was ever intoxicated or that the defendants had knowledge that he drank intoxicating liquor, much less that he drank to excess. The testimony of other witnesses indicated that he was not in the habit of drinking liquor. The jury would not have been warranted in finding the defendants negligent in employing him.

Exceptions overruled.

Harry W. SMITH, Appt.,
v.

ETNA LIFE INSURANCE COMPANY.
(185 Mass. 74.)

1. Steeple-chase riding by one who gives

his occupation as a cotton merchant is voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy exempting the insurer from liability for injuries resulting from such exposure.

2. Knowledge by the agent of the insurer that the insured occasionally rode in steeple chases does not constitute a waiver of a provision in the policy that the insurer shall not be liable for injuries received through voluntary exposure to unnecessary danger.

(February 25, 1904.)

APPEAL by plaintiff from a judgment of the Supreme Judicial Court for Worcester County in favor of defendant in an action brought to recover upon an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank Bulkeley Smith, T. H. Gage, Jr., and Frank F. Dresser, for appellant:

It was not necessary for the plaintiff to say that he rode horses, any more than that he ate, he slept, or traveled in street cars. The term "occupation" has reference to the vocation, profession, or calling in which the insured is engaged for his profit, and does not preclude him from the performance of acts and duties which are simply incidents connected with the daily life of men in any society.

National Acci. Soc. v. Taylor, 42 Ill. App. 97; *Stone v. United States Casualty Co.* 34 N. J. L. 371; *Fox v. Masons' Fraternal Acci. Assn.* 96 Wis. 390, 71 N. W. 363; *Union Mut. Acci. Assn. v. Frohard*, 134 Ill. 228, 10 L. R. A. 383, 23 Am. St. Rep. 664, 25 N. E. 642; *Kentucky Life & Acci. Ins. Co. v. Franklin*, 102 Ky. 512, 43 S. W. 709; *Travellers' Preferred Acci. Assn. v. Kelsey*, 46 Ill. App. 371; *North American Life & Acci. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Atl. 212; *Tucker v. Mutual Ben. Life Co.* 50 Hun, 50, 4 N. Y. Supp. 505.

A voluntary exposure to unnecessary danger implies a conscious, intentional exposure; something which one is consciously willing to take the risk of.

Keene v. New England Mut. Acci. Assn. 161 Mass. 149, 36 N. E. 891; *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 754; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 22 L. R. A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; *Burkhard v. Travellers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Equitable Acci. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267, 9 So. 869.

NOTE.—For earlier cases in this series as to what constitutes voluntary exposure to unnecessary danger, see *Fidelity & C. Co. v. Chambers*, 40 L. R. A. 482, and *note*; *Willey Casualty Co. v. Sheppard*, 47 L. R. A. 650; 64 L. R. A.

Fidelity & C. Co. v. Sittig, 48 L. R. A. 359; *Standard Life & Acci. Ins. Co. v. Thornton*, 49 L. R. A. 116; *Smith v. Etna L. Ins. Co.* 56 L. R. A. 271; and *Small v. Travelers' Protective Assn.* 63 L. R. A. 510.

The jury should decide for themselves, under all the facts before them attending the death of the insured, whether it was caused by his wilful exposure to an unnecessary danger or peril.

Travellers' Ins. Co. v. Seaver, 19 Wall. 531, 22 L. ed. 155; *Keeffe v. National Acci. Soc.* 4 App. Div. 392, 38 N. Y. Supp. 854; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39; *Thomas v. Masons' Fraternal Acci. Asso.* 64 App. Div. 22, 71 N. Y. Supp. 692; *Cornwell v. Fraternal Acci. Asso.* 6 N. D. 201, 40 L. R. A. 437, 66 Am. St. Rep. 601, 69 N. W. 191; *Collins v. Bankers' Acci. Ins. Co.* 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778; *Conboy v. Railway Officials' & Employees' Acci. Asso.* 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363; *Knickerbocker Casualty Ins. Co. v. Jordan*, 7 Ohio L. J. 71; *Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652, 61 N. W. 485.

The policy was not effectively canceled by the defendant company. It could not be canceled without notice and tender of the unearned premium to the legal owners and holders of the policy.

May, Ins. § 67; *Lattan v. Royal Ins. Co.* 45 N. J. L. 453.

Both acceptance of unearned premium and notice of cancellation are necessary, "for acceptance of unearned premium without notice is not a cancellation of the policy."

Crawford v. Aachen & M. F. Ins. Co. 100 Ill. App. 454; *Manlove v. Commercial Mut. F. Ins. Co.* 47 Kan. 309, 27 Pac. 979; Wood, Fire Ins. § 107; *McLean v. Republic F. Ins. Co.* 3 Laus. 423; *German Ins. Co. v. Rounds*, 35 Neb. 752, 53 N. W. 660; *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516.

A broker or agent to procure insurance is not an agent to receive notice of cancellation of the policy, and his authority from the insured ends with the procurement of the policy.

White v. Connecticut F. Ins. Co. 120 Mass. 330; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Insurance Cos. v. Raden*, 87 Ala. 311, 13 Am. St. Rep. 36, 5 So. 876; *Quong Tse Ning v. Anglo-Nevada Assur. Corp.* 86 Cal. 566, 10 L. R. A. 144, 25 Pac. 58; *Broadwater v. Lion F. Ins. Co.* 34 Minn. 465, 26 N. W. 455; *Body v. Hartford F. Ins. Co.* 63 Wis. 157, 23 N. W. 132; *Rothschild v. American Cent. Ins. Co.* 74 Mo. 41, 41 Am. Rep. 303; *Hermann v. Niagara F. Ins. Co.* 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; *American F. Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373.

Messrs. Herbert Parker and Henry H. Fuller for appellee.
64 L. R. A.

Morton, J., delivered the opinion of the court:

This is an action to recover indemnity under an accident insurance policy for injuries received by the plaintiff while engaged in riding a steeple chase. The case was heard by a judge of the superior court upon agreed facts, and the court found and entered judgment for the defendant, and the plaintiff appealed.

The policy in suit is a renewal policy, and expired June 6, 1901. The accident occurred June 1, 1901. The original policy was issued in 1895, and ran for one year. There have been successive renewals from year to year as each expired. In the application on which the original policy was issued, the plaintiff's occupation was stated to be that of a cotton manufacturer. The application required that the "occupations" of the applicant "should be fully stated." In the policy the plaintiff was described as "a cotton manufacturer by occupation." Amongst the conditions on which the policy was issued was one that the policy should not cover injuries caused by "voluntary exposure to unnecessary danger." On May 28, 1901, the defendant learned that the plaintiff engaged in steeple-chase riding, and directed its agent in Worcester to cancel the plaintiff's policy, on the ground that it could not assume that hazard, or take the chance of a claim. Thereupon the defendant's agent sent a check for the unearned premium to the agents through whom the plaintiff had procured the policy, and to whom he had paid the premiums, with a request to notify the plaintiff that the policy had been canceled, and to return it. The plaintiff was absent from the city, and his bookkeeper opened the letter containing the notice and check, and, after communicating with the agents through whom the plaintiff had obtained the policy, and being assured by them that it would be all right to do so, delivered up the policy. There was a provision in the policy giving the defendant the right to cancel it upon returning the unearned premium. Upon being informed as to what had taken place in his absence, the plaintiff repudiated what had been done, and notified the defendant he held the check subject to its order.

There are two questions before us: (1) Whether the plaintiff's injuries were received in consequence of a voluntary exposure to an unnecessary danger, within the meaning of the policy; and (2) whether the policy had been duly canceled before the accident.

We do not find it necessary to consider whether the policy had been duly canceled, as we are of opinion that there was a voluntary exposure to unnecessary danger. Steeple-chase riding, as commonly understood, differs from ordinary riding and driving,

and involves elements of unusual hazard and danger. There can be no question that the danger was unnecessary, and that the exposure to it was voluntary. There was nothing in the description of the occupation of the plaintiff, contained in the policy, nor in anything else contained in the policy, which included steeple-chase riding, or which showed that the plaintiff engaged in it. We do not mean to say that an accident policy containing a provision like that contained in the policy in this case against voluntary exposure to unnecessary danger debars the insured from recovery if injured while engaged in the common sports and amuse-

ments. But in steeple-chase riding the liability to accident is much greater than in the ordinary sports and amusements. The fact that the race in which the plaintiff was injured was for amateurs makes no difference. Neither does the circumstance that the defendant's agent was aware that the plaintiff occasionally rode steeple-chase races make any difference. The liability to the defendant depends on the terms of the policy, and whether an accident sustained in steeple-chase riding comes within them. For reasons already given, we do not think that it does.

Judgment affirmed.

MICHIGAN SUPREME COURT.

THIRD NATIONAL BANK of the City of
New York, *Plff. in Err.*,

v.

George A. STEEL.

(129 Mich. 434.)

1. A court will not entertain a suit to charge a person on an unsigned representation as to the credit of another person, although it is valid where made, if the statute of the place where the suit is brought provides that no action shall be brought to charge one on such a representation, unless it is in writing, signed by the party to be charged thereon.
2. The defense that the statute prevents the maintenance of an action

because the instrument on which it is brought is not signed by the party to be charged may be raised by a plea of the general issue.

3. A signed letter stating that the writer remembers "of exhibiting a statement" of another's resources is not sufficient to make the letter a signed statement of them, within the meaning of a statute providing that no action shall be brought on such a statement unless it is signed, where the statement on which the plaintiff relies was exhibited by a third person, and there is nothing in the letter to identify the one to which it refers, and by the terms of the letter the exhibited statement did not contain the whole substance of the communication upon the subject.

(February 11, 1902.)

NOTE.—*Conflict of laws as to statute of frauds.*

- I. As between law of forum and substantive law of contract, 119.
- II. As between law of place where contract is made and that of place where it is performed, 122.
- III. As between law of place where contract is made and that of place where property is situated, 123.
- I. As between law of forum and substantive law of contract.

The earlier decisions upon this point are shown in the note to *Wolf v. Burke*, 19 L. R. A. 792. An examination of the cases there cited reveals a decided conflict among the authorities. Some of the cases adopt the distinction in *Leroux v. Brown*, 12 C. B. 801, 22 L. J. C. P. N. S. 1, 16 Jur. 1021, 1 Week. Rep. 22, to which attention is there called; others repudiate it; others make no allusion to it, and render decisions that are consistent either with its adoption or repudiation. The latter is also true of *Brinker v. Scheunemann*, 43 Ill. App. 659, which applied a statute of another state declaring a contract void. The decisions upon this question, so far as it relates to the mode of acceptance of a bill of exchange, will be found in a note to *Spies v. National City Bank*, 61 L. R. A. 193.

A few decisions have been rendered upon 64 L. R. A.

the point since the publication of the note first referred to. Some of these repudiate the distinction, and take the view that the statute of frauds, regardless of the differences in phraseology upon which the distinction was based, is substantive, rather than remedial. Thus, *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 180, 34 N. E. 1111, *Reversing* 42 Ill. App. 332, held that a statute of Illinois (*lex fori*) providing, in effect, that "no action shall be brought" upon a parol contract for the sale of land, did not apply to a contract made in Kansas with reference to land in that state. So, in *Raphael v. Hartman*, 87 Ill. App. 634, the court, speaking of a contract not to be performed within a year, said that, if the contract were within the Illinois statute of frauds, it would not avail defendants, because it was made in New York and must be construed according to the laws of New York. So, in *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, *Affirmed* on *Rehearing* in 5 Ind. App. 97, 51 Am. St. Rep. 235, 31 N. E. 581, the court expressly repudiated the distinction, and held that a parol agreement made in Illinois to lease land in that state for one year, to begin at a definite future time, being within the Illinois statute of frauds, which declares that "no action shall be brought," could not be enforced in Indiana, although not repugnant to the statute of the latter state. Another case, *Heaton v. Eldridge*, 56 Ohio St. 87, 36 L. R. A. 817, 60 Am. St. Rep. 737, 46

ERROR to the Circuit Court for Clinton County to review a judgment in favor of defendant in an action brought to hold defendant liable for losses which were alleged to have accrued to plaintiff by relying upon false and fraudulent representations made by defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Spaulding, Norton, & Deol-
ing for plaintiff in error.

Mr. H. E. Walbridge, for defendant in error:

There is no contractual relation between the defendant and the Third National Bank upon which to found a cause of action, and whatever right of action is claimed is by reason, only, of whatever wrong, if any, there may have been in Mr. Steel's making

statements respecting the financial condition. In other words, the right of action does not arise out of contract, but from tort.

The *lex loci* will not be followed where it contravenes the policy of the state where it is attempted to be asserted. If by the law of the forum no action can be maintained on a particular oral contract if made in that country, the like rule will obtain as to the contract made abroad, although it was valid by the law of the place where made.

Story, Conf. L. § 576; *Andrews v. Herriot*, 4 Cow. 508; *Pearall v. Dwight*, 2 Mass. 84, 3 Am. Dec. 35; *Bank of United States v. Donnelly*, 8 Pet. 361, 8 L. ed. 974; *First Nat. Bank v. Burch*, 80 Mich. 242, 45-

N. E. 638, while apparently repudiating the distinction, seems to regard the statute of frauds, without reference to the differences in phraseology upon which the distinction is based, as remedial, rather than substantive, and therefore holds that the statute of frauds of the forum is applicable to a contract made in another state. The statute of the forum which was applied in this case, however, was in substantially the same terms as the 4th section of the English statute, declaring that no action should be brought on the contract, and therefore would have been applicable even if the distinction had been adopted.

Obeare v. First Nat. Bank, 97 Ga. 587, 33 L. E. A. 384, 25 S. E. 335, held that a provision of the Georgia Code, declaring that, in order for a partial payment upon a note to constitute a new point from which the period of limitation will run, it must be entered upon the note, relates to the remedy, and applies, although the note was made and payable in another state. In this case no allusion is made to the distinction, and it will be observed that the decision is consistent either with the adoption or repudiation of the distinction.

But it has been held in Georgia that the validity and construction of an agreement for arbitration, made in Tennessee, depend upon the law of Tennessee; and a parol award, being valid by the law of that state, will be upheld in Georgia. *Green v. East Tennessee & G. R. Co.* 37 Ga. 456.

It will be observed that *THIRD NAT. BANK v. STEEL* expressly adopts and applies the distinction.

Emery v. Burbank, 163 Mass. 326, 28 L. R. A. 57, 47 Am. St. Rep. 458, 39 N. E. 1026, takes a new position upon the point. It was held in that case that a statute of Massachusetts, providing that an agreement to make a will shall not be valid unless in writing, applied to an agreement made in another state by a Massachusetts testator. It will be observed that this provision is substantive, rather than remedial, in form, and that, if the court had been guided solely by the form of the statute, it would not have been applied to the agreement in question because it was not made in Massachusetts. The real ground of the decision in this case is that the statute embodied a fundamental public policy, namely, the prevention of fraud and perjury, which required the extension of the statute to agreements made

in other states, by Massachusetts testators. The court expressly refrained from expressing any opinion upon the question whether the statute would apply to such an agreement made in another state by a nonresident of Massachusetts. The opinion in this case—unnecessarily, as it seems to the present writer—ascribes a double character to the statute, taking the view that, while the statute is substantive in form, it implies also a rule of procedure broad enough to cover an agreement made in another state by a Massachusetts testator. It was said in this connection: "It is possible, however, that a statute should affect both validity and remedy by express words; and, this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other." The ultimate ground of the decision, however, is the public policy embodied in the statute. In this view the necessity of ascribing a remedial character to the statute is not apparent; for the distinction based upon the substantive or remedial character of the statute has no significance, so far as the conflict of laws is concerned, when the statute of the forum, either by virtue of its express terms or by virtue of the public policy embodied in it, applies to foreign, as well as domestic, contracts. Even assuming that a statute is purely substantive and not remedial at all, it may certainly be applied to contracts made outside of the forum, if, in express terms, it covers such contracts; and even if it does not, in express terms, extend to foreign contracts, it may, even without ascribing a remedial character to it, be extended to such contracts upon the ground that it embodies a part of the distinctive public policy of the forum. In other words, the distinction, based upon the character of the statute as substantive or remedial, is only important, so far as the choice of laws is concerned, when the terms of the statute are not explicit in this respect, and it embodies no distinctive public policy by virtue of which it may be extended to foreign contracts.

None of the other cases have invoked the public policy of the forum as a ground of extending the statute of the forum to foreign contracts, although, as shown in the note to *Wolf v. Burke*, 19 L. R. A. 792, they have frequently resorted to the distinction made in *Leroux v. Brown* to accomplish that result. The possibility of applying the principle here stated to other

N. W. 93; *Heaton v. Eldridge*, 56 Ohio St. 87, 60 Am. St. Rep. 737, 46 N. E. 638; *Emery v. Burbank*, 163 Mass. 326, 28 L. R. A. 57, 47 Am. St. Rep. 456, 39 N. E. 1026; 1 Beach, *Modern Law of Contracts*, §§ 595-598; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 128; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Galloway v. Holmes*, 1 Dougl. (Mich.) 349; *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *Hess v. Culver*, 77 Mich. 599, 6 L. R. A. 498, 18 Am. St. Rep. 421, 43 N. W. 994; *Swann v. Phillips*, 8 Ad. & El. 457; *Lyde v. Barnard*, 1 Tyrw.

& G. 250; *Haslock v. Fergusson*, 7 Ad. & El. 86; *Kimball v. Comstock*, 14 Gray, 508; *Wells v. Prince*, 15 Gray, 562; *McKinney v. Whiting*, 8 Allen, 207; *Belcher v. Costello*, 122 Mass. 189; *Cook v. Churchman*, 104 Ind. 141, 3 N. E. 759.

It is not necessary to plead the statute of frauds in order for the defendant to avail himself of such a defense.

Kinnie v. Owen, 1 Mich. 249; *Ingalls v. Eaton*, 25 Mich. 32; *Rawson v. Finlay*, 27 Mich. 268; *Edwards v. Chandler*, 14 Mich. 471, 90 Am. Dec. 249.

The statutory general issue is as broad as at the common law, where everything that plaintiff had to show to make out his case was put at issue.

Osburn v. Lovell, 36 Mich. 250.

provisions of the statute of frauds depends, of course, upon the question whether the prevention of frauds and perjuries, which is the object of such statute, is regarded as a part of the distinctive public policy of the forum. There were some considerations favoring such view with reference to the particular provision involved in the case referred to that do not apply to other provisions. Again, it will be observed that, even in Massachusetts, where the case was decided, contracts valid by their substantive law have been upheld and enforced, though contrary to the statute of frauds of the forum. *Denny v. Williams*, 5 Allen, 1. (See note to *Wolf v. Burke*, 19 L. R. A. 793.)

It will be observed that the principle based upon the public policy of the forum, while it subjects a foreign contract to the statute of the forum, does not involve the following propositions, which are the necessary logical consequences of the adoption of the distinction made in *Leroux v. Brown* (4 c.), the distinction based upon differences in the phraseology of the statutes in declaring the consequences of noncompliance with their terms):

1. The proposition that, if the statute of frauds of the place that furnishes the law of the contract merely provides that no action shall be brought on the contract, the contract may be enforced if not in violation of a similar statute of the forum. The distinction never seems to have been applied with such result except in *Marie v. Garrison*, 13 Abb. N. C. 210 (a referee's report); but there seems to be no logical escape from the proposition, and it was expressly said in *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29, that, if the decision in *Leroux v. Brown*—that the provision of the statute involved in that case applied to the remedy—was sound, it necessarily followed that, if the statute of frauds had existed in France, but not in England, the action must have been sustained, although it could not have been by the law of France.

2. The proposition, which is a corollary of the last, that the contract may be enforced, though it violates both a statute of the place which furnishes the substantive law declaring that no action shall be brought on the contract, and a statute of the forum declaring, in effect, that the contract shall be invalid or void. The distinction seems to have been applied with this result in *Marie v. Garrison*, 13 Abb. N. C. 210, and 64 L. R. A.

It is difficult to see how it can be avoided upon the assumption that the distinction is sound.

Upon the other hand, the adoption of the principle that a particular provision of the statute of frauds embodies a part of the distinctive public policy of the forum which requires its extension to foreign contracts is perfectly consistent with the refusal to enforce a foreign contract which is not in conflict with the statute of the forum, because it is in conflict with the statute of the place which furnishes the substantive law of the contract, even if the latter statute merely provides that no action shall be brought on the contract. In one respect the principle based upon the public policy of the forum is more effective than the distinction based upon the particular phraseology of the statute in extending the statute of the forum to foreign contracts; for the distinction can only be invoked for that purpose when the statute of the forum is remedial in form, while the principle referred to may be invoked whether that statute is remedial or substantive in form. The principle based on the public policy of the forum is, however, less effective in extending the statute of the forum to foreign contracts than the principle which repudiates the distinction, and ascribes a remedial character to the statute without reference to its phraseology; since the public policy of the forum must be superadded to the statute in order to call the former principle into operation, while the latter principle may be called into operation by the statute itself without reference to the public policy of the forum. There is very little support, however, for the latter view of the statute of frauds,—at least among the cases involving any question as to the conflict of laws.

As already shown, there is a decided tendency, upon the part of the later cases, to repudiate the distinction, made in *Leroux v. Brown*, based upon differences in phraseology in declaring the consequences of a noncompliance with the terms of the statute. Repudiating the distinction, the better view seems to be that the statute of frauds, without regard to its form in the respect mentioned, is substantive rather than remedial. In this view a contract is governed by its substantive law with reference to matters ordinarily comprehended by the statute of frauds, and not by the law of the forum; but this rule is subject to the right of the court of the forum to apply

The burden of proof rested with the plaintiff to show that the statute of frauds did not bar his right of recovery.

Dayton v. Williams, 2 Dougl. (Mich.) 31; *Bush v. Sprague*, 51 Mich. 41, 16 N. W. 222; *Harris Photographing Supply Co. v. Fisher*, 81 Mich. 136, 45 N. W. 661; *Kroll v. Diamond Match Co.* 106 Mich. 127, 63 N. W. 983; *Whipple v. Parker*, 29 Mich. 369; *Palmer v. Marquette & P. Rolling Mill Co.* 32 Mich. 274.

A contract which is void under the statute of frauds cannot be used for any purpose.

Chamberlain v. Dow, 10 Mich. 319; *Hall v. Soule*, 11 Mich. 494; *Holland v. Hoyt*, 14 Mich. 238; *Grimes v. Van Vechten*, 20 Mich. 410; *Scott v. Bush*, 27 Mich. 421,

12 Am. Rep. 311; *Detroit, H. & I. R. Co. v. Forbes*, 30 Mich. 176; *Hillebrands v. Nibbelink*, 40 Mich. 646; *Sutton v. Rowley*, 44 Mich. 112, 6 N. W. 216; *Raub v. Smith*, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796.

If the defendant had not appeared at all in this case, it would have been the duty of the court to have instructed the jury to render a verdict for the defendant, unless it appeared from the plaintiff's own showing that he was able to establish the representations to have been made in writing and signed by the defendant.

May v. Sloan, 101 U. S. 231, 25 L. ed. 797; *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486; *Busick*

any or all of the provisions of the statute of frauds of the forum to a contract made and performable elsewhere, or with reference to real property situated elsewhere, if it regards such provision or provisions as embodying a distinctive part of the public policy of the forum.

11. *As between law of place where contract is made and that of place where it is performable.*

Upon any hypothesis other than that the statute of frauds, regardless of its form, is remedial, it may become necessary to choose between the law of the place where the contract is made and that of the place where it is performable. As between the two, the weight of authority seems to be in favor of the law of the place where the contract is made. Thus, it has been held (in cases that hold or assume that the contract in this respect is governed by its substantive law, and not by the *lex fori* as such) that a contract, valid by the law of the place where it is made, will be enforced, though contrary to the statute of frauds of the place of performance. *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Hunt v. Jones*, 12 R. I. 266, 34 Am. Rep. 635; *Perry v. Mt. Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Allen v. Schuchardt*, 1 Am. L. Reg. N. S. 13, Fed. Cas. No. 236; *Green v. Lewis*, 26 U. C. Q. B. 618. (See also, upon this point, cases cited in note to *Spies v. National City Bank*, 61 L. R. A. 193, subd. IV.)

In *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331, 20 Mo. 563, it was held that the fact that wheat, sold and delivered in Illinois, was to be paid for upon its arrival at St. Louis, was not sufficient to subject the contract to the Missouri statute of frauds.

The following quotation from *Green v. Lewis*, 26 U. C. Q. B. 618, seems to embody the correct rule on this point: "It may well be that, if any part of the contract to be performed in England [Canada?] would be in itself contrary to, or in violation of, our law, our courts would refuse to enforce it, even if shown to be legal by the *lex loci contractus* [stating authorities]; . . . but we have seen no case in which, if the parties had bound themselves by a contract lawful and obligatory in the place of making, its performance in another country would be refused because certain solemnities 64 L. R. A.

required by the law of the latter had not been observed in its original creation. If the parties have once bound themselves lawfully for any universally lawful purpose, such as here for the sale of goods at a fixed price, it appears to us that our courts must hold them bound here as they would be in the place of the contract."

This was said in reply to the contention that, as the contract of sale was to be performed by delivery at Toronto, the law of Ontario, as the place of performance, should govern.

So, it has been held, conversely, that a contract in violation of the statute of frauds of the place where it was made will not be enforced, though valid according to the law of the place of performance. *Kelwert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206; *Dacosta v. Davis*, 24 N. J. L. 319; *Roethke v. Philip Best Brewing Co.* 33 Mich. 340.

In *Goldstein v. Scott*, 76 App. Div. 78, 78 N. Y. Supp. 730, a provision of the New Jersey statute of frauds, that no broker or real-estate agent selling or exchanging land shall be entitled to any commission unless his authority is in writing, was applied to a contract made in New Jersey. It does not appear where the contract was to be performed, but the decision is expressly put upon the ground that the contract was made in New Jersey.

In many of the cases the contract was made and performable in the same state. Some of these cases contain no intimation as between the law of the place where the contract is made and that of the place where it is performable. Thus, in *Denny v. Williams*, 5 Allen, 1, the court said that, as the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern in respect to its construction and performance. Others, however, e. g., *Kling v. Fries*, 33 Mich. 275; *Forward v. Harris*, 30 Barb. 338; and *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417, seem to intimate that, in case of a conflict, the law of the place where a contract is made should govern in this respect. These cases, however, are only full authority for eliminating the *lex fori* as such.

A contract made and performable in Michigan is governed by the Michigan statute of frauds, without reference to the residence of the agents of the party who made the contract. *Foster v. Lumbermen's Min. Co.* 63 Mich. 188, 36 N. W. 171. So, *Brinker v.*

v. Van Ness, 44 N. J. Eq. 82, 12 Atl. 609; *Birchell v. Neaster*, 36 Ohio St. 331; *Suman v. Springate*, 67 Ind. 115; *Popp v. Nranke*, 68 Wis. 364, 31 N. W. 916; *Hudson v. Emmons*, 107 Mich. 549, 65 N. W. 542.

An objection that the evidence does not sustain the declaration is in time if made at any stage of the case before judgment.

Pennsylvania Min. Co. v. Brady, 14 Mich. 260; *Shaw v. Hoffman*, 21 Mich. 151; *Moore v. Nason*, 48 Mich. 300, 12 N. W. 162.

Montgomery, J., delivered the opinion of the court:

This is an action brought against the defendant to recover the amount of a loan made to Robert M. Steel, which loan, it is

Scheunemann, 43 Ill. App. 659, speaking of the statute of frauds, said that a contract is to be interpreted and defined by the law of the place where it is made, and where, in the absence of anything to indicate the contrary, it is presumed that it is to be performed.

Other cases, however, have expressly held that the law of the place of performance prevails over the law of the place where the contract is made, in this respect. Thus:

The validity of a parol antenuptial contract is governed by the law of Illinois, rather than that of Pennsylvania, notwithstanding that it was made in the latter state, where, at the time of the marriage, the husband was a resident of Illinois, and the matrimonial domicile was established in the latter state, and the contract was to be performed in such state. *Davenport v. Karnes*, 70 Ill. 465. The actual question in this case, however, related to real property in Illinois, and the decision may be really referable to the principle that the *lex rei sitæ* governs, although the court seems to have applied the law of Illinois as the *lex loci solutionis*.

A verbal agreement made in Germany for the employment of a person for one year, to begin at a subsequent date, which contemplates performance in New York, is subject to the New York statute of frauds. *Turnow v. Hochstadter*, 7 Hun, 80.

A verbal agreement entered into in Louisiana, though invalid in that state because not in writing, is valid where the partnership business is to be prosecuted in California. *Young v. Pearson*, 1 Cal. 448.

It will be observed that, in the three cases last cited, the contract was to be performed at the forum, so that the *lex loci solutionis* and *lex fori* were the same; but it is clear that the decisions rest upon the ground that the *lex loci solutionis*, rather than the *lex fori* as such, governs.

In *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 55 Am. St. Rep. 680, 44 N. E. 959, the court expressly held that the question as to the governing law in this respect depended upon the presumed intention of the parties, and said in this connection that the *lex loci solutionis* and *lex loci contractus* must be taken into consideration, but that neither was of itself conclusive. It was held that, under the circumstances of the case, the parties must have contemplated that the contract, which was for the sale of cotton, should be considered a Maine contract, and con-

alleged, was induced by the false and fraudulent representations of the defendant, George A. Steel. The declaration avers that on the 27th of June, 1895, the defendant represented that Robert M. Steel was worth a sum in excess of \$1,000,000; that this representation was made through the instrumentality of an innocent agent, General Spaulding, to whom was committed an unsigned statement of the resources and liabilities of Robert M. Steel, under date of March 1, 1895. The plaintiff introduced testimony tending to support the averments of the declaration. The defendant offered no testimony in the case, but rested his defense upon the legal ground that our statute (3 Comp. Laws 1897, § 9518) denies any remedy to the plaintiff in such case.

trolled by the laws of that state. This decision is apparently upon the assumption that the contract was technically completed in New York, but was performable in Maine. In the opinion in *Goldstein v. Scott*, 76 App. Div. 78, 78 N. Y. Supp. 736, however, it is assumed that the question that was referred to the intention of the parties in the *Wilson Case* related to whether the contract was to be regarded as made in Maine or New York, and not to whether the place where the contract was made, or that of the place where it was performable, assuming them to be different, furnished the governing law. In this view, the opinion in the *Wilson Case* would be in harmony with what seems to be the true rule; but the opinion in that case seems scarcely susceptible of such interpretation. Some of the cases cited in the note to *Spies v. National City Bank*, 61 L. E. A. 193, with reference to the acceptance of bills of exchange, seem to refer the question to the intention of the parties; and in one case, *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154, the law of the place of performance of the agreement to accept was applied.

Assuming, as this subdivision does, that the statute of frauds is substantive, rather than remedial, it relates to the formal validity of the contract, and would therefore seem to come clearly within the first rule laid down in *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; namely: Matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made; rather than the second rule; namely: Matters connected with its performance are regulated by the law prevailing at the place of performance. While the first rule cannot literally, and without qualification, be applied to matters bearing upon the essential validity of the contract, it seems to need no limitation or qualification as applied to matters affecting its formal validity.

III. *As between law of place where contract is made and that of place where property is situated.*

Most of the cases in which there was an actual conflict between the two have held, without reference to the particular question involved, or to the character of the action, that a contract relating to real property is governed by the statute of frauds of the place where the property is situated, rather than by the statute of

The plaintiff shows that no such statute as that in question is in force in New York, and contends that, as it was expected that General Spaulding would exhibit this statement to the plaintiff in New York, the law of New York should govern, and that the Michigan statute constitutes no bar. This is the first and most important question presented in the case. The authorities are not in harmony as to whether, under a statute such as the one in question, the transaction is wholly void, or whether the effect and force of the language are simply to exclude the remedy. There are not wanting authorities which sustain the contention of plaintiff, and which hold, in construing statutes similar to this, that the case is to be ruled by the law of the state where the transaction occurs or the con-

tract is made, and that a contract valid in another state is not rendered invalid in the state where the action is brought. Plaintiff's counsel cite and rely upon the case of *Kling v. Fries*, 33 Mich. 275, in support of their contention. The question involved in that case was whether a contract, valid in the state where it was entered into, could be enforced in this state, in view of our statute (3 Comp. Laws 1897, § 9516), which provides that "no contract for the sale of any goods, wares, or merchandise, for the price of \$50 or more, shall be valid, unless the purchaser shall accept," etc. It was held that this section of the statute had reference to contracts made within the state, and such, we think, would be the holding in any jurisdiction. There are, however, cases, like *Cochran v. Ward*, 5

the place where the contract is made. It was so held in *Burrell v. Root*, 40 N. Y. 496, and *Siegel v. Robinson*, 56 Pa. 19, 93 Am. Dec. 775, where the action was for the recovery of the purchase price of land; and in *Bissell v. Terry*, 69 Ill. 184, where the suit was for specific performance. So, in *Abell v. Douglass*, 4 Denio, 305, a parol transfer of an equitable interest in real property in Pennsylvania was upheld upon the assumption that the common-law rule prevailed in Pennsylvania, notwithstanding the New York statute declared that trusts could only be declared created or transferred in writing.

In *Carrington v. Brents*, 1 McLean, 167, Fed. Cas. No. 2,446, Affirmed in 9 Pet. 86, 19 L. ed. 60 (a bill to obtain legal title), it was held that a parol contract, made in Virginia for land in Kentucky, was not void under the Kentucky statute of frauds, since the contract was made long before the state of Kentucky was organized. It was further held that the contract was valid according to the law of Virginia. At the time the contract in question was made Kentucky was a part of the state of Virginia, and the implication seems to be that the law of Kentucky, as the *lex rei sitæ*, would have governed if Kentucky had been a separate state at the time the contract was made.

In *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019, however, Judge Story assumed that the statute of frauds of a state in which a parol copartnership for the purchase and sale of land in Maine was made, would govern; though he further held that it was not necessary to determine whether the contract was made in Massachusetts, in Maine, or in New Hampshire, since the statutes of all those states were substantially alike.

In *Wolf v. Burke*, 18 Colo. 264, 19 L. R. A. 792, 32 Pac. 427 (action to recover purchase price); *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111 (action to recover purchase price); *Anderson v. May*, 10 Helak. 84 (action for rent); and *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, Affirmed on Rehearing in 5 Ind. App. 97, 51 Am. St. Rep. 235, 31 N. E. 581 (action for breach of lease),—the contract was made in the state where the property was situated; and the decisions are only full authority for eliminating the *lex fori* as such. In *Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 64 L. R. A.

31 N. E. 581, the court, referring to the general rule that contracts relating to real property are governed by the *lex rei sitæ*, said: "There can be no doubt of the correctness of this rule in so far as it relates to questions of construction, title, covenants real, mode and formality of execution, and all things else which the laws of the situs impress upon the nature of the property and the character of the tenure and mode of transmission. But where a conveyance is executed in this state between citizens of this state, for lands in another state, in so far as it treats of covenants which never attach to the soil, but are essentially personal, the laws of this state control." The court in this case, however, took pains to state that the actual controversy was merely between the *lex fori* on one hand and the *lex loci contractus* and *lex rei sitæ* on the other; and that, consequently, it had maintained no distinction between the latter, or between actions real and personal. The distinction above suggested is also supported by the opinion in *Polson v. Stewart*, 167 Mass. 211, 36 L. R. A. 771, 57 Am. St. Rep. 452, 45 N. E. 737 (see note to *Union Nat. Bank v. Chapman*, 57 L. R. A. 513), though the actual question in that case was as to the capacity of a married woman to contract with reference to real property. And see also *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019, *supra*.

It is clear, both upon principle and authority, that contracts relating to personal property are governed by the statute of frauds of the place where the contract is made, rather than that of the place where the property is situated. *Dacosta v. Davis*, 24 N. J. L. 319; *Hatch v. Collins*, 34 Hun, 314; *Allen v. Schuchardt*, 1 Am. L. Reg. N. S. 13, Fed. Cas. No. 236; *Eaves v. Gillespie*, 1 Swan, 130; *Dougherty v. Curle*, 2 Humph. 453. In some cases, however, as when there is a sale of an unidentified part of a larger mass, the place where the property is situated may determine the location of the last act essential to the consummation of the contract; but this consideration does not militate against the rule that the place where the contract is made furnishes the governing law in this respect.

See also note to *Brown v. Wieland*, 61 L. R. A. 417, for a discussion of the question as to the effect of the statute of frauds upon the governing law with respect to sales of intoxicating liquor.

Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 785, 31 N. E. 581, which apply the same rule to a statute such as the one involved in the present case. Our statute reads as follows: "No action shall be brought to charge any person upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 3 Comp. Laws 1897, § 9518. The peculiar wording of this section distinguishes it from those sections of the statute which declare that a contract made without certain prescribed formalities shall not be valid, or shall be void. The cases which fail to note this distinction usually refer to Story, Conf. L. § 262. The first case in which the distinction between the two sections was noted is the carefully considered case of *Leroux v. Brown*, 12 C. B. 801. This case was argued at length. A separate opinion was filed by each of the justices, all concurring, and the conclusion reached that, under the language of the statute (§ 4 of the British act), which provides that "no action shall be brought upon any agreement," etc., the contract was not necessarily void, but that this provision affected the remedy, and that, as it affected the remedy, the *lex fori* governed. The views expressed by Judge Story in his work above cited were called to the attention of the court, but the chief justice answered by saying: "Dr. Story puts the 4th and 17th sections together, as both avoiding the contract;" showing that, in the view of the court, Judge Story had failed to note the true distinction. This case of *Leroux v. Brown* was followed in *Downer v. Chesabrough*, 36 Conn. 39, 4 Am. Rep. 29, and was cited approvingly by Mr. Justice Matthews in *Pritchard v. Norton*, 106 U. S. 134, 27 L. ed. 104, 1 Sup. Ct. Rep. 102. In *1 Brandt, Suretyship & Guaranty*, § 52, it is said: "The statute of frauds does not provide that the contract to answer for another shall be illegal or void if not in writing. It says, 'no action shall be brought.' The contract is just as legal since the enactment of the statute as it was before, but no action can be brought to enforce it. . . . As the prohibition is against the remedy, the courts of a country in which the statute prevails will not enforce an unwritten contract of suretyship or guaranty made in another country, which was perfectly valid and enforceable in the country where the contract was made. This is upon the principle that, while the validity and binding force of a contract depend upon the law

of the country in which it was made, the remedy is always governed by the law of the country in which the action is brought." In Wharton, Conf. L. 1st ed. at § 690, it is said: "But the question shifts where there is a local statute, like the statute of frauds, directing that no suit shall be sustained, in certain classes of cases, except on written testimony. Such statutes are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here, then, would come into play the position on which Savigny lays such great stress, that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states." The writer refers to the position of Judge Story, and criticises it, and directs attention to a note appended to Judge Story's work by Judge Redfield, as follows: "We must confess that upon principle, as the statute does not declare the contracts void, but only that no action or suit, either in law or equity, shall be maintained on such contract, it ought to be regarded as a statute affecting the remedy, rather than the contract; and that, wherever made, it could not be sued in the courts of a state where the statute expressly provided that no such action shall be maintained." In Anson, Contr. p. 62, referring to the provisions of § 4 of the English statute, it is said: "The terms of the section do not render such a contract void, but they prevent it being enforced by action. The contract, therefore, though it cannot be sued upon, is yet available for some purposes." And in a note, referring to some of the cases which are apparently opposed to the doctrine of *Leroux v. Brown*, it is said: "In none of these cases is the proposition announced in *Leroux v. Brown* considered. They are decided on the assumption that the note or memorandum required affects the validity of the contract. While many of the cases involve contracts for the sale of chattels, still the decisions are not based on any distinction between the 17th and 4th sections, except *Houghtaling v. Ball*, 20 Mo. 563." In our view, the better reasoning is found in the case of *Leroux v. Brown* and the authorities which follow it; and the holding of the circuit judge upon this point is sustained.

But it is contended that this defense was not open to the defendant, for the reason that the statute of frauds was not pleaded. We think the general issue was sufficient to enable the defendant to raise the question. It goes to the whole liability. See *May v. Sloan*, 101 U. S. 231, 25 L. ed. 797;

Busick v. Van Ness, 44 N. J. Eq. 82, 12 Atl. 609. While the authorities are not uniform upon this question, we think the better rule is that a general denial puts the plaintiff to his proof of a contract complying with the law, or of a transaction which would render the defendant liable. For a collection of authorities sustaining this rule, see 9 Enc. Pl. & Pr., p. 709. While the question has never been distinctly ruled by this court, it has been assumed in many cases that the defense of the statute of frauds was open under the general issue. Subdivisions "b" and "c" of circuit court rule No. 7, cited in the brief of counsel for plaintiff, have no application.

It is further contended that the circuit judge erred in directing a verdict, and in refusing to admit a certain letter written by defendant, for the reason that, had the letter been received, it would have shown, in effect, that there was a written statement signed by George A. Steel. The contents of the letter offered in evidence were as follows, the letter being addressed to the president of the plaintiff bank: "I remember, when arranging the loan prior to October, 1895, of exhibiting statement of

my father's resources and liabilities, showing net resources considerably in excess of \$1,000,000, as shown by his books; and at the time stated that considerable fire loss since the date of statement reduced this amount somewhat." Was this letter so connected with the statement in question as to make the latter a signed statement, within the meaning of the statute? It will be noted that the statement introduced in evidence was not exhibited by defendant, George A. Steel, in person, but by General Spaulding. It will also appear that there was not enough in this writing to identify the statement, either as to amount or date, but parol evidence would have to be introduced to connect them. Further than that, the exhibited statement was, according to the terms of the letter introduced, not the whole substance of the communication made by defendant to the plaintiff. We think, therefore, it cannot be said that this amounted to a signed statement within the requirements of this statute.

The judgment will be affirmed.

Long and Grant, JJ., did not sit. The other Justices concur.

MINNESOTA SUPREME COURT.

William HENSLIN, *Appt.*,
v.

Charles A. WHEATON *et al.*, *Respts.*

(.....Minn.....)

*1. In an action against a physician and surgeon for negligence and unskillfulness in applying to plaintiff's body the device known as "Roentgen's X-rays" for the purpose of locating a foreign substance thought to be in his lungs, it is held that the rule of liability is the same as that applied in other actions for malpractice, and one of ordinary care and prudence.

2. A physician who applies the X-rays, not for medical purposes, but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in applying it determined by the opinions of physicians of his own school.

(January 8, 1904.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County

* Headnotes by BROWN, J.

NOTE.—As to degree of care or skill that a physician or surgeon must exercise generally, see, in this series, *Whitesell v. Hill*, 37 L. R. A. 830, and *note*; also *Burk v. Foster*, 59 L. R. A. 277, and cases in *note* to *Johnson v. State*, 61 L. R. A. 287.
64 L. R. A.

denying his motion for new trial after judgment in defendants' favor, in an action brought to recover damages for personal injuries alleged to have been inflicted upon him by defendants' malpractice. *Reversed.*

The facts are stated in the opinion.

Messrs. S. C. Olmstead and Charles H. Taylor, for appellant:

The evidence shows a *prima facie* case of negligence for the jury. The exposures of plaintiff to said machine were made by Dennis, not as medical treatment, but in an attempt to satisfy himself of the location, in plaintiff's body, of the piece of gold metal inhaled by plaintiff, before advising plaintiff whether or not its presence might prove injurious.

Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992.

Under the maxim or rule known as "*res ipsa loquitur*," it was not necessary for plaintiff to have made direct proof of negligence on the part of defendants.

21 Am. & Eng. Enc. Law, 2d ed. p. 512; *Wood v. Roxborough C. H. & N. Pass. R. Co.* 12 Montg. Co. L. Rep. 155; *Rintoul v. New York C. & H. R. R. Co.* 17 Fed. 905; *Bevis v. Baltimore & O. R. Co.* 26 Mo. App. 19; *Ellis v. Portsmouth & R. R. Co.* 24 N. C. (2 Ired. L.) 138; *Moore v. Parker*, 91

N. C. 275; 1 Kinkad, Torts, § 371, pp. 729-732; 1 Shearn. & Redf. Neg. 5th ed. §§ 58-60; *McLean v. Burbank*, 11 Minn. 277, Gil. 189; *Olson v. Great Northern R. Co.* 68 Minn. 155, 71 N. W. 5; *Clarke v. Nussau Electric R. Co.* 9 App. Div. 51, 41 N. Y. Supp. 78; *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107; *Hathorn v. Richmond*, 48 Vt. 557; *Sanderson v. Holland*, 3s Mo. App. 233.

The dangerous character of electricity, in high voltage, has come to be a matter of common knowledge. This common knowledge, it would seem, should in itself have required extreme care on the part of defendant Dennis, when assuming to expose plaintiff in the manner which he did; for the thought of danger in so frequent and extended exposures would have occurred, even to a layman.

Wittenberg v. Onsgard, 78 Minn. 342, 47 L. R. A. 141, 81 N. W. 14; 1 Kinkad, Torts, § 371.

Messrs. C. D. O'Brien, T. D. O'Brien, and T. A. Garrity for respondents.

Brown, J., delivered the opinion of the court:

Action to recover damages for personal injuries alleged to have been caused by the negligence and unskillfulness of defendants. The action was dismissed on the trial in the court below, and the plaintiff appealed from an order denying a new trial. The facts are as follows: Plaintiff, under the impression that he had inhaled into his lungs the gold crown of one of his teeth, went to defendants, who are practising physicians and surgeons, for medical advice and treatment. He informed one of the defendants of his trouble,—the fact that he had inhaled the gold crown,—and was anxious to know what could be done to relieve him. For the purpose of locating the crown, if anywhere in his lungs, defendants applied the X-rays to his person. He was exposed to this device on several different occasions, one or two skiagraphs being taken; but the efforts to locate the crown by this method were unsuccessful. Plaintiff suffered no particular inconvenience from the fact that it was in his lungs, but he was anxious to have it located, and, if possible, removed. About two weeks subsequent to the application of the X-rays to his person there appeared upon his back what is termed an "X-ray burn." This was very painful, and did not immediately yield to medical treatment, or become wholly healed for a considerable time, though it appears to have been wholly healed at the time of the trial of the action. On the theory and claim that defendants were negligent and unskillful in

applying the X-rays to his person, this action was brought to recover damages.

This is the first case to come before us involving alleged negligence on the part of physicians in applying the recently discovered X-rays, and no rule of care in such cases has been laid down. But there can be no doubt that the rule applicable to the care and skill required of physicians toward their patients in other cases applies. That rule was stated in *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487, in the following language: "The legal obligation of the physician to his patient, where his conduct is questioned in an action of this character, demands of him no more than the exercise of such reasonable care and skill as is usually given by physicians and surgeons in good standing." The rule is one of ordinary care and prudence, and the question presented in the case at bar is whether the evidence received and that offered on the trial tended to show a failure on the part of defendants to exercise such care. Plaintiff testified, in support of the allegations of the complaint, that the exposure of his person to the X-rays was made for too long a period of time, and that the tube or bulb through which the rays are generated was placed too close to his body. He testified to the number of times the X-rays were applied, and the length of time,—from thirty to forty minutes on each occasion,—and that the tube of the apparatus was placed within 2 inches of his person in each instance, except one. Plaintiff then called Prof. Freeman as an expert witness, who testified that he was familiar with electricity, and had been from childhood; that he had taught it for a number of years; that he knew the X-ray and its properties; that he had been a professor of physical sciences at the State Normal School at Winona; that he had used the X-ray more or less since its discovery by Roentgen in demonstrations and diagnosis, and in lectures before classes in physics and classes in the study of therapeutical methods. He disclosed that he was thoroughly familiar with the apparatus and had used both the coil and static machines, and had examined frequently the style of machine used by defendants. In short, the foundation was fully laid for his opinion as an expert touching the questions involved in the case. Plaintiff sought to prove by him that it was negligence to apply the X-ray to the person of a patient with the tube only 2 inches from the body; that the effect of the X-ray upon the body, and the extent or degree the flesh would be affected, are determined by the nearness of the exposure; and also whether the nearness of the exposure was likely to cause an X-ray burn,

when, if farther removed, such would not result. In short, the testimony of this witness, if received, would tend to show unskilfulness and negligence on the part of defendants. Defendants objected to all such evidence on the ground that the witness was not a physician and surgeon, and was incompetent to testify against them under the rule announced in the case of *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, which objection the court sustained. The ruling is assigned as error. It was held in that case that, in an action against a physician or surgeon for malpractice—unskilfulness in treatment being charged—the physician was entitled to have the propriety of his treatment tested by physicians of the same school; that, if a physician of the allopathic school be sued for malpractice, the question whether his treatment was unskilful should be tested by the rules and methods of that school, and the testimony of a physician of the homeopathic school would be incompetent. The trial court applied that rule to the case at bar, and in doing so we are of opinion that it erred. The application of the X-ray to plaintiff was not for the purpose of treating any disease or ailment from which he suffered, but for the purpose of locating, if possible, a foreign substance thought to be in his lungs. While it, perhaps, may in some instances be used as a remedial agent, it was not so employed in this case. The so-called X-rays, discovered by Roentgen, have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During this time the apparatus for the generation of the X-rays, together with the fluoroscope, has been used very generally by electricians, professors of

physics, skiagraphers, physicians, and others, for experimental and demonstrative purposes. It is a scientific and mechanical appliance, the operation of which is the same in the hands of the college professor, or the physician of the allopathic, homeopathic, or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be explained by any person who understands it. The rule in the *Courtney Case* can, therefore, have no application to the case at bar. It might apply, did it appear that the application of the X-rays to plaintiff's person was for medical purposes, and not for the scientific purpose of discovering the presence of a foreign substance in his lungs.

It was conceded by the defendants that the X-ray burn frequently follows an application of the rays to the body, but that some are not susceptible to its influence, while others are; that the burn is likely to follow, regardless of the distance the apparatus is placed from the person of the patient; and that it is impossible to determine in advance who are and who are not susceptible to injurious effects. Whether this is so, or not, we are not permitted to determine at this time. The question was one of fact, or perhaps might have been, had the case been fully tried, and for the jury to determine.

For the error in excluding the evidence of witness Freeman and dismissing the action, the order appealed from must be reversed.

It is so ordered.

MONTANA SUPREME COURT.

ANCIENT ORDER OF HIBERNIANS,
Division 1, of Anaconda, Appt.,
v.

Charles W. SPARROW *et al.*, Respts.

(.....Mont.....)

1. A court will not blindly follow the construction of a particular statute by the courts of the state from which it was borrowed, when it does not appeal to the court as founded on right reasoning.
2. The liability of sureties on a contractor's bond is not for the direct pay-

ment of money, within the meaning of a statute authorizing an attachment in actions on contracts "for the direct payment of money."

(November 16, 1903.)

APPEAL by plaintiff from an order of the District Court for Deer Lodge County dissolving an attachment. *Affirmed.*

The facts are stated in the opinion.

Messrs. T. O'Leary and H. R. Whitehill, for appellant:

The action is upon a bond,—an express contract for the direct payment of money. It is for an amount certain. The measure of liability is furnished and fixed, and all sums within that measure are agreed to be paid, and agreed to be paid on a con-

NOTE.—The above decision presents an unusual question in the law of attachment.

As to attachments in actions on contracts tainted with fraud, see note to *Weare Commission Co. v. Druley*, 30 L. R. A. 465.
64 L. R. A.

t contingency which it is alleged has become certain. The plaintiff alleges that the full amount of the bond is due. That is the fact in issue, and it cannot be determined upon a motion to dissolve the attachment.

Newell v. Whitwell, 16 Mont. 243, 40 Pac. 866; *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718; *Withers v. Brittain*, 35 Neb. 436, 53 N. W. 375.

The contract is for the direct payment of money upon a contingency which in this case is alleged to have happened. The bond only limits the amount to be paid and all sums within that limit are agreed to be paid. The proof goes only to such as are within the bond, and as to such the bond liquidates them.

Hathaway v. Davis, 33 Cal. 161; *Wheeler v. Farmer*, 38 Cal. 215; *San Francisco v. Brader*, 50 Cal. 506; *Monterey County v. McKee*, 51 Cal. 255; *Donnelly v. Struven*, 63 Cal. 182; *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64; *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Flagg v. Dare*, 107 Cal. 482, 40 Pac. 804; *Hyman v. Newell*, 7 Colo. App. 78, 42 Pac. 1016; *Wilson v. Wilson*, 8 Gill, 192, 50 Am. Dec. 685; *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4,816; *Drake*, *Attachm.* §§ 12-23, 27; *Roelofson v. Hatch*, 3 Mich. 277; *Farmers' Nat. Bank v. Fonda*, 65 Mich. 533, 32 N. W. 664.

Our statute is similar to, and taken from, the statutes of California. The California cases are therefore controlling in this state. *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558.

Meers, Rodgers & Rodgers and *George B. Winston* for respondents.

Holloway, J., delivered the opinion of the court:

On November 16, 1898, the Ancient Order of Hibernians, Division No. 1, of Anaconda, Montana, entered into an agreement with Edward B. White, a contractor and builder, by the terms of which White agreed to furnish the materials and erect a building for the order in Anaconda, for which he was to be paid the sum of \$13,575, the building to be completed prior to December 1, 1898, and all the work to be done according to plans and specifications which were furnished. For the faithful performance of that contract White executed his indemnity bond in the sum of \$3,500, with respondents Sparrow, Wegner, Radefeld, and Thieffenthaler as sureties, the condition of the undertaking being that, "if the said Edward B. White shall in all things comply with the contract in letter and spirit, and turn over to the said A. O. H. Div. No. 1, of Anaconda, the said building fully finished and completed in all its parts in strict compliance with the said plans and speci-

fications, . . . then the above obligation to be void, otherwise to remain in full force and virtue." The complaint alleges that, although White entered upon the work and performed a part of it, he abandoned the same before it was completed, and that the appellant was compelled to complete the same at a cost of more than \$4,500 over and above the contract price of the building. The complaint then alleges that prior to the commencement of this action this appellant recovered a judgment against White for the breach of said contract in the sum of \$5,440, and that White was soon afterwards adjudged a bankrupt without assets. The prayer of the complaint is for the full amount of the bond.

At the time of the commencement of this action and the issuance of summons, upon a proper affidavit being made and the undertaking required by law being given, the clerk of the district court issued a writ of attachment under which the sheriff of Deer Lodge county levied upon property belonging to the defendants. Thereafter the defendants appeared, and moved the court to discharge the attachment upon the ground, among others, that the action is not founded upon a contract for the direct payment of money within the meaning of §§ 890 and 891 of the Code of Civil Procedure. This motion was by the court sustained, and the attachment dissolved. From the order dissolving the attachment this appeal is prosecuted.

Section 890 of the Code of Civil Procedure provides as follows: "Sec. 890. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, . . . as follows: In an action upon a contract, express or implied, for the direct payment of money," etc. Without question this is an action upon an express contract, and the only difficulty to be met with is in the proper construction of the phrase "for the direct payment of money." So far as we are advised, California and Oregon are the only other states having the same statutory provision. Colorado had prior to 1895. Sections 120 and 121 of the California practice act (Stat. 1851, chap. 5, p. 68; Code Civ. Proc. 1897, §§ 537, 538) contain the same provisions as our § 890, above, and those sections received construction by the supreme court of California in *Hathaway v. Davis*, 33 Cal. 161, where by a divided court it was held that an ordinary appeal bond was a contract for the direct payment of money within the meaning of §§ 120 and 121, above. However the majority of the court characterized its own opinion as not

being very satisfactory. This decision was made the sole ground for holding that a bail bond was likewise a contract for the direct payment of money (*San Francisco v. Brader*, 50 Cal. 506); and upon the authority of these two cases the same court, in *Monterey County v. McKee*, 51 Cal. 255, held the official bond of the county treasurer was such a contract as is contemplated by the attachment statute.

It is contended by appellant that, under the rule of construction that, where a statute is adopted from another state by this state, it is adopted with the construction given it by the highest court of that state, the decision in *Hathaway v. Davis* is conclusive in this instance. It may be true, as assumed by counsel for appellant, that our § 890, above, was borrowed from California, and yet that is only an assumption, as there is nothing whatever to indicate that it is a fact. The expression "for the direct payment of money" does not appear in our attachment laws from January 15, 1869, to the adoption of the Code in 1895, at which latter date at least two other states had substantially the same statutory provision as California. However, this court will not blindly follow the construction given a particular statute by the court of a state from which we borrowed it, when the decision does not appeal to us as founded on right reasoning. We understand the rule to be "that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it." Endlich, *Interpretation of Statutes*, § 371; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372; or, as was said in *Stadler v. First Nat. Bank*, 22 Mont. 203, 74 Am. St. Rep. 586, 56 Pac. 114: "When a particular statute has been adopted by this state from the statutes of another, after a judicial interpretation (suited to our condition) has been placed upon it by the parent state, the courts of this state are bound by the interpretation of the courts of the state whence it was adopted, or will at least accord respectful consideration to such interpretation, and depart from it only for strong reasons." Prior to 1895 Colorado had an attachment statute which provided that the writ should issue upon the plaintiff making an affidavit that the action is brought upon an overdue promissory note, bill of exchange, or other written instrument for the direct and unconditional payment of money only or upon an overdue book account. Mills's Anno. Code, § 92. This section received consideration in *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792, which was an action upon an

appeal bond, and reference is there made to the case of *Hathaway v. Davis*, 33 Cal. 161, and the majority opinion disapproved. The supreme court of Colorado, after holding that such appeal bond does not come within the purview of § 92, above, says: "In this case the obligation assumed by the sureties was not direct, but collateral. They could be charged only upon failure of the principal to pay. If he failed to pay the judgment appealed from, if affirmed by this court, then there would be a breach of the condition of the bond upon which a cause of action might be predicated." In *People v. Boylan*, 25 Fed. 595, Hallett, J., in construing the above section of the Colorado Code in an action upon an administrator's bond, says: "A direct payment is one which is absolute and unconditional as to time, amount, and the persons by whom and to whom it is to be made. And a written instrument which provides for such payment is one which expresses those terms fully. It is needless to point out the difference between such an instrument and an administrator's bond." Commenting on the majority opinion in *Hathaway v. Davis*, 33 Cal. 161, Judge Hallett says: "It is to be observed, also, that in the only case cited from that state [California] in which the question was discussed the views expressed were not altogether satisfactory to the court. . . . And the opinion will hardly be more convincing to the profession than it was to the court." In *Hathaway v. Davis*, 33 Cal. 161, Sawyer, J., dissenting, says: "The undertaking upon which a recovery is sought is 'that the appellants will pay all damages and costs which may be awarded against defendant on the appeal, not exceeding \$300.' This appears to me to be an undertaking that another party shall pay, and not that the party himself will pay. There is no promise that the defendants themselves will pay any money at all, and consequently no contract on their part for the direct payment of money. On a failure of the appellants in the suit to pay in accordance with the terms of the undertaking, there is a breach, it is true, and the party to the undertaking is liable for damages for the breach. But the liability is strictly for damages, and not on his own contract that he himself will pay money. For these reasons I think there was no contract, express or implied, on the part of the defendant for the direct payment of money within the meaning of the attachment law, and that an attachment is unauthorized." It is to be noted that this dissenting opinion is quoted with approval in *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792.

The Code of Civil Procedure of New York

(§ 635) provides for the issuance of an attachment "in an action . . . to recover a sum of money only as damages for . . . a breach of contract, express or implied," and § 649 provides the manner of levying the writ. Construing these sections, the supreme court, in *Trepagnier v. Rose*, 18 App. Div. 393, 46 N. Y. Supp. 397, said: "But we are clear that, to be an instrument for the payment of money, it must be an instrument which acknowledges an absolute obligation to pay, not conditional or contingent; one, the execution of which being admitted, it would be incumbent on the plaintiff, in an action to enforce it, only to offer the instrument in evidence to entitle him to a recovery,—in other words, an instrument that admits an existing debt. We think that this is the correct line which divides such instruments from other written contracts which contain obligations on the part of one party or the other to pay money, such as agreements of sale, hiring, leases, building contracts, etc."

One of the definitions given in Webster's Dictionary for the word "direct" is "immediate; express; unambiguous; confessed; absolute;" and it does seem that, if the term is to be given any meaning, as used in our attachment statute, it must distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money. In other words, that class of contracts which provide for the direct payment of money must differ somewhat from all other contracts for the payment of money, or the term "direct" has no meaning whatever. The term first appeared in our attachment statute in 1866

(Act Third Legal Assem. approved December 3, 1866, chap. 12, § 1, p. 62). This act was amended by an act of the fifth legislative session approved January 15, 1869 (Laws 1869, § 11, p. 64), and the word "direct" omitted, and it does not reappear until 1895, when its re-enactment into our laws must be presumed to have been done for a purpose, viz., to limit the operation of the writ of attachment. Before 1895 an attachment could be had in every action upon a contract, express or implied, for the payment of money, where the debt was not secured. Since then the writ can only issue in those cases arising on contracts, express or implied, for the direct payment of money, and, applying the definitions of the term "direct" as given above, the obvious intention of the legislature can be made plain. The contracts now contemplated by § 890, above, are such only as require the payment unconditionally and absolutely of a definite sum. As the sureties to the undertaking under consideration became liable only on condition that their principal, White, defaulted in the performance of his contract, and then only for such sum as the indemnified party might recover as damages for the breach (not exceeding the sum mentioned in the bond), we are of the opinion that the bond sued upon is not such a contract as is contemplated in § 890, above, and that the attachment was properly discharged.

The order discharging the attachment is affirmed.

Brantly, Ch. J., and Milburn, J., concur.

NEBRASKA SUPREME COURT.

STATE of Nebraska *ex rel.* LANCASTER COUNTY COMMISSIONERS, *Plff. in Err.*

v.
Paul HOLM.

(.....Neb.....)

*1. A county officer is not required to account for and pay over to his county money received by him in payment for services performed for another, by private agreement, which are not part of the duties of

*Headnotes by BARNES, C.

NORM.—The above case seems to come very close to the line between the work that a public officer on a salary may do for his own profit during the time for which he receives the salary, and that for which he must account as an officer. If evidence had been admitted that this 64 L. R. A.

his office, and which are not incompatible with, and are not included within, his official duties.

2. It is no part of the official duties of a register of deeds to search the records of his office to ascertain whether persons signing a petition to obtain a liquor license are freeholders.

3. Such officer may, by agreement, perform such services for persons who, under the rules of the excise board of a city, are required to make proof of the qualifications of such signers by his certificate, and may collect and receive such compensation as may be agreed upon therefor.

4. In such a case he must place the fee

work was done by his deputies, who were also paid salaries, the claim of the register to the fees would seem manifestly untenable; but this might have raised a question of right as between him and the deputies themselves.

for his certificate and seal on his fee book and account for and pay the same over to the county, if in excess of the salary allowed him by law; but he cannot be compelled to account for and pay over the amount received by him for his labor in searching the records.

(December 16, 1903.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in a mandamus proceeding to compel the accounting for money alleged to belong to the county. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. James L. Caldwell, William T. Stevens, and Loren E. Winslow, for plaintiff in error:

It is the duty of the county treasurer to make searches of the tax lists, books, and records in his office, in his care and control as such county treasurer, and to make abstracts and copies thereof, and attach his certificate and seal thereto when lawfully demanded, and to demand and receive reasonable fees therefor.

State ex rel. Buffalo County v. Allen, 23 Neb. 451, 36 N. W. 756; *State ex rel. Miller v. Sovereign*, 17 Neb. 175, 22 N. W. 353; *State ex rel. Atty. Gen. v. Leidtke*, 12 Neb. 171, 10 N. W. 703; *State ex rel. Chesney v. Wallichs*, 16 Neb. 110, 20 N. W. 27; *Ripley v. Gifford*, 11 Iowa, 367; *Henry v. Tilson*, 17 Vt. 479; *State ex rel. Frontier County v. Kelly*, 30 Neb. 574, 46 N. W. 714; *State ex rel. Holt County v. Hazelet*, 41 Neb. 257, 59 N. W. 891; *State ex rel. Lancaster County v. Silver*, 9 Neb. 85, 2 N. W. 215; *Bayha v. Webster County*, 18 Neb. 131, 24 N. W. 457; *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376.

The county treasurer was the county's officer and agent, and cannot in any instance be heard to say he performed the service as an individual.

Blaco v. State, 58 Neb. 566, 78 N. W. 1056; *Morris v. State*, 47 Tex. 593; *Com. v. Philadelphia*, 27 Pa. 497; *Olean v. King*, 116 N. Y. 362, 22 N. E. 559; *People v. Swineford*, 77 Mich. 573, 43 N. W. 929; *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554; *Hughes v. People*, 82 Ill. 78; *Delaware County v. Griffin*, 17 Iowa, 166; *Graham County v. Van Slyck*, 52 Kan. 622, 35 Pac. 299.

He performed these services as register of deeds; he assumed to have the power to perform the service and make the certificate; and he charged for it as register of deeds.

State v. Leach, 60 Me. 58, 11 Am. Rep. 172; *State v. Wedge*, 24 Minn. 150; *State v. Porter* (Neb.) 95 N. W. 769. 64 L. R. A.

That the services were performed after office hours is immaterial.

State ex rel. Holt County v. Hazelet, 41 Neb. 257, 59 N. W. 891.

On petition for rehearing.

Wherever the rights of third persons require the performance of a duty, it becomes an official duty.

Smith v. State, 1 Kan. 365.

Fees are a compensation for public officers for services rendered to individuals.

Tillman v. Wood, 58 Ala. 578; *Evans v. Trenton*, 24 N. J. L. 764; *State ex rel. Holt County v. Hazelet*, 41 Neb. 257, 59 N. W. 891; *Flemming v. Hudson County*, 30 N. J. L. 280.

Paul Holm and his deputy and clerks were the servants and agents of the county, and could not act in an official and a private capacity at the same time. All "fees" belong to the county.

Bedwell v. Custer County, 51 Neb. 387, 70 N. W. 945; *Hayes County v. Christner*, 61 Neb. 275, 85 N. W. 73.

He charged fees for his services, and cannot be heard to claim that they are his own perquisites.

Ripley v. Gifford, 11 Iowa, 367; *Henry v. Tilson*, 17 Vt. 479; *Morris v. State*, 47 Tex. 593; *Com. v. Philadelphia*, 27 Pa. 497; *People v. Swineford*, 77 Mich. 573, 43 N. W. 929; *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554; *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172.

Messrs. Stewart & Munger, for defendant in error:

There is no statute prescribing any fee or charge to be made by the register of deeds for such services.

Officer's fees are charges authorized by law to be made for specific acts of official duty.

Drexel v. Douglas County, 62 Neb. 862, 87 N. W. 1055.

These charges were neither "authorized law;" nor were they for acts of "official duty;" nor is any fee prescribed by law.

Lusk v. Carlin, 5 Ill. 395.

As it was not respondent's duty to do the work, he could either refuse to do it or contract for a compensation therefor.

Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941; *Drexel v. Douglas County*, 62 Neb. 862, 87 N. W. 1053; *Cornell v. Irvine*, 56 Neb. 657, 77 N. W. 114; *Mallory v. Ferguson*, 50 Kan. 685, 22 L. R. A. 99, 32 Pac. 410; *State v. Obert*, 53 Kan. 107, 36 Pac. 64; *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659.

Unless the statute allows a fee for a legal duty, none can be charged, but the services must be gratuitous.

Red Willow County v. Smith (Neb.) 93 N. W. 151; *O'Shea v. Kavanaugh* (Neb.)

91 N. W. 578; *State ex rel. Axen v. Meserve*, 58 Neb. 451, 78 N. W. 721; *Stoner v. Keith County*, 48 Neb. 279, 67 N. W. 311; *Held v. Polk County*, 46 Neb. 28, 64 N. W. 376; *Bayha v. Webster County*, 18 Neb. 131, 24 N. W. 457; *State ex rel. Lancaster County v. Silver*, 9 Neb. 85, 2 N. W. 215; 23 Am. & Eng. Enc. Law, p. 390; *Howland v. Wright County*, 82 Iowa, 164, 47 N. W. 1086.

If Holm had no authority to collect any fees, or exacted too much, such an act is illegal, and is denounced by statute. For doing that he must pay a penalty for every offense.

Courier Printing & Pub. Co. v. Leese (Neb.) 91 N. W. 357; *O'Shea v. Kavanaugh* (Neb.) 91 N. W. 578; *Phœnix Ins. Co. v. McEvony*, 52 Neb. 567, 72 N. W. 956.

In addition, an officer is liable on his bond to the person from whom such fee is exacted.

Kane v. Union P. R. Co. 5 Neb. 105; *Phœnix Ins. Co. v. McEvony*, 52 Neb. 566, 72 N. W. 956.

Barnes, C., filed the following opinion:

The plaintiff in error filed its petition in the district court against the defendant, praying for a writ of mandamus to compel him, as register of deeds of Lancaster county, to enter certain sums of money, received as hereinafter stated, on his fee books, and to account for and pay the same over to said county. Defendant filed his answer to the alternative writ, and on the issues thus joined, together with a stipulation or agreed statement of facts, the court rendered a judgment denying the writ and dismissing the relator's action. From that judgment the county prosecuted error.

It appears from the record that, during the time the defendant was the register of deeds of Lancaster county, the excise board of the city of Lincoln required every person applying for a saloon license in said city to obtain a certificate of the register of deeds to the effect that the persons signing his petition were freeholders; that during the defendant's two terms of office he made search of the records and furnished such certificates for 224 applicants; that he charged each of such persons for his investigation of the records \$3.50, and 50 cents for his certificate as register of deeds; that in each case he reported the 50 cents for the certificate as fees, placed the same upon his fee book, and duly accounted for and paid the same over to the county. It further appears that his salary fixed by law was \$2,500 per year; that he received and retained that sum for each fiscal year, which included the sums so reported for certificates as aforesaid; that he refused to

enter the amount paid him for searching the records on his fee book, and refused to pay it over to the county, claiming that such service was no part of his official duties, and that he had the right to contract with the applicants for his work in examining the records, and receive from each of them such a sum as they should agree to pay him for the services so performed. It is contended, however, on the part of the relator, that the sums so received by the defendant were collected and received by him by virtue of his office, that he was entitled to receive only \$2,500 per year from all sources, and that therefore the court erred in denying the writ and dismissing the action. This is the sole question presented for our consideration.

It may be stated at the outset that, if the services for which respondent received the money in question were any part of the duties of his office, he would be required to account for and pay the same over to the relator; and it would make no difference whether the statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the respondent and the person for whom he performed the service. Counsel for the relator contends that the money was received because of respondent's official position, and the judgment should be reversed because of the rule announced in *State ex rel. Miller v. Sovereign*, 17 Neb. 175, 22 N. W. 353. In that case the acts performed by Sovereign were a part of his official duties, and it was held that he could not, by making his certificate as a notary public instead of county clerk, avoid accounting for the fees which were fixed by law for the performance of those duties. We are also cited to the well-known case of *State ex rel. Atty. Gen. v. Leidtke*, 12 Neb. 171, 10 N. W. 703. In that case Leidtke, who was the auditor of public accounts, performed certain duties in administering the law relating to insurance companies. Those duties were required of him by virtue of his office, and the fees therefor were fixed by law. The statute further provided that such fees should be paid to him as auditor. It was contended that for that reason he was entitled to retain those fees in addition to the amount of his salary as fixed by law and the Constitution. It was held that the Constitution requires these fees to be paid to the state treasurer, and Leidtke was for that reason ordered to account for and pay the same over to the state. Counsel also calls our attention to the case of *State ex rel. Chesney v. Wallich*, 16 Neb. 110, 20 N. W. 27. The only question involved in that case was whether or not a county presenting its refunding

bonds to the auditor for registration must pay one fourth of 1 per cent on the dollar for each bond registered as provided by law. Our attention is also called to *State ex rel. Frontier County v. Kelly*, 30 Neb. 574, 46 N. W. 714. In that case it was held that where a county clerk, who was also a notary public, took acknowledgments of deeds, mortgages, affidavits, and depositions, as a notary public, it was his duty to enter upon his fee book, as county clerk, and report to the county board, every item received by him for such services, under the rule laid down in *State ex rel. Miller v. Sovereign*, 17 Neb. 175, 22 N. W. 353. It was further held that he could not retain the fees received by him for making and certifying abstracts of title, which was a part of the duties of his office, although he was at that time a bonded abstractor. The relator relies, also, on the case of *State ex rel. Holt County v. Hazelet*, 41 Neb. 257, 59 N. W. 891. In that case the county clerk insisted that he was entitled to receive, retain, and not account for and pay over to the county, the fee of \$2 for furnishing the sheriff with a certificate of liens and encumbrances in cases of appraisals and sale under decrees of foreclosure and on execution. It was held that it was a part of the official duties of the clerk to furnish such certificates when requested to do so by the sheriff; that he was entitled to collect therefor the sum of \$2 in each case, which he must enter upon his fee book and account for, notwithstanding the duty was performed by his deputies outside of regular office hours. *State ex rel. Lancaster County v. Silver*, 9 Neb. 85, 2 N. W. 215, is also relied on by the relator. Silver was the county clerk of Lancaster county, and claimed that extra compensation should be allowed him by the board of commissioners for making the tax list and duplicates. His claim was disallowed, and it was held that a public officer must discharge all of the duties pertaining to his office for the compensation allowed by law, and that he cannot be allowed compensation for extra work unless it is authorized by the statute. We are further cited to *Bayha v. Webster County*, 18 Neb. 131, 24 N. W. 457. The only question presented in that case was whether or not the clerk was entitled to extra compensation for making out the tax list, and it was again held that a public officer must discharge all the duties pertaining to his office for the compensation allowed by law; that he can receive no compensation for extra work unless it is authorized by statute. Lastly, our attention is called to the case of *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376, where the same question was involved, and was decided

in the same way as in the case last above mentioned.

It is further contended that, even if it was not the official duty of the respondent to perform these services, yet he was the county's officer, and the custodian of its books and seal, and that he cannot be heard to say that he performed them as an individual. To sustain this view, the relator cites *Blaco v. State*, 58 Neb. 566, 78 N. W. 1056. An examination of that case discloses that the decision is based, as in all of the foregoing cases, on the fact that the fees were received on account of official services provided for by law; and the particular point decided was that the respondent must account for such fees, whether he performed the services regularly or irregularly, and that his bondsmen could not escape liability on the claim that the services were irregularly performed.

So it would seem that our decision must be based upon the sole question as to whether or not the services rendered for the applicants, as above stated, were a part of the official duties of the respondent. If they were, then he must account for and pay over the money received therefor to the relator. If, however, they were no part of his official duties, then the question falls within the rule announced in the case of *State v. Obert*, 53 Kan. 107, 36 Pac. 64, where it was held that a county treasurer, who, for compensation, made searches and answered letters of inquiry, and charged therefor, without a statute authorizing a charge, did not have to report such fees, except for his certificate alone. The law of Kansas on this question is the same as the law of this state. It was provided by the Kansas statutes that, in counties having a population of more than 5,000, and not over 10,000, the treasurer should receive \$1,500 per annum, and that he should account for, and pay over to the county, all of the money collected by him as fees in excess of that amount. It was stated in the body of the opinion that, under the general statutes relating to fees and salaries, county officers are entitled to no more compensation than the salaries fixed by law, and that all fees received by them for official services should be accounted for, and deducted from each quarterly allowance of salary. The court further said: "We do not think that the fees Obert collected for making and certifying abstracts of title, and in writing letters, and giving information therein as to taxes, etc., should be reported or accounted for. Such services are no part of the official duty of a county treasurer, as that duty is defined by the statute;" citing *Mallory v. Ferguson*, 50 Kan. 685, 22 L. R. A. 99, 32 Pac. 410. The

same rule was announced in the case of *San Bernardino County v. Davidson*, 112 Cal. 503, 44 Pac. 659. In that case it was shown that it was the custom of miners to have the county recorder record notice of mining claims. There was no statute requiring such work, but the clerk kept a record, and charged for it. It was held that "it was no duty imposed by law, and no fees fixed by law for it, and hence he need not account for such fees." The case of *Cornell v. Irvine*, 56 Neb. 657, 77 N. W. 114, seems to throw some light on this question. There it was said that, where a state officer has rendered services outside of, and not incompatible with, his duties as such officer, it is not proper for the auditor of public accounts to refuse to issue a warrant in payment of such extra services merely because the salary of such officer was already paid for the period during which said extra services were rendered. And so it was held that Judge Irvine was entitled to receive compensation for lectures delivered to the law class of the State University, and that such services were not incompatible with, and were not included within the scope of, his duties as supreme court commissioner. We have recently held in *Shepard v. Easterling*, 61 Neb. 882, 86 N. W. 941, that a county judge might be allowed the sum of \$300 by the county board for docketing several hundred old cases, and for making an index to the records of the probate court, because such services were extraofficial; in other words, that the county judge could not be required, as a part of the duties of his office to perform the services which should have been performed by his predecessor, and, although no fees were fixed by law for the performance of such services, he could contract with the commissioners to do that work, and would be entitled to receive the amount agreed upon, over and above the amount of fees which he could retain during his current term. In the case at bar it cannot be contended that the respondent was obliged to perform

the services in question as a part of his official duties. The rule of the excise board of the city of Lincoln was in no manner binding upon him. He could not be compelled to perform any duties or services except such as the statute enjoined upon him. As a strict matter of law, there seems to be no reason why he could not contract with the persons applying for saloon licenses to search the records for them, and receive such compensation therefor as might be agreed upon. The fact that such services were performed by his deputies, who had received payment from the county for their services, or that they were performed by himself personally, we are not at liberty to consider, because no competent offer to prove that fact was made by the relator. While the conduct of the respondent may be of doubtful propriety, and while, perhaps, from an equitable standpoint, the money in question ought to be paid to the relator, yet these matters cannot be taken into consideration by us in deciding this case. The question presented is whether or not, as a matter of law, the respondent can be compelled to account for and pay over the money in controversy herein. It appearing that the services rendered by respondent were no part of the duties of his office, we are constrained to hold that the money paid him therefor under private contract or agreement cannot be recovered by the relator, and therefore the district court did not err in denying the writ and dismissing the action.

For the reasons above given, we recommend that the judgment of the district court be affirmed.

Albert and Glanville, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

J. D. ELLIOTT, Appt.,

v.

M. F. JEFFERSON.

(183 N. C. 207.)

1. Where a grantor, in dividing his estate, makes calls different from those which he had previously marked upon the

NOTE.—As to controlling effect of landmarks or monuments over calls for courses and distances in determining boundaries, see also, in this series, *Teass v. St. Albans*, 19 L. R. A. 802, 64 L. R. A.

ground, the question whether those in the deed, or those marked on the ground, will control, depends upon his intention.

2. One claiming that calls in a deed, which vary from those previously run on the ground, did not represent the will of the grantor, has the burden of showing that fact, where the calls in the deed are not inherently inconsistent.
3. The rule that a marked line controls a call in a deed for course and distance is not applicable unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption that the grantor intended to adopt it.

4. No rule can be invoked for the construction of a deed which tends to defeat the intention of the grantor.

(October 20, 1903.)

APPEAL by plaintiff from a judgment of the Superior Court for Beaufort County in favor of defendant in an action brought to recover certain logs which were alleged to have been wrongfully cut on property belonging to plaintiff. *Affirmed*. The facts are stated in the opinion.

Messrs. Rodman & Rodman, for appellant:

The object of every deed is to enable one to retrace the lines actually made, or intended to be made, as the boundaries of the tract conveyed. The rule is that lines actually run and marked at or before the execution of the deed control course and distance.

Cherry v. Slade, 7 N. C. (3 Murph.) 82; *Den ex dem. Reed v. Shenok*, 14 N. C. (3 Dev. L.) 76; *Safret v. Hartman*, 50 N. C. (5 Jones L.) 185; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033.

If both Elliott and Jefferson are in possession of different parts of the disputed land, the possession of that part not in the actual possession of either is in him who has the true title.

Boomer v. Gibbs, 114 N. C. 76, 19 S. E. 226.

Messrs. Small & MacLean and *Charles F. Warren* for appellee.

Douglas, J., delivered the opinion of the court:

This is an action for the recovery of certain logs, and, in its determination, involves the title to the land from which the logs were cut. There are many exceptions both to the giving and refusal of instructions, but all that are necessary for us to consider are substantially involved in the question whether the line run and marked by Burbank before the execution of the deeds in question should control the boundaries of the land, regardless of the calls in the deed. As the jury found the issues as to title in favor of the defendant, all question as to the measure of damages is practically eliminated from the consideration of this case. Both parties claim under J. S. and W. H. Lodge by deeds of equal date, so the only question of boundary is as to the dividing line between the two tracts.

The principal exception relied on by the plaintiff is to the refusal of the court to give the following instruction: "If the jury, from the evidence, find that the two Lodges, who then owned the land, in 1875 employed the witness Burbank to run out these lands, which are afterwards conveyed unto the
64 L. R. A.

Morgans and Mrs. Corbin, and that in making this survey of these lands the witness Burbank ran from the gum to the pine, and from the pine to the cypress stump under water, and that this line from the pine to the stump was blazed or marked, and that afterwards the deed to the Morgans was made, calling from the gum north, 73 east, and from the pine 73½ east, and that the line called for in these deeds was the line which Burbank ran from the gum to the pine and from the pine to the stump under water, then these lines actually run and marked would be the true lines, whether the course given in the deed was the same course the compass now gives or not." If this prayer referred to the purpose and intent of the grantors at the time the deeds were executed, we think it is sufficiently included in the instructions that were given. If it meant anything else, it was properly refused.

The following instructions, among others, were given by the court: "The court charges you that the burden is upon the plaintiff to satisfy you by a preponderance of the evidence that W. H. and John S. Lodge, for the purpose of making the division above mentioned, had the line claimed by plaintiff actually run and marked, and established such line as the dividing line between these two tracts of land; and further, that when the deeds to Mary Morgan and Martha Corbin were made on March 15, 1876, after the survey of Burbank, it was the intention of said W. H. and John S. Lodge, in describing the lands conveyed in said deed, to convey the same as run and marked by said Burbank; and the plaintiff must satisfy you by a preponderance of the evidence that this line was actually run and marked as the division line between the Morgan and Corbin land, and that when the deeds were made it was the purpose and intention of said John S. and W. H. Lodge to convey the land in accordance with this line, if you find that the same was run and marked as before explained. . . . Now, if you should find from the evidence that it was the purpose of the parties to this deed, at the time the same was made, not to run from the pine to the stump, but that it was their purpose and intention to run from the pine the course and distance called for in the deed, to the creek, then the line as described in this deed, allowing the proper variation, would be the true line of the defendant Jefferson. . . . If you should find from the evidence that it was the purpose and intention of the parties to the deed to begin at the gum designated by Gay, and run the course and distance given in the deed to Mary Morgan, then the line as described in said deed, allowing the proper

variation, would be the true line of the Mary Morgan tract. If it was the purpose and intention of John S. and W. H. Lodge to make the line from the pine to the stump the division line between the Mary Morgan and Martha J. Corbin land, and the survey was made for that purpose, and the line actually run and marked, still they could abandon such purpose and intention, and make the lines such as they inserted in the deeds, and, if they did not so abandon their purpose, the lines as inserted in their deeds would control." We see no error in these instructions, or in any material part of the charge. The plaintiff says in his brief: "We submit that these instructions, as given by the court, were erroneous, in that they made the whole question of whether the marked line controlled in the deed turn on whether the course as given was given by mistake or not. We contend that there are two grounds upon which the marked line controls: (1) When the call is north or south, and the line actually runs south or north, we submit that there is a question of mistake; that the draftsman simply makes the mistake of reversing his call. (2) That there is another ground, and that is that where a surveyor goes out and actually runs a line, and takes the course as given by his compass at the time, and records that course, and the line is marked by it, that the marked line controls. The course as given by his compass may be recorded by the draftsman correctly, but the compass may have had some temporary aberration of the needle, causing it to read incorrectly. Now, this view of the law was entirely excluded by the charge as given by the court, but it was made to depend upon the question of intention and mistake, and, we submit, under the authorities above cited, was erroneous." His honor was correct in charging that the jury should be governed in their verdict by what they might find to have been the purpose and intention of the grantors at the time of the execution of the deeds. If at that time they intended to adopt the line run and marked by Burbank, and thought that the calls in the deed followed that line, there was evidently a mistake in drawing the deed, as it failed to correctly set forth the intention of the grantors. If, however, they intended the line to follow the calls in the deed, regardless of any marked line, such calls must control the location of the line. Where the description in a deed is not inherently inconsistent, it is the *prima facie* expression of the will of the grantor. It is different where, for instance, the courses and distances are incapable of practical location, or are inconsistent with marked lines or other natural objects called

for in the deed itself. This matter would have been much simplified if the deeds in question had called for the Burbank line, which might easily have been done, had the grantors so desired.

There is an exception to the following charge: "That, if the two deeds to Mary Morgan and Martha Corbin were drawn without mistake on the part of the draftsman, then the lines called for in these deeds would control, and not the marked lines, if any exist." This paragraph, taken by itself, might be capable of misconstruction, from the use of the word "draftsman," but we think it is so qualified by the remainder of the charge as to clearly inform the jury that they must be governed by the intent of the grantors, whose language the deed is supposed to be, in the absence of evidence to the contrary. We think the error of the plaintiff lies in a misapprehension of the application of the rule that in case of a discrepancy a marked line controls the calls in the deed as to courses and distances. This rule never applies unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption as to the intent of the grantor. The mere running and marking of a line can never convey the title to land, nor can it take the place of a deed. At best, it can only serve to locate the land conveyed in the deed, and can operate only in aid of the deed. Admitting that a line is run in contemplation of a deed, it does not bind the grantor, as a different contract may be made, or the line subsequently changed. As no title can vest, except by the execution of a deed, the vital question is the intent of the grantor at the time of such execution. Perhaps the farthest this court has gone in allowing marked lines to control a conveyance of land is in *Barker v. Southern R. Co.* 125 N. C. 596, 74 Am. St. Rep. 658, 34 S. E. 701. It was there held that where a grantor had executed a deed defective in fact, but admittedly intending to convey the land in question, and, in furtherance of such intention, had had the land surveyed, and had placed the defendant in possession thereof, under known and visible boundaries, he was estopped from maintaining an action of ejectment against the defendant, who had ever since remained in open, continuous, and adverse possession. That case turned upon the doctrine of estoppel, and not upon the theory that the marked lines and corners had given validity to the deed. If the defendant had not been in possession, and especially if the land had been in possession of an innocent purchaser, a different question would have been presented. Wherever a marked line or other natural object is per-

mitted to vary the description called for in the deed, it is always in presumed furtherance of the intent of the grantor in the execution of the deed. In other words, it is to carry out the true intent of the deed, and never in derogation thereof. This principle is clearly recognized in the authorities cited by the plaintiff himself, as will appear from the following extracts: In *Cherry v. Slade*, 7 N. C. (3 Murph.) 82, which really went off on the point that the jury, instead of finding the facts, had only found the evidence, Taylor, Ch. J., says on page 90: "This rule is founded upon the same reasons with the preceding ones, the design of all being to ascertain the location originally made; and calling for a well-known line of another tract denotes the intention of the party, with equal strength, to calling for a natural boundary, so long as that line can be proved." In *Den ex dem. Reed v. Shenck*, 13 N. C. (2 Dev. L.) 415, the court says on page 417: "For many years we have in all cases, I believe, except one, adhered to the description contained in the deed, and it is much to be lamented that we do not altogether. The case to which I allude is, where the deed describes the land by course and distance only, and old marks are found corresponding in age, as well as can be ascertained, with the date of the deed, and so nearly corresponding with the courses and distances that they may well be supposed to have been made for its boundaries, the marks shall be taken as the termini of the land. This is going as far as prudence permits, for what passes the land not included by the description in the deed, but included by the marked termini? Not the deed, for the description contained in the deed does not comprehend it. It passes, therefore, either by parol or by a mere presumption. As far as we know, there has been no series of decisions by which the description in the deed is varied by marks, unless they were made for the termini of the land described in the deed, or supposed to be so made, and to which it was intended the deed should refer, or to which it was supposed the deed did refer, or, rather, supposed that the courses and distance corresponded with the marks, and that the same land was described, whether by course and distance in the deed, or by the marked termini." In *Safret v. Hartman*, 50 N. C. (5 Jones L.) 185, the court says on page 189: "His honor charged 'that, notwithstanding the black-oak was not called for in the deed, yet, if it was marked as a corner to the land conveyed, at the time of the conveyance, the line should be extended to it, regardless of course and distance.' In this there is error. His honor misconceived and misapplied the rule laid down in *Cherry v.* 64 L. R. A.

Slade, 7 N. C. (3 Murph.) 82: 'Where it can be proved that there was a line actually run by the surveyor, which was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed.' This rule presupposes that the patent or deed is made in pursuance of the survey, and that the line was marked, and the corner that was made in making the survey was adopted and acted upon in making the patent or deed, and therefore permits such line and corner to control the patent or deed, although they are not called for, and do not make a part of it. Parol evidence being thus let in for the purpose of controlling the patent or deed, by establishing a line and corner not called for, as a matter of course, it is also let in for the purpose of showing that such line and corner were not adopted and acted on in making the patent or deed, because the rule presupposes this to be the fact." In *Baxter v. Wilson*, 95 N. C. 138, the court says on page 143: "For instance, when there has been a practical location of the land, as when it can be proved that there was a line actually run and marked, and a corner made, such a boundary will be upheld, notwithstanding a mistaken description in the deed. *Cherry v. Slade*, 7 N. C. (3 Murph.) 82. The construction has been adopted by our court, to carry out the intention of the parties, when it is clearly made to appear; and, to effect that object, course and distance will be disregarded, if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when some monument is erected contemporaneously with the execution of the deed." The doctrine thus laid down is in full accord with the principles enunciated and the cases cited in *Bowen v. Gaylord*, 122 N. C. 816, 29 S. E. 340, and is sustained by the general current of authority here and elsewhere. In the construction of all deeds and grants, there is one essential object to be kept in view, and that is to ascertain the true intent of the grantor, and to give full effect to that intention, when not contrary to law. All rules of construction adopted by the courts are simply means to a given end, being those methods of reasoning which experience has taught are best calculated to lead to that intention. Hence all authorities unite in saying that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. This doctrine is of such universal acceptance as to require but few citations, more to illustrate its extent than to prove its existence. It is well expressed by Chief

Justice Shaw in *Salisbury v. Andrews*, 19 Pick. 250, 252, as follows: "In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable,—all, however, designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained, being the governing principle of construction." In *Smith ex dem. Dormer v. Parkhurst*, 3 Atk. 135, Lord Chief Justice Willes says: "Another maxim is that such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor. The words are not the principal thing in a deed, but the intent and design of the grantor. We have no power, indeed, to alter the words, or to insert words which are not in the deed; but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. Those maxims, my lords, are founded upon the greatest authority (Coke, Plowden, and Lord Chief Justice Hale), and the law commends the *astutia* (the cunning) of judges in construing words in such a manner as shall best answer the intent. The art of construing words in such a manner as shall destroy the intent may show the ingenuity of counsel, but is very ill becoming a judge." Devlin on Deeds, § 835, says: "But it is doubtful how far arbitrary rules can be of service where the only object is to determine the intention of the parties. In fact the truth was well expressed by Mr. Justice Sanderson (*Walsh v. Hill*, 38 Cal. 481, 487), who said that, 'in the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value . . . is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it.' This is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention."

The judgment of the court below is affirmed.

STATE of North Carolina

v.

Andrew C. BIGGS, Appt.

(133 N. C. 729.)

1. The legislature cannot define the practice of medicine or surgery, for the purposes of an act forbidding such

practice without a license, as the management of any disease, physical or mental, real or imaginary, for fee or reward, by any method whatever.

2. The attempt to confer the exclusive right to treat all diseases, physical or mental, real or imaginary, upon licensed doctors, is unconstitutional.
3. An examination and license as for a practitioner of medicine and surgery cannot be required for the treatment of disease by baths, physical culture, the manipulation of muscles, bones, spine, and solar plexus, and advice as to diet.

(December 18, 1903.)

APPEAL by defendant from a judgment of the Superior Court for Guilford County, convicting him of practising medicine and surgery without a license, contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. C. M. Stedman and E. J. Justice, for appellant:

It is only when the public good demands it that legislation against a person following such avocation as he desires will be upheld.

Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *State v. Pendergrass*, 106 N. C. 667, 10 S. E. 1002; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 65 Am. St. Rep. 785, 51 N. E. 136.

The destruction of the property of the citizen, and proscribing his right to follow innocent pursuits, are expressly prohibited by the 14th Amendment to the Constitution of the United States, and by N. C. Const. art. 1, §§ 1, 7, 17, 31.

The act of 1903, chap. 697, is unconstitutional *in toto*. It makes it unlawful for any but the excepted classes mentioned therein, to minister to the sick for fee or reward, unless they stand the examinations prescribed by law for allopaths and osteopaths; and thereby proscribes all others than the adherents of these two schools. The act gives a false and arbitrary definition to the term, "the practice of medicine;" and thereby citizens of the state are deprived of "the enjoyment of the fruits of their own labor," when the public good does not require it.

State v. Yopp, 97 N. C. 479, 2 Am. St. Rep. 305, 2 S. E. 458; *Smith v. Lane*, 24 Hun, 632.

The examination prescribed for osteopaths is before a board composed entirely of allopaths in the branches taught in the schools of the latter, and not in the branches peculiar to osteopathy, and is more severe than that prescribed for those who pro-

NOTE.—As to constitutionality of a statute requiring a license from all who announce to the public their readiness to heal or relieve those

suffering from disease, see, in this series, *Parks v. State*, 59 L. R. A. 190.

As to constitutionality of regulations as to

pose, regularly, to practise medicine and surgery.

State v. Liffing, 61 Ohio St. 39, 46 L. R. A. 336, 76 Am. St. Rep. 358, 55 N. E. 168; *Nelson v. State Bd. of Health*, 108 Ky. 769, 50 L. R. A. 386, 57 S. W. 501; *State v. Gravett*, 65 Ohio St. 289, 55 L. R. A. 791, 87 Am. St. Rep. 605, 62 N. E. 325.

Our constitutions are founded upon individualism, and they make prominent the theory that to the individual should be granted all the rights consistent with public safety, and our development is chiefly attributable to the firm establishment and maintenance of those rights by an authorized resort to the courts for their protection against all hostile legislation which is not required by considerations of public health or safety. In the absence of such considerations those rights are alike immutable.

See note to *State v. Goodwill*, 6 L. R. A. 622.

Mr. Robert D. Gilmer, Attorney General, for the State:

Skilled trades and learned professions are subjects of police regulation.

Tiedeman, *State & Federal Control*, § 87, pp. 241, 242; Cooley, *Torts*, p. 289; Brannon, 14th Amendment, p. 81; *State v. Van Doran*, 109 N. C. 869, 14 S. E. 32; *State v. Call*, 121 N. C. 643, 28 S. E. 517.

Laws regulating the practice of medicine are of ancient origin.

Dr. Bonnam's Case, 8 Coke, 116a.

Laws of this character have been incorporated in the statutes of almost every state in the Union, and have been upheld as a valid exercise of the police power of the state.

State ex rel. Burroughs v. Webster, 150 Ind. 616, 41 L. R. A. 212, 50 N. E. 750.

The legislature has "ample power to protect the public health and welfare by providing that only the learned may pursue a learned profession whose activities so closely affect them."

State v. Gravett, 65 Ohio St. 289, 55 L. R. A. 791, 87 Am. St. Rep. 605, 62 N. E. 325.

In the interpretation of statutes it is the duty of the courts to resolve every doubt in favor of their constitutionality, and to assume that the legislature, in their enactment, acted in good faith, for the public good.

practice of medicine generally, see cases in note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L. R. A. 579.

For cases in this series holding that the practice of osteopathy is the "practice of medicine" within the meaning of statutes regulating such practice, see *Little v. State*, 51 L. R. A. 717; *State v. Gravett*, 55 L. R. A. 791, and *Bragg v. 64 L. R. A.*

State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143.

The definition of what constitutes the practice of medicine as defined in the act of 1903 embraces the osteopath, and the mode or manner of determining his qualifications to practise his profession is a question purely within the domain of legislation.

Williams v. People, 121 Ill. 88, 11 N. E. 881; *People, use of State Bd. of Health v. Blue Mountain Joe*, 129 Ill. 377, 21 N. E. 923; *Driscoll v. Com.* 93 Ky. 399, 20 S. W. 431; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97.

The act of 1903 is constitutional. The statute applies alike to all persons belonging to the same class,—that is, to all osteopaths. In such cases the legislature is the sole judge of the classification.

State v. Stevenson, 109 N. C. 734, 26 Am. St. Rep. 595, 14 S. E. 385; *State v. Moore*, 113 N. C. 697, 22 L. R. A. 472, 18 S. E. 342.

There is nothing in the statute which indicates any intention on the part of the legislature to deprive any person of his rights. The object and spirit of the statute are clearly within the police power, and its purpose is to prevent the incompetent osteopath from practising his profession.

Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Iowa Eclectic Medical College Asso. v. Schrader*, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24.

The defendant does not possess any natural right to practise his profession which is not subject to the control of the legislature, restricted only by positive provisions of the Constitution.

Cooley, *Const. Lim.* 6th ed. p. 197, § 4; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Williams v. People*, 121 Ill. 88, 11 N. E. 881; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888.

Clark, Ch. J., delivered the opinion of the court:

The defendant is indicted on a charge that he "did unlawfully and wilfully begin, engage in, and continue the practice of medicine and surgery, and the branches thereof, for fee or reward, without having obtained a license so to do from the Board of Medical Examiners of the state of North Carolina." Upon the facts found, the court

State, 58 L. R. A. 925; *contra*, *State v. Liffing*, 46 L. R. A. 334, and *Nelson v. State Bd. of Health*, 50 L. R. A. 383.

As to right of Christian Scientists to practice without physician's license, see *State v. Buswell*, 24 L. R. A. 68, and *State ex rel. Swarts v. Mylod*, 41 L. R. A. 428.

was of opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

The special verdict found that the defendant advertised himself as a "nonmedical physician;" that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith;" that he advertises to cure by natural methods, without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage baths and physical culture, manipulates the muscles, bones, spine, and solar plexus, and kneads the muscles with the fingers of the hand; he writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the State Medical Board, and claims no exemption, under the provisions of the act of 1903, as a nurse, or midwife, nor as one curing by prayer; and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment, and received payment therefor, since the passage of chap. 697, p. 1074, Laws 1903, *To Define the Practice of Medicine and Surgery*.

Section 3124 of the Code requires that every person who applies for license to practise "medicine or surgery or any of the branches thereof" shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, and the practice of medicine." There was added by § 2, chap. 117, p. 180, Laws 1885, the following provision: "And any person who shall begin the practice of medicine or surgery in this state for fee or reward, after the passage of this act, without first having obtained license from said board of examiners [meaning the State Board of Medical Examiners] shall not only not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than \$25, nor more than \$100, or imprisoned, at the discretion of the court, for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts, on the ground that everyone has an "inalienable right to life, liberty, and the pursuit of happiness," as our great Declaration phrases it, and that by that guaranty it

is the right of everyone to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon § 7 of article 1 of our state Constitution, which forbids exclusive privileges and emoluments to any set of men, and § 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the 14th Amendment to the Constitution of the United States, which prohibits any state "to deny to any person the equal protection of the law." There was undeniably great force in the argument on that side. The lawmaking power slowly in this state and in others, yielded to the view that it could or should pass such act. In 1858-59 (Acts 1858-59, chap. 258, p. 356) it first incorporated "The State Medical Society," and authorized the above examination, and prohibited anyone to practise medicine or surgery or prescribe for the cure of diseases, for fee or reward, without such license, but was careful to add a proviso that no one who should practise without such license should be guilty of a misdemeanor, the only penalty being that if he practised on credit he could not recover his fees in the courts. The law remained thus till the above-recited act passed in 1885, and which was made prospective. The constitutionality of this last statute was fully considered, and, after a most able argument against it by counsel, was sustained by this court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privilege." *State v. Call*, 121 N. C. 646, 28 S. E. 517. If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public, the legislature was prohibited by the Constitution from enacting it, nor could the legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any state system of healing. *State v. McKnight*, 131 N. C. 723, 59 L. R. A. 187, 42 S. E. 580. After these decisions, moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guaranty that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by meth-

ods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practise their faith and be treated, if they chose, by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the legislature could not, under the Constitution, restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—"allopathic," "homeopathic," "Thompsonian," and the like—should be examined upon a course such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the board of examiners.

At the last session of the general assembly the following act (Act 1903, chap. 697, p. 1074) was passed amendatory of § 3122 of the Code: "For the purpose of this act the expression 'practice of medicine and surgery' shall be construed to mean the management, for fee or reward, of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever: Provided, that this shall not apply to midwives nor to nurses: Provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis, and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis: Provided, this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson, in *McAden v. Jenkins*, 64 N. C. 801, noted, as of common knowledge, and reiterated in *Raleigh & S. Air-Line R. Co. v. Jenkins*, 68 N. C. 505, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. Though there may be no promoters here, the same rule applies to this act amending the charter of this corporation, in whose supposed in-

terests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "practice of medicine and surgery" shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." That is, the practice of surgery and medicine shall mean practice without surgery or medicine, if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The legislature cannot forbid one man to practise a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says, "any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs, on the courthouse square, who banishes headaches, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression, forbidding treatment "for fee or reward" by other than an M. D. "by any other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D. It is not even admissible to "minister to a mind diseased" in any method, or even dissipate an attack of the "blues," without that label, duly certified. Is not this creating a monopoly, and the worst of monopolies, that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, and

the practice of medicine?" Such examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guaranty that is given by his license that the M. D. is competent. But how about those who are too poor, or too ignorant, or too perverse, to wish that kind of treatment? Is it requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this state to remove corns or to plug teeth without full knowledge of the *materia medica*, or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomach ache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution.

Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s, it would necessarily follow that the legislature would have to prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly. The medical profession merited and obtained a due share of prosperity prior to above statute of 1903, and will receive no great detriment because the defendant cannot be punished under its provisions.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science, and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M. D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law

says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practise medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practise to cure diseases without such examination. By what process of reasoning can massage baths and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, fifteen centuries older than the Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa, in ancient Elam, there are found (§§ 215-225) regulations of the medical profession, fixing a scale of fees, and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks, "Is there no balm in Gilead? Is there no physician there?" The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent, and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatments is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practise them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D., or prohibiting the use of such remedies altogether, neither of which

results the legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited.

In this case the defendant is found guilty of the following acts, and no more: (1) Administering massage baths and physical culture; (2) manipulating muscles, bones, spine, and solar plexus; (3) kneading the muscles with the fingers of the hand; (4) advising his patients what to eat and what not. And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable, "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, *materia medica*, and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the state to regulate the "practice of medicine and surgery," and to throw around the public any reasonable protection against unfit members of that honorable profession, and provide against malpractice, but the general assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practise it. But it is not found here that the defendant is deceiving and injuring the public, or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It may be that if he were not there some of the patients might call in an M. D., but that is due, possibly, to the ignorance or perversity of the patients, who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases. The law is thus stated in *Lawton v. Steele*, 152 U. S. 137, 138, 14 Sup. Ct. Rep. 501, 38 L. ed. 389: "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said on page 138, 152 U. S., page 501, 14 Sup. Ct. Rep., page 389, 38 L. ed.: "In all those cases the acts were held to be

invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public interests." See also *State v. Pendergrass*, 106 N. C. 667, 10 S. E. 1002; *State v. Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 65 Am. St. Rep. 785, 51 N. E. 136.

License is required for the practice of pharmacy, of dentistry, of law, and many other skilled professions. We have a state system of law, for the "law is the state," and laws are prescribed by the legislature; and we also have a state system of education. Yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale, or any other legal instrument whatever; nor is it made punishable to settle litigation out of court by arbitration or otherwise, without the aid of a lawyer, nor to teach in other than the state schools. Though there are many methods of treating diseases among which the legislature is not authorized to select one as the state system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment, upon examination of that system, thus denying mankind any relief from pain and suffering, except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief,—not by the M. D.'s themselves, nor by the courts. Judges are lawyers, and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who eschew medicine and surgery may well object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one. His learned counsel contends that Act 1903, chap. 697, p. 1074, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses, and those who profess to heal by prayer, who minister to the sick for fee or reward, 'by any other method whatsoever,' shall be construed to be practising medicine or surgery, and then follows this language: 'Provided further, that applicants not belonging to the regular school of medicine shall not be

required to stand an examination except upon the branches taught in their regular colleges; to wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics, and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in, except pharmacy, materia medica, therapeutics, and the practice of medicine, and, in addition, he is required to stand an examination in branches that the regular medical student is not required to be examined on, as follows: 'histology, urinalysis and toxicology, regional anatomy, neurology, bacteriology, gynecology, and physical diagnosis.' But it is remarkable that he is not required to pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations, and osteopathic diagnosis." As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed course of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to say that the acts of which he was convicted of doing "for a fee," to wit, using massage baths, physical culture, manipulating muscles, bone, spine, and solar plexus, and advising his patients as to diet, could be done as safely to the public, so far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology, and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practise osteopathy, and, of course, only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert

knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way. The term "practice of medicine and surgery" embraces probably the larger, and certainly by far the most profitable, part of the "treatment of diseases," but is not co-extensive with the latter term, and cannot be made so, unless "surgery and medicine" are adopted as the state system of treatment,—a monopoly,—and all other methods are made indictable. On the other hand, the State Medical Society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners and practices which they would not wish to recognize. All the law so far has done or can do is to require that those practising on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Dr. Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this state has said that out of twenty-four serious cases of disease, three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than His followers were casting out devils and curing diseases, He said, "Forbid them not."

Upon the special verdict the defendant should be adjudged not guilty.

Reversed.

Walker and Connor, JJ., concur in result.

OKLAHOMA SUPREME COURT.

Nathan NEELEY, *Plff. in Err.*,

v.

SOUTHWESTERN COTTON SEED OIL COMPANY.

(13 Okla. 356.)

*1. The court may withdraw a case
* Headnotes by BURFORD, Ch. J.

from the jury, and direct a verdict for the defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

2. In case of an accident to an employee the fact of accident carries

NOTE.—As to right of servant who continues work on the faith of the master's promise to re-
64 L. R. A.

move a specific cause of danger, see also, in this series, *Illinois Steel Co. v. Mann*, 40 L. R. A.

with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the accident was the result of the negligence of the employer.

3. It is the duty of the employer to furnish the employee a reasonably safe place to work, and reasonably safe appliances with which to work, reasonably safe material to work with, and reasonably competent fellow servants. He is required to furnish appliances free from defects discoverable by the exercise of ordinary care, and the employee has the right to rely upon this duty having been performed; and while, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. The exception to this rule is that where the employee receives for use a defective appliance, and with knowledge of the defect and its dangerous character continues to use it without notice to his employer, he cannot recover for an injury resulting from such defective appliance thus voluntarily used.
4. A servant entering into an employment which is hazardous assumes the usual risks incident to such service and those which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of appliances from which injury may be apprehended, he also assumes the hazards incident to such situation.
5. The risks assumed by an employee are such perils as exist after the employer has used due care and precaution to guard the former against danger by providing him a reasonably safe place to work in, reasonably safe appliances to work with, reasonably safe materials to work upon, and reasonably competent fellow servants to work with; but, when the employee undertakes to use defective or unsafe appliances with knowledge of such unsafe condition he assumes the increased risk of danger, and the employer is relieved from responsibility to the employee by reason of the employee's knowledge.
6. It is the duty of the employer to provide the employee with reasonably safe machinery, tools, and appliances with which to do his work, and he cannot relieve himself from liability by delegating this duty to another; and, in case of injury

resulting from defective or unsafe appliances, the relations of fellow servants cannot arise.

7. If an employee discovers that appliances furnished him by the employer with which to do his work are defective or dangerous, and informs the employer of such defect, and requests that the employer remedy such defect so as to avoid increased risk, and the employer gives him assurances that the defect will be remedied, and, relying upon such assurance, the employee continues in the service, but before the repairs are made an injury results to the employee by reason of such defective appliances, the employee will ordinarily be entitled to recover. But if, after giving such assurances, and prior to the accident, the employer directly or indirectly revokes his former promise to repair or remedy, the employee will not, in such event, be warranted in further continuing his service based upon such promise to repair; and, under such circumstances, the question of contributory negligence should ordinarily be left to the jury.
8. When, on the trial of a cause, a question is presented as to the existence of negligence or contributory negligence, and the facts which the evidence reasonably tends to establish are such that all reasonable men must draw the same conclusions from them, the case is one of law for the court; but, if fair-minded men may honestly draw different conclusions, the cause should not be withdrawn from the jury.

(September 10, 1903.)

ERROR to the District Court for Oklahoma County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Reversed.*

Statement by **Burford, Ch. J.:**

The plaintiff, Neeley, brought this action in the district court of Oklahoma county to recover damages from the Southwestern Cotton Seed Oil Company for personal injuries received while in the employ of the defendant. The plaintiff was a common day laborer, and had been in the employ of the defendant as such for only a few weeks

781, and *note*; *Albrecht v. Chicago & N. W. R. Co.* 53 L. R. A. 653; *Rice v. Eureka Paper Co.* 62 L. R. A. 611, and the following case of *Collins v. Harrison*.

As to delegation of personal duties of master to another, see cases in *note* to *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 33; also *Trade-water Coal Co. v. Johnson*, 61 L. R. A. 161.

As to when question of negligence of master, or contributory negligence of servant, is for the court, and when it is for the jury, see also, in this series, *Goodrich v. New York C. & H. R. R. Co.* 5 L. R. A. 750; *Warden v. Louisville & N. R. Co.* 14 L. R. A. 552; *Nelson v. Chesapeake & O. R. Co.* 15 L. R. A. 583; *Schroeder v. Chicago & A. R. Co.* 18 L. R. A. 827; *Mensch v. Pennsylvania R. Co.* 17 L. R. A. 450; *Orman v. Mannix*, 17 L. R. A. 602; *East Tennessee, V.* 64 L. R. A.

& G. R. Co. *v. Kane*, 22 L. R. A. 315; *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552; *Giraudi v. Electric Improv. Co.* 28 L. R. A. 597; *Union P. R. Co. v. Erickson*, 29 L. R. A. 137; *Tobey v. Burlington, C. R. & N. R. Co.* 33 L. R. A. 496; *Prosser v. Montana C. R. Co.* 30 L. R. A. 814; *Little Rock & M. R. Co. v. Barry*, 43 L. R. A. 349; *Hanley v. California Bridge & Constr. Co.* 47 L. R. A. 597; *Terre Haute & I. R. Co. v. Fowler*, 48 L. R. A. 531; *McKee v. Tourtellotte*, 48 L. R. A. 542; *Dallemard v. Saalfeldt*, 48 L. R. A. 753; *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 33; *Coley v. North Carolina R. Co.* 57 L. R. A. 817; *Long v. Illinois C. R. Co.* 58 L. R. A. 237; and *O'Neill v. Chicago, R. I. & P. R. Co.* 60 L. R. A. 443.

when the accident occurred. The defendant is a corporation engaged in the manufacture of cotton seed oil and cotton seed products at its plant at Oklahoma city. As part of its buildings, was a large room about 30 by 50 feet, containing portions of its mill machinery. Through this room, about 18 feet from the floor, extended a steel revolving shaft, on which were pulleys, and from which connecting belts drove these various machines. The floor was smooth and slick from the oil. One of the pulleys on this shaft carried an 8-inch leather belt to the pulley on the "linters." Occasionally this belt slipped off the upper pulley while the machinery was in motion, and it was necessary to go up to the upper shaft to replace it. It is usual and customary in oil mills of this character to have a footboard placed a few feet below the shaft, upon which persons could walk and stand when oiling or repairing the machinery or adjusting the belts. This mill had only been completed one season, and no footboard had been placed in position. The company had procured to be made for its use a ladder about 18 feet long, constructed of two 2x4 pine scantlings, dressed down to about 2x3½, for side pieces, upon which steps or cross-pieces were nailed, made from 1x3 boards. This ladder was weak on one side, and had a tendency to turn sidewise with the weight of a person, and to avoid this defect a 1x4 board about 2 to 3 feet long had been nailed on the inner side of the right-hand scantling. This ladder was furnished by the company to be used for placing the belt upon the upper shaft or pulley. In order to perform this difficult feat, the lower end of the ladder was placed upon the floor, and the upper end rested against the revolving shaft. One employee then ascended the ladder and lifted the belt in place, while another employee went upon some part of the machinery and held the other end in place, and the two operating together thus readjusted the belt to its proper place. It required from the man upon the ladder a force or resistance of from 100 to 200 pounds to force the belt onto the pulley. All the employees who had used this ladder considered it weak and limber, and two or three had called the attention of the superintendent to this fact, and requested that the company put up a footboard to avoid the anticipated danger. The superintendent informed the employees who gave him this warning that he understood his business, and that, if they did not want to use the ladder, he would get someone who would. On the 31st day of January, 1899, the plaintiff, who had been in the employ of the company about two weeks as a laborer, was engaged in operating the

machinery in the room in question, when the belt came off, and he and a fellow servant attempted to replace it. The plaintiff placed the ladder in position, and ascended it, and took the belt in his hands, and was in the act of placing it on the pulley when the ladder gave down and fell to the floor with the plaintiff. The plaintiff received injuries resulting in a severe shock, a wound on the head, and the fracture of the bones in both wrists. After the fall one side of the ladder was found broken apart, and the piece that had been nailed on to strengthen it was both broken and split. About one week before the accident the night foreman had told the plaintiff that he intended to put up a footboard along the shafting in question, and about three days before the accident the plaintiff told the foreman that the ladder seemed unsafe, and asked him to put up a footboard. To this request his reply was: "That ladder is all right, and you boys go ahead, and if it don't suit you, and you can't do this work, I'll get men that can do it." The plaintiff, previous to the accident, was strong and able-bodied, thirty-three years old, and a common laborer, and has been disabled from work ever since. The plaintiff, on the trial of the cause to a jury, introduced evidence tending to establish the foregoing state of facts. The defendant demurred to the evidence, and the court sustained the demurrer, and rendered judgment for the defendant. From this judgment the plaintiff has appealed, and we are called upon to review the proceedings below.

Messrs. Hays & McMechan and M. Fulton for plaintiff in error.

Messrs. Howard & Ames for defendant in error.

Burford, Ch. J., delivered the opinion of the court:

In the briefs presented for our consideration a great many cases are cited from the various state courts and quite a number from the Supreme Court of the United States. The questions embraced in this case have been extensively discussed by the jurists and authors, and no court or text writer has ever been able to harmonize the numerous decisions. Every question presented could be decided either way, and have ample authority for its support. The Supreme Court of the United States has in the last quarter of a century had before it every legal proposition that is likely to arise in a personal injury case, and enunciated rules which ought to be safe for a court to follow which has no state Constitution, statute, or judicial precedents to control or embarrass it. It has been the

policy of this court, on questions where there is a seeming conflict between the state courts and the Supreme Court of the United States, to follow that court which has direct appellate supervision over the decisions of this court, and we are content to continue that policy. There are a few general principles established by repeated decisions of that court, which, when applied to the facts in the case under consideration, control every question presented by the record. We will not attempt to follow the arguments presented in the briefs upon either side, but will endeavor to determine each question which, in our judgment, may be fairly raised by the record in this case, and argued in the briefs.

When may a court take a case from the jury and direct a verdict? "If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively established contributory negligence on his part as would have compelled the trial court, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor, then the direction to find for defendant was proper." *Kane v. Northern O. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Phenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; *Dunlap v. Northeastern R. Co.* 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647; *Texas & P. R. Co. v. Cow*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140. Mr. Justice Brewer, in discussing this question in *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, very appropriately said: "It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. . . . It is undoubtedly true that cases are not to be lightly taken from the jury, that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. . . . Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a 64 L. R. A.

peremptory instruction for a verdict one way or the other. At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record; and when, in his deliberate opinion, there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

It requires a more extended examination of the facts and reasonable inferences therefrom in plaintiff's favor in order to determine whether or not the court acted within the foregoing rule in taking the case from the jury. The rules of law governing this case are those relating to employer and employee. These rules are different from those which govern in cases of accidents to passengers or to strangers. In the case of an employee, "the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence." And "it is not sufficient for the employee to show that the employer may have been guilty of negligence,—the evidence must point to the fact that he was." *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. The duty that an employer owes to his employee has been extensively discussed, and the Supreme Court of the United States has enunciated the rule a number of times. In *Northern P. R. Co. v. Peterson*, 162 U. S. 353, 40 L. ed. 994, 16 Sup. Ct. Rep. 845, it is said: "The general rule is that those entering into the service of a common master become thereby engaged in a common service, and are fellow servants; and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes as such to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective du-

ties. And it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employees, and, if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." This doctrine was cited, quoted, and approved in the later case of *New England R. Co. v. Conroy*, 175 U. S. 323, 338, 44 L. ed. 181, 188, 20 Sup. Ct. Rep. 85. It was also said in *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1049: "Neither individuals nor corporations are bound as employers to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was or ought to have been known to him, and was unknown to the employee or servant." And the foregoing was quoted with approval in *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. In the case of *Texas & P. R. Co. v. Arohibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, Mr. Justice White stated the law concisely and intelligibly as follows: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed; and that whilst, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general 64 L. R. A.

rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employee assumes the risks usually incident to the employment. The employee, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business, or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which, where an appliance is furnished an employee in which there exists a defect known to him, or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it. In assuming the risks of the particular service in which he engages the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, the court said: 'It is as a general rule, true that a servant entering into employment

which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation; and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended he also assumes the hazards incident to the situation. . . . Those not obvious, assumed by the employee, are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances, which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation." The foregoing excerpt embraces practically all the law in the case under consideration, and is well supported by the decisions of numerous state courts, and we might safely rest the decision of this case on the law as stated by Justice White. In the case of the *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 387, 37 L. ed. 772, 13 Sup. Ct. Rep. 921, the opinion of the court was delivered by Mr. Justice Brewer, and he there quoted and approved the language of Mr. Justice Valentine in *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632, as follows: "A master assumes the duty toward his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then at common law the servant assumes all the risks and hazards incident to, or attendant upon, the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and coemployees. And at common law whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master, and becomes a substitute for the master,—a vice principal; and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for

the acts or negligence of any mere fellow servants or coemployee of such servant, where the fellow servant or coemployee does not sustain this representative relation to the master."

These cases are sufficient to establish the law defining the relations of employer and employee, the duties which the employer owes to the employee, and the test of liability when the employer has been negligent and the employee is without fault. We must now determine the rule as to what constitutes contributory negligence on the part of the employee. Here again we find the adjudications numerous and conflicting, and, without attempting to harmonize or explain them, we shall follow the rule which has met the approval of the Supreme Court of the United States in numerous well-considered cases. In *Kane v. Northern C. R. Co.* 128 U. S. 91, 95, 32 L. ed. 339, 341, 9 Sup. Ct. Rep. 17, that court said: "It is undoubtedly the law that an employee is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger. . . . But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion." It was also held in the case of *District of Columbia v. McElligott*, 117 U. S. 621, 633, 29 L. ed. 946, 950, 6 Sup. Ct. Rep. 889: "That it was the duty of an employee having knowledge of the dangerous character of the place in which he was working to exercise due diligence and care in protecting himself from harm; and if he failed to exercise such care, and exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the employer to provide precautionary measures, be guilty of such contributory negligence, as would defeat his claim for injuries so received; and also that the employer is not liable in any event if the danger apprehended is so imminent or manifest as to prevent a reasonably prudent man from risking it, and the employee, possessed of such knowledge, continues his service. But in all such cases the real question to be determined is whether at the time of the

accident the plaintiff was exercising such reasonable care and caution as an ordinary person would exercise under similar circumstances." In *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1049, the court said: "But if the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery." In *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 673, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, the court said: "Where an employee takes reckless risks with full knowledge of the danger, and injuries result, he cannot recover, for the reason that he has not exercised due care." *Bunt v. Sierra Butte Gold Min. Co.* 138 U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464. These cases seem to fairly state the law upon the question of contributory negligence on the part of an employee where negligence is alleged on the part of the employer in failing to perform a duty to such employee. The plaintiff undertook to prove negligence on the part of the company in failing to provide him a safe means of performing his work, and it is claimed that the evidence introduced by him established contributory negligence on his part. If this be true, then clearly he cannot recover. But this leads us to the inquiry as to what the state of the evidence must be to warrant the court in taking the case from the jury and holding, as a matter of law, that contributory negligence has been shown. It was observed in the case of *St. Louis & S. F. R. Co. v. Schumacher*, 152 U. S. 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479, that where it plainly appears from the evidence that the plaintiff was guilty of contributory negligence, and there is no evidence of a wilful or intended negligence on the part of the defendant, the court may take the case from the jury. It has been held that, "as a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences." *Washington & G. R. Co. v. McDade*, 135 U. S. 573, 34 L. ed. 235, 10 Sup. Ct. Rep. 1049. In the last-cited case the court approves the rule stated in *Daley v. American Printing Co.* 150 Mass. 77, 22 N. E. 439, in a case very similar to the one at bar. That court said: But "the ground upon which the case was withdrawn from the jury is not stated. 44 L. R. A.

We cannot say, as a matter of law, that no sufficient evidence was introduced or offered of negligence on the part of the defendant, or of freedom from negligence on the part of the plaintiff. . . . If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care." In *Kane v. Northern C. R. Co.* 128 U. S. 91, '32 L. ed. 339, 9 Sup. Ct. Rep. 16, a brakeman brought an action to recover for injuries received while climbing from a freight car which had a broken step. He knew of the dangerous condition of the step prior to the accident, and had called the conductor's attention to it. The trial court held that he was guilty of contributory negligence, and took the case from the jury, and rendered judgment for the defendant railroad company. The Supreme Court reversed this judgment, and directed the question of contributory negligence submitted to a jury, and said: "It is undoubtedly the law that an employee is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man under similar circumstances would have avoided them if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger. . . . But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position; indeed, to all the circumstances of the particular occasion." In the case of *Siqua City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, the court announced the law to be that on the trial of a cause, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case must be submitted to the jury; and we think this is the safe and sound rule. As was well said in that case: "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, apply their separate experience of the affairs of life to the facts proved, and draw unanimous conclusions. This average judgment thus given it is the great effort of the law to obtain.

It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." It was held in the case of *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748, Mr. Justice Brewer speaking for the court, that "it is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." It was held in *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably inferred, and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred. When the facts are such that all reasonable men must draw the same conclusions from them, the case is one of law for the court, and may be taken from the jury. *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140. It has also been frequently stated thus: "A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish." *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Dunlap v. Northeastern R. Co.* 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647; *Kane v. Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118.

There is but one other legal proposition, we think, presented by this case. It is suggested that the relation of fellow servant existed between plaintiff in error and the night boss, who had charge of the oil mill at the time the accident occurred to the plaintiff. The question of the relation of fellow servant has no place in this case. The plaintiff seeks to recover for injuries resulting from the alleged failure of the oil company to provide reasonably safe appliances with which to do his work. The law makes it the duty of the employer to provide the employee with reasonably safe and suitable appliances with which to do his work, and the employer cannot delegate this duty to a subordinate, or relieve himself from liability by imposing the duty upon

another. And in any case of injury resulting from defective or unsafe appliances the relations of fellow servant do not and cannot arise. *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Union P. R. Co. v. Daniels*, 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756.

By a correct application of the rules of law enunciated in the authorities herein cited to the facts, and reasonable inferences in plaintiff's favor, as shown by his evidence, a correct conclusion should be reached. It seems clear that when the oil company employed the plaintiff it undertook to provide him a reasonably safe place in which to work, reasonably safe appliances, machinery, and tools with which to do his work, and reasonably competent fellow servants to assist in his work. On the other hand, the plaintiff assumed all the dangers and risks incident to his employment, as well as the risks of any enhanced dangers arising from defective appliances of which he had full knowledge, or which were so obvious as to be readily apparent. The duty of the company to provide safe appliances was measured by the hazards reasonably incident to the operation of oil-mill machinery, constructed as its mill was; and the risks assumed by the plaintiff were such as could be reasonably expected to result from the operation of such machinery and its appliances when properly constructed and properly operated. The company was required to exercise reasonable care and caution in the supplying and maintenance of its appliances furnished employees with which to perform their work, and the employee was required to exercise reasonable care and caution for his own safety, and to avoid injuries to himself. The company was not required to furnish the best or latest patterns or most modern designs of machinery or appliances, but it was bound to provide such as were reasonably safe and free from dangerous defects, and was required to exercise reasonable care and caution in the selection and in the maintenance of that character of appliances that it did provide and use. If

the company, instead of erecting a foot-board for use of its employees in oiling and repairing the overhead shafting and pulleys and in adjusting the belts to the pulleys, elected to provide a ladder for such purpose, it was then its duty to exercise due care and caution in the selection of such a ladder as would be reasonably safe, and without dangerous defects which might, in the exercise of reasonable diligence, have been discovered; and the duty remained with the company continuously, so long as the ladder was so used, to see that it was reasonably suitable and satisfactory for such purpose. If the ladder was defective, if it was too weak, if it was not suitable for the purpose for which it was used at the time of the accident, then the company was chargeable with notice of such dangers or defects as shown by the evidence, as a number of the employees at divers times had informed the manager of the company of the conditions as they existed. There was evidence reasonably tending to show that the ladder was weak on one side; that when in use the weight of a person upon it had a tendency to cause it to turn to one side; that in replacing the belt the operator had to stand near the top of the ladder, and lift one end of a large belt, and in putting on the belt a considerable pressure was required, amounting, it was estimated, to from 100 to 200 pounds. To support the weight of the man and the added weight of the belt, and resist the required pressure to adjust the belt, required a sustaining capacity very largely in excess of that ordinarily required on a ladder. This ladder had been used about the mill for several months, had been used by carpenters and laborers, and had been frequently used for the purpose of putting on the belt the same as when the accident occurred. An attempt had been made to strengthen the weak side of the ladder, and a piece of a board had been nailed on, which had caused the side piece to split. It was clearly shown that the proper and suitable mode of constructing such mills was to construct a foot or running board along the shafting, with railings, so that employees required to go up to the shafting could walk upon such footboard and reach the shaft, pulleys, and belts; and that it was more hazardous to use the ladder for such purposes. But the plaintiff knew of this mode of performing this work when he took this particular employment. He had previously worked in other parts of the mill, and knew of the risk and danger of ascending this ladder for the purpose of replacing the belt in question. With full knowledge of these conditions, he took the employment, and accepted the risks incident to such work.

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He assumed such extra hazards as were to be reasonably expected from the use of the ladder in putting on the belt, but he also had a right to assume that the employer had provided a ladder which was strong enough to support his weight, and the additional force necessary to put the belt on the pulley, unless the defect or danger of the ladder breaking was so obvious and imminent as to be apparent or observable. The employee is not required to inspect machinery furnished him to work with; he is not bound to look for latent defects; nor is he chargeable with notice of defects that he might have discovered by the exercise of reasonable diligence. He is only chargeable with such defects as are apparent to ordinary observation. This was expressly decided in the case of *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, and our own court has said in *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562: "There must be knowledge of the danger, or sufficient reason to apprehend it, to put a reasonable man on his guard, or there can be no contributory negligence. But, even though the person injured had reason to apprehend it, yet it does not necessarily follow that he has been guilty of contributory negligence. Thus one may voluntarily and unnecessarily expose himself or his property to a known danger without being guilty of contributory negligence as a matter of law; and while, in so doing, he is held to assume all risks of injury which a careful and prudent person would apprehend as likely to flow from his conduct, yet, if injured by the negligence of another without any negligence upon his part proximately contributing to the injury, he may recover, and it is usually held a question for the jury whether he was in exercise of due care to avoid danger."

The company which procured the ladder to be made, and supplied it for the use in the room where the accident occurred, and caused it to be used in the manner that the plaintiff was using it when he was injured, was bound to know that it was suitable for this purpose. It had no right to guess or experiment with it. The duty it owed to its employee required it to exercise reasonable care, skill, caution, and judgment. It was required to know or take reasonable precautionary steps to ascertain the kind, character, and quality of the timber used in the construction of the ladder so far as it could be ascertained from examination and inspection. It was required to know that the scantlings used for the side pieces were of sufficient capacity to support the weight of the plaintiff and resist the force necessary to be used in replacing the belt. And after the ladder

was "spliced," or "patched," as it was termed by the witnesses, it was the duty of the company to see that it was not weakened by the nails or cracks caused by the nails. To fail to use such reasonable care and caution at all times as was necessary to obtain such information was negligence. On the other hand, if there were defects rendering the ladder unsafe, which were of such a character as to be apparent to ordinary observation, and the plaintiff had reason to apprehend danger from such defects, then he assumed the hazard incident to such condition, and his own negligence contributed to his injury, and thereby prevents a recovery. But he was not required to know the sustaining power of the timbers, the amount of resistance required to meet and overcome the force of putting up and adjusting the belt, or how much weight the ladder was capable of supporting. He had a right to assume that the employer, in performance of its duty, had done all things reasonably necessary to provide him with a reasonably safe ladder, and to rely upon such assumption, unless the condition of the ladder itself, and what he had observed in the use of it previously, were such as would lead a reasonably careful person to believe that it was unsafe and dangerous for use in replacing the belt on the overhead pulley. If he did have such knowledge as would cause a reasonably cautious person to refrain from taking the risk under all the circumstances of the case at the time, and not regarding such knowledge he continued using the ladder, then he will not be entitled to recover for any injury resulting from the insufficiency of the ladder for the purpose used. It is not every suspicion or apprehension of danger that will warrant an employee in abandoning his post and in refusing to perform his labors. Taking the risk of apprehended danger is not necessarily negligence. There must be knowledge of danger, or knowledge of a condition which reasonably leads to a belief of danger, and this rule is different from that which controls in case of passengers, travelers, or strangers. In this case the mill was running day and night. The plaintiff and one other person were employed in the room where the "linters" and "hullers" were operated. These machines were propelled by the belt which was in turn driven by the pulley on the overhead shaft, against which it was necessary to support the upper end of the ladder in adjusting the belt. When this belt slipped off the pulley, a portion of the machines in this room were stopped, and the seed being forced into them, they became choked. It was necessary to raise the lids or doors on these machines to prevent more serious

consequences. The engineer was in another room. When the belt came off the power continued, and other parts of the machinery were kept in motion. Breaking this link destroyed the effectiveness of any of the process. The plaintiff was employed to look after the operation of the machinery in this room. He had one assistant, who had not worked long at the business. He complained to the company of the hazard of adjusting the belt while standing on a ladder, and said the ladder did not seem safe. The night manager assured him the ladder was all right, and instructed him to go ahead, and further said, if it did not suit him, he would get men who would use it. With this assurance he did go on and use the ladder. Does this state of facts, under all the surrounding circumstances, show contributory negligence? Can fair-minded men arrive at only one conclusion, and that that the plaintiff recklessly and heedlessly, and without regard to his own safety, used the ladder in question? Or will some fair-minded men honestly come to the conclusion that the plaintiff acted in this case as any ordinarily careful and cautious person would be expected to act under all the circumstances? We think there is room for a diversity of honest judgment, and that the plaintiff was entitled to have the question, both of negligence of the defendant and that of contributory negligence, go to the jury. We think the case is one that comes within the rule where it is error to withdraw the case from the jury and decide the case as a question of law.

There are some suggestions in the briefs that ought to be referred to, inasmuch as a new trial must be had. It had been suggested that the law as stated in the case of *Guthrie v. Swan*, 5 Okla. 779, 51 Pac. 562, is controlling in this case. We do not think so. This case is governed entirely by the law as between employer and employee in such cases, and their reciprocal relations to each other. The *Swan Case* is controlled by the laws governing the duties of municipal corporations to pedestrians. While some of the principles stated in the *Swan Case* are applicable here, the controlling principle is not the same.

The plaintiff has sought in his brief to make the rule apply as stated in *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612. There it was held: "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would

not preclude all reasonable expectation that the promise might be kept." But we do not think him entitled to the benefit of this rule. It is true that he testified that about a week previous to the accident he complained of the dangerous mode of performing the duty of putting on the belt, and that the officer in charge assured him that he would have a footboard put up. But this assurance was clearly revoked and repudiated by the last conversation, had only two or three days before the accident, at which time he again stated to the officer in charge that the ladder seemed unsafe, and was informed that it was sufficient, and, if he did not like it, he would get someone who would use it. In view of this last conversation, we do not think the plaintiff was still permitted to rely upon the previous promise, or to govern his conduct thereby. In order to entitle an employee to the benefit of the rule claimed, the promise to repair or remedy must have been made under such circumstances that the employee relied upon it, and continued his service upon the assurance that it would be done.

Counsel for defendant in error very confidently rely upon the case of *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, where Mr. Justice Shiras, speaking for the court, said: "He knew as much about it and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery, or with new appliances, nor to elect between the expense of doing so and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from its use. The general rule is that the servant accepts the service subject to the risks incidental to it, and where the machinery and implements of the employer's business are, at that time, of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." In the *Seley Case* the plaintiff was employed upon a railroad as conductor. He placed his foot in a frog and was run over by the train and killed. He was familiar with frogs, the various kinds and their dangers, and took his employment assuming all the risks incidental to their use. It was shown that there

was a later improved pattern of frog that was not subject to these perils. The contention of plaintiff's counsel was that it was negligence on the part of the railroad company to use these open frogs. The court cites a number of cases, all to the effect that, where the company has adopted an appliance which is suitable and in common use, it will not be charged with negligence for not adopting a later pattern. But there is nothing in the *Seley Case* which absolves an employer from exercising reasonable care and caution to supply reasonably safe appliances and to keep them in a reasonably safe condition. As said before in this opinion, the oil-mill company had elected to make use of a ladder to put up these belts, and the plaintiff took his employment with knowledge of such mode of doing the work; yet the oil-mill company was not absolved from providing a reasonably suitable and safe ladder, and, in the absence of direct knowledge to the contrary, the plaintiff had a right to assume that the company had done its duty, and that the ladder was reasonably suitable and safe for the work which he was required to do. The rule we have herein stated is, we think, in harmony with the law as expressed in the *Seley Case*. Nor is there anything herein in conflict with the law as enunciated in *Chaddick v. Lindsay*, 5 Okla. 616, 49 Pac. 940.

In conclusion, we are of the opinion that on account of the error of the trial court in withdrawing the case from the jury the judgment should be reversed, and cause remanded to the district court, with directions to resubmit the issues to a jury, and, unless the evidence should be substantially different, that the question of whether the defendant oil-mill company exercised proper care and caution in the selection of the ladder and keeping it in repair, and whether it was defective or reasonably sufficient to support a person while adjusting the belt in question, and whether the company exercised ordinary caution in determining such questions, and also whether, under the circumstances at the time, the plaintiff acted as an ordinarily prudent person would be expected to act, be submitted to the jury under proper instructions of the court.

The judgment is reversed, at costs of defendant in error.

All the Justices concur, except **Burwell, J.**, who tried the case below, not sitting, and **Gillette, J.**, absent.

RHODE ISLAND SUPREME COURT.

Mary COLLINS

v.

Alonzo HARRISON.

(.....R. I.....)

1. An employer who undertakes to furnish a domestic servant with a lodging place is bound to see that it is suitable for the purpose intended and is liable for injuries caused to the servant by sickness due to the leaky condition of the roof.
2. A domestic servant is not deprived of a right of action against her employer for sickness caused by the leaky condition of the roof of the room furnished as her sleeping apartment by the fact that she continued to occupy it after learning of its unfit condition, if she did so under his promise to repair.
3. Setting up a promise to repair as a ground for continuing service, in an action by a servant against her employer for injuries caused by an unsafe lodging place, does not render the complaint bad for duplicity, as counting upon both contract and tort.

(December 14, 1903.)

ON DEMURRER to a declaration in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Overruled.*

The facts are stated in the opinion.

Mr. Irving O. Hunt, for plaintiff:

The defendant, as the employer of the plaintiff, is under a duty to provide a safe and suitable place in which the plaintiff can sleep.

As a general proposition the ordinary relation of master and servant does not place upon the master the duty to provide food and lodging for his servant. But that does not mean that the master, under special contracts, or by reason of prevailing custom, cannot assume the duty to provide board and lodging for his servant.

King v. Interstate Consol. Street R. Co. 23 R. I. 583, 51 Atl. 301; *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333, 12 Pac. 219; *Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 287; 20 Am. & Eng. Enc. Law, 2d ed. p. 55; 1 Shearm. & Redf. Neg. 5th ed. p. 304; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315.

The plaintiff did not, after having made known to the defendant the condition of the room and bed, and having received the assurances of the defendant that the roof would be repaired, assume the risk, and

cannot be charged with contributory negligence.

1 Shearm. & Redf. Neg. 5th ed. p. 372; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Rogers v. Leyden*, 127 Ind. 50, 28 N. E. 210; *Smith v. E. W. Backus Lumber Co.* 64 Minn. 447, 67 N. W. 358; *Rice v. Eureka Paper Co.* 70 App. Div. 336, 75 N. Y. Supp. 49; *Cooley, Torts*, 1st ed. p. 559; *Hyatt v. Hannibal & St. J. R. Co.* 19 Mo. App. 287; *Smith v. Tripp*, 13 R. I. 152; *Whalan v. Whipple* (R. I.) 13 Atl. 107.

The declaration is not demurrable on account of duplicity, for the action is based on a breach of duty which the defendant owed the plaintiff, and the promise to remove the danger is inserted in the declaration to rebut the presumption that the plaintiff, by remaining in the employ of the defendant, assumed the risk of the employment.

13 Enc. Pl. & Pr. p. 904; *Chicago & O. Coal & Car Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Malm v. Thelin*, 47 Neb. 686, 66 N. W. 650; *Snowberg v. Nelson-Spencer Paper Co.* 43 Minn. 532, 45 N. W. 1131.

Mr. James A. Williams for defendant.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff sues in an action on the case for negligence. The declaration alleges that the plaintiff was employed by the defendant as housekeeper, the defendant agreeing to provide the plaintiff with board and lodging; that the roof over the room in which the plaintiff slept was out of repair and leaked, so that the plaintiff's bed and bedding became wet and unfit to use; that the plaintiff gave notice to the defendant of the condition of her room; that she could not sleep in it; that he then promised, if she would remain in his employ, to repair the roof and provide suitable bedding; and that, relying on the promise, she remained seven days, being obliged to sleep in said room, by reason of which she became sick. The defendant demurs to the declaration, on the following grounds: (1) That the declaration does not set forth any duty which the defendant owed to the plaintiff, for which she can maintain this action. (2) That the plaintiff was not bound to remain in the house after she learned of its condition, and that she did so at her own risk, the results of which are attributable to her own act. (3) That the declaration sets forth a promise by the defendant to repair, and a breach thereof by him, thus setting forth two causes of action in the

NOTE.—As to right of servant who continues work on the faith of the master's promise to remove a specific cause of danger, see also the preceding case of *Neeley v. Southwestern Cotton Seed Oil Co.*, and cases in footnote thereto. 64 L. R. A.

same count, which makes it bad for duplicity.

The general rule is that a master is bound to provide appliances for a servant, and the term "appliances" is stated, in 1 Bailey's Personal Injuries, 1, to include machinery, apparatus, and premises. This rule is usually invoked in cases where a servant is employed in some mechanical work, but we fail to see why it is not equally applicable to a domestic servant. Wood on Master and Servant, 2d ed. p. 166, § 8, states the rule, where board and lodging are to be furnished by the employer, as follows: "So, too, he [the employer] impliedly undertakes to furnish him [the servant] with suitable lodging and good and wholesome food." Unfortunately, the case cited as authority on this point has no relation to it. Still the rule is a reasonable one, and in the line of the general duty of a master to a servant. Thus, in *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315, it was held that a master was liable for injuries to a servant caused by the fall of a privy insecurely attached to the factory in which the servant was employed. In *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366, it was held that an employer was liable to a domestic servant for the improper condition of an outside flight of stairs, by reason of which the servant fell and was injured. Knowlton, J., said: "The plaintiff had occasion to use these stairs frequently, as a servant of the defendant, and it was the duty of the defendant to keep them safe, so far as the exercise of reasonable care and diligence on her part would accomplish that result." See also *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464, and *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333, 12 Pac. 219.

The first ground of demurrer, as stated, is that the declaration does not set forth any duty which the defendant owed to the plaintiff, whereas the declaration explicitly sets forth that it became the duty of the defendant to furnish proper shelter, etc., on his agreement to provide the plaintiff with board and lodging. Evidently the demurrer was intended to raise the question of a legal duty, and we have so considered it. We think it was the duty of the defendant to provide suitable shelter, under the allegations of the declaration.

The declaration covers the second ground of demurrer by stating that the defendant promised to repair the leak in the roof if the plaintiff would not leave his employment. Durfee, Ch. J., said, in *Kelley v. Silver Spring Bleaching & Dyeing Co.* 12 R. I. 112, 34 Am. Rep. 615: "If, when the danger occurred, the plaintiff had notified

the defendant of it, and had been induced to remain in his position by assurances that it should be remedied, or, as some of the cases hold, by a reasonable expectation that it would be remedied, then it would not necessarily be presumed, from his knowledge of the danger, that he had assumed the risk." In *Jones v. New American File Co.* 21 R. I. 125, 42 Atl. 509, it was held that the effect of a promise to remedy a defect is to raise a question of fact whether, under the circumstances, the servant is excused from taking the risk after such promise; the conditions being whether the employer had sufficient time to make the repairs, and whether, knowing the danger, the plaintiff proportionately increased his own care and precaution. *King v. Interstate Consol. Street R. Co.* 23 R. I. 583, 51 Atl. 301, distinguished *Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333, 12 Pac. 219, on the ground that the former case did not show a promise, as was shown in the latter case. See also *Stephenson v. Dunoon*, 73 Wis. 404, 9 Am. St. Rep. 806, 41 N. W. 337.

The third ground of demurrer is that, as the declaration sets forth a promise, it is bad for duplicity. True, a promise is set out in the declaration, but not as a cause of action. The obvious purpose is to excuse the continuance in service, and thus to avoid a demurrer on that ground. This is not duplicity.

The defendant's demurrer to the declaration is overruled.

Douglas, J., dissenting:

"I am unable to agree with my brethren that, independently of contract, a householder owes to his domestic servant the duty of repairing a leaky roof over the room in which she is lodged. The rule which has become established for the security of workmen in manufactories where dangerous machines and instruments are used ought not, in my opinion, to be extended to the comparatively secure occupations of domestic service. The analogous rule which requires an employer to furnish his workmen with reasonably safe tools and appliances has been held not to apply to ordinary implements not naturally dangerous. As was said by Judge Miller, of the New York court of appeals, in *Marsh v. Chickering*, 101 N. Y. 396, 400, 5 N. E. 57, where a workman was injured by a ladder which he was using: "We have been referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability in the case considered would be far-reaching, and would extend the principle stated to many of the

vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor which only requires the use of implements with which they are entirely familiar." This case is cited in *Gowen v. Harley*, 6 C. C. A. 190, 12 U. S. App. 754, 56 Fed. 973, and *Corcoran v. Milwaukee Gaslight Co.* 81 Wis. 192, 51 N. W. 328; and in all of these cases a promise by the master to furnish other implements is held not to excuse the servant who had assumed the obvious risks of those which were furnished. The domestic servant takes the accommodation assigned to him as it is, and is at liberty to decline the employment if his quarters are not satisfactory. If the premises are out of repair, he assumes the obvious risk of exposure to the weather, and the liability to discomfort and disease, which is as well known to him as to the master. It seems to me unreasonable to consider that a leaky roof constitutes the chamber under it a dangerous place in any such sense as the words are used when applied to a mill or foundry filled with machinery or materials capable of inflicting the gravest injuries, and there is no such compulsion upon a domestic servant to occupy a particular room as upon a mill operative to work in a certain place upon a certain machine. It is, of course, competent for the parties to agree specially that certain accommodations shall be furnished; and if such an agreement, made upon good consideration, is broken, no doubt the innocent party may recover damages for the breach, according to the rules governing actions on contract. If the law did not impose the duty alleged, the obligation of the defendant in this case is based simply upon his promise to repair, and the plaintiff's action should have been assumpsit, not tort.

L'UNION ST. JEAN BAPTISTE DE PAW-TUCKET

v.

Thomas OSTIGUY.

(.....R. I.....)

1. A mutual benefit society cannot sue a former member for dues for nonpayment of which it has expelled him from the society.

NOTE.—For liability of member of benefit association to action for assessments, see also, in this series, *Ellerbe v. Barney*, 23 L. R. A. 435, and *note*, and *Lehman v. Clark*, 43 L. R. A. 648.
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2. Assessments by a mutual benefit association are not debts recoverable by action at law, where the right to the benefit is dependent on good standing in the society, and good standing depends on the payment of assessments which are always made in advance, and not to meet accrued obligations.

(November 23, 1903.)

EXCEPTIONS by defendant to rulings of the District Court for Providence County sustaining a demurrer to a plea in an action brought to recover assessments against a former member of a mutual benefit society. *Sustained.*

The facts are stated in the opinion.

Mr. Thomas Riley, Jr., for defendant.
Mr. Hugh J. Carroll for plaintiff.

Stiness, Ch. J., delivered the opinion of the court:

The plaintiff, an incorporated beneficial society, whose members are subject to monthly dues, brings this action to recover dues for nonpayment of which the defendant has been stricken from the rolls of the society. The defendant pleaded the fact that he had been removed from the rolls, whereby the plaintiff had exhausted its remedy, and to this plea the plaintiff demurs. The district court of the tenth judicial district sustained the demurrer, and the defendant brings the case here on exceptions to that decision.

The simple question is whether a society can sue a member for dues after having expelled him for nonpayment. We think the question must be answered in the negative. As a general rule, when a penalty is enforced for a default it is a waiver of other remedies for the same default under the contract. The plaintiff claims, however, that the collection of past dues is a right of the society, which is unaffected by the penalty of expulsion. An obvious reply to this position is that dues are paid for the benefits and privileges of membership. So long as a member pays them he is entitled, in this respect, to remain a member. The society, in its by-laws, elects to take the forfeiture of membership in lieu of unpaid dues, because, if it can collect the dues after the forfeiture, the member would no longer be in default, and the reason for expulsion would no longer remain, yet he would stand legally expelled. Recovery of such dues at law amounts to compelling a member to perform his part without giving him the benefits of membership. Membership and liability for dues are correlative. One cannot stand without the other. It is a quasi contract. But if a contract provides for a payment of money, and in default thereof for the forfeiture of some-

thing else, an action, after forfeiture has been exacted, cannot be maintained for the money under the contract. A forfeiture which has been enforced amounts to a satisfaction of the contract.

Aside from these general considerations, there have been some decisions upon the question of a member's legal liability for assessments. *Nash v. Russell*, 5 Barb. 556, before beneficial societies were so numerous as now, held that a member was not liable at law for dues, nor for a note which he had given for them, because the note was not based upon a consideration of legal obligation, the payment being voluntary, or at most resting on moral obligation only. Since then societies of this kind have been recognized as of the nature of insurance companies, and in some cases membership is treated as a contract. *Ellerbe v. Barney*, 119 Mo. 632, 23 L. R. A. 435, 25 S. W. 384, held that a forfeiture clause did not discharge a member from past society debts or dues, his promise to pay the assessments, when called, being the consideration for his insurance as a member. It was a decision of four judges against three. The action was brought by the state superintendent of insurance, to recover assessments to pay the designated amount due on the death of a member. The superintendent had been appointed receiver of the society, and sued as such to recover money from the members at the time to pay the claims against it. The insurance in that case was treated like insurance in a mutual company, where members are liable on all losses occurring during their membership in the company, though the membership may then have ceased. *Provident Mut. Relief Asso. v. Pelissier*, 69 N. H. 606, 45 Atl. 562, followed *Ellerbe v. Barney*. *McDonald v. Ross-Lewin*, 29 Hun, 87, was also an assessment for a death loss which was treated as a mutual insurance contract. *Palmetto Lodge No. 5, I. O. O. F. v. Hubbell*, 2 Strobb. L. 457, 49 Am. Dec. 604, held that a member was liable for all dues after suspension, if the by-laws so provide. The court pointed out the distinction between a suspended and an expelled member. "According to the by-laws, a suspended member may be reinstated on paying the amount charged against him. An expelled member can be readmitted only on the terms and conditions of a new member." One under suspension was still a member and could be assessed. *Com. v. Wetherbee*, 105 Mass. 149, held that the issue and acceptance of a certificate, whereby the company agreed to pay a fixed sum on the death of a member, and the members also agreed to pay a fixed sum on

their part to make up the amount payable on the certificate, was mutual insurance. The promises were mutual, and so, also, was the liability. The case, however, was an indictment for doing insurance business contrary to law.

On the other hand are cases which hold that an expelled member is not liable for dues and assessments in a society of this kind. Thus *Lehman v. Clark*, 174 Ill. 279, 43 L. R. A. 648, 51 N. E. 222, recognized the insurance feature as equivalent to mutual insurance but held that it was a unilateral contract; and, whether the payment for insurance be termed a premium or an assessment, the right of the association or company is to declare a forfeiture, and not to recover the assessment or premium in a suit. In *Chicago Mut. Life Indemnity Asso. v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55, the court said: "While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void, and the membership ceases. But the making of an assessment or the maturing of dues does not make the member a debtor to the association, so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion." To the same effect is *Re Protection L. Ins. Co.* 9 Biss. 188, Fed. Cas. No. 11,444. See also 2 May, Ins. 3d ed. § 341a. This is the accepted rule in ordinary life insurance. The insured pays his premium when he takes his policy, and it is optional with him to continue or not when it expires. No company would consider that it had a right to sue for a premium after forfeiture. No wrong is done under this rule. Premiums are payable in advance, and thus the insured pays for his insurance while he has it, and then he drops it. The conditions of the society in this case are not substantially different. Dues and assessments are payable in advance. When a member ceases to pay, he has already paid for all the time for which he has had benefit. The defaulted payment is for future benefits, which he does not choose to continue. This is right and proper, and in strict analogy to other insurance. Where insurance has been procured for a fixed sum, upon mutual promises to make up the amount, there is a much

more distinct contract and a clearer reason for holding one liable under it than in the present case. Here the contract is that the beneficiary shall receive from the society, in case of a death, as many dollars as there are members. The number of members is liable to vary, and the member is presumed to take notice that under the by-laws those in default will cease to be members. The payment is postponed thirty days, and the members have the same time within which to pay their assessments. The postponement of payment to the beneficiary is not for the purpose of collecting the money, because, assessments being in advance, the fund is already in hand at the time of the member's death, and the assessment thereupon becoming due is for the next death that may take place. It would seem, therefore, as if the reason for delay might be to ascertain the number of members who are in good standing at the time, as the basis on which the payment is to be made. However this may be, it shows a difference between the ordinary contract of mutual insurance to pay proportionally for all losses during membership, and advance payments upon which membership is to depend.

Another difference between a society of this kind and insurance companies proper is that benefit societies usually give a term of grace—as in this case of thirty days—within which payment can be made; while other companies, formerly at least, required payment on the anniversary of the date of the policy. The object of this term of grace, however, is apparently to enable the member to avoid expulsion, and not a provision to affect the contract; for he is in default at the expiration of the time originally fixed for payment in the by-laws, and under them he is not entitled to benefits or to the mutual aid fund while so in default. He therefore does not have benefits after default, which otherwise might be regarded as a consideration for liability for dues. See art. 24, § 2; art. 27, § 10; art. 30; art. 31, § 3; art. 33, § 2; art. 33. A term of grace accorded by a society cannot make that a debt which is not a debt, nor create an equitable liability of one member by a provision which is made for its own benefit or for the accommodation of all its members. It amounts to an extension of the time of payment within which a member may reinstate himself. We think that under the by-laws in this case assessments are not debts recoverable at law.

The exception to the ruling of the District Court sustaining the plaintiff's demurrer to the defendant's plea is sustained.
64 L. R. A.

James E. WINWARD, Admr., etc., of
Frank W. Prescott, Deceased,
v.

Levi C. LINCOLN et al.

(23 R. I. 476.)

1. Transactions of a broker which become the basis of a note given by his principal, and which are performed in one state where the note is delivered under directions of the principal by telephone or letter from another state, are, for the purpose of determining the validity of the consideration for the note, to be judged by the law of the place where the broker performed them.
2. A note, valid where made, cannot be enforced in another state to whose public policy the transactions which form its consideration are contrary.
3. Provisions of a statute as to implications to be drawn from acts in connection with dealing in stocks have no application in the courts of another state, where the validity of a stock transaction is drawn in question any further than they may tend to throw light upon the validity of such transactions under the statute.
4. Actual purchases of stock by a broker are shown by a ledger indicating that, in response to an order to purchase, the broker charged the customer with the price of the stock, charged him monthly interest on the amount invested, credited dividends received from the stocks and the entry of the final closing out of the stock at different prices during the day as shares were sold, while the broker's correspondent testifies that, as to at least some of the stock, the broker actually had the shares in his possession.
5. That one ordering a broker to purchase stock for him did not intend to receive the certificates is not sufficient to show

NOTE.—Conflict of laws as to gambling and lottery contracts.

I. Gambling contracts.

a. Public policy of forum; transitory character of action, 180.

b. Governing law when public policy of forum does not interfere, 185.

II. Lottery contracts, 189.

This note is strictly confined to cases in which different elements of the contract have their situs in two or more different jurisdictions, or in which an action is brought in one jurisdiction upon a contract which has its situs in another. With the general question as to what constitutes a gambling contract, or as to the rights and remedies of the parties to such a contract, this note is not concerned, except so far as they are incidental to the question, which jurisdiction furnishes the law by which these matters are to be determined with reference to a particular contract or transaction.

I. Gambling contracts.

a. Public policy of forum; transitory character of action.

The prevailing tendency seems to be to regard

that he did not intend an actual purchase by the broker on his account.

6. That one ordering a broker to purchase stocks on his account had not the means of paying for them is not conclusive evidence that a mere wagering contract was intended, where the purchaser availed himself of the broker's credit and facilities for borrowing on the stocks themselves.
7. Where upon its face a transaction for the purchase and sale of stocks between customer and broker is a genuine one, the burden of proof is upon the one attacking it, to show its falsity.
8. A transaction by which a broker, upon orders of his customer, actually purchases stocks in good faith and with the intention that they shall be delivered upon demand, is not void as a wager

at common law, although the stocks are not in fact paid for by, or delivered to, the customer, who has no intention of receiving them, but are held by the broker, who either borrows or advances the purchase money upon the security of the stock, and holds them until ordered by the customer to sell them.

(January 14, 1902.)

CASE transferred by a single justice for the opinion of the full bench to determine questions which arose in an action to enforce payment of a promissory note which was alleged to be void because given in settlement of liabilities incurred in a stock gambling transaction. *Judgment for plaintiff.*

The facts are stated in the opinion.

statutes declaring gambling contracts and transactions illegal or void as embodying a distinctive public policy, which requires the courts of the state or country in which they are enacted to refuse to recognize or enforce any contract or transaction in violation of their terms, even though such contract or transaction may have had its situs outside of the forum, and, therefore, does not come within the direct operation of the statutes. The practical result of the adoption of this view is that a contract, in order to be upheld or enforced, must be valid, both by its proper law (i. e., by the law of its situs), and by the law of the forum, so far as the element of gambling is concerned.

Thus, a note to pay a bet on a horse race in another state, where such notes are presumed valid, and where the original note, of which the one in suit is a renewal, was given, will not be enforced in North Carolina, even if it be deemed a Virginia contract, since it is contrary to the public policy of the forum. *Gooch v. Faucett*, 122 N. C. 270, 39 L. E. A. 835, 29 S. E. 362.

A plea in an action upon notes, setting up that they were given in a transaction which the common law holds a gambling transaction, presents a good defense, regardless of the law of the place where the notes were made or payable. *Brown v. Alexander*, 29 Ill. App. 626. The notes in this case were made in Virginia, and payable in Maryland. The transactions in question took place at different points, — New York, Baltimore, Chicago, and St. Louis. The action appears to have been brought by the original holder of the notes.

This principle has been frequently applied to transactions in stocks and grain, commonly known as "options" or "futures."

The provision of the Mississippi act of 1882, that no money advanced for the purchase of "futures" shall be recovered in any court of Mississippi, prevents the maintenance of an action in that state for the recovery of advances made upon such purchases in London, even though the transactions were valid according to the law of England, and the action could have been maintained in that country. *Lemonius v. Mayer*, 71 Miss. 514, 14 So. 33. *White v. Eason* (Miss.) 15 So. 66, is to the same effect.

Contracts between a broker and his customer, a resident of New Jersey, for speculations in stocks upon margins, which do not contemplate delivery of the stock, but are in reality mere

dealings in the differences between prices, so that, if made in New Jersey, they would be contrary to the provisions of the statute of that state, to prevent gaming, will not be enforced by a court of that state, although made in New York and presumably legal by the law of that state, since their enforcement would violate the plain public policy of New Jersey on the subject of gambling and betting, evinced by such statute. *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, Reversing 36 N. J. Eq. 48.

The rule laid down in *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, was restated in *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113, although in this case it was held that the transactions were not gambling transactions, even as tested by the law of New Jersey.

Gist v. Western U. Tele. Co. 45 S. C. 344, 55 Am. St. Rep. 763, 23 S. E. 143, while recognizing the general principle that a contract, valid by the law of the place where it was made and is to be performed, is valid everywhere, held that contracts for the sales of "futures," on account of their immoral tendency, will not be recognized by a court of a state by whose laws they are forbidden, even if valid by the law of the state where they were made and were to be performed.

The rule laid down in *Gist v. Western U. Tele. Co.* 45 S. C. 344, 55 Am. St. Rep. 763, 23 S. E. 143, was applied, in *Riordan v. Doty*, 50 S. C. 537, 27 S. E. 939, to an action for advances by a broker in buying and selling cotton "futures" on the New York cotton exchange. The court seems to have assumed that the right to maintain the action depended upon the law of South Carolina, and there was no discussion of the question whether that law, or the law of New York, governed.

So, in *Harvey v. Doty*, 54 S. C. 382, 32 S. E. 501 (an action by a broker to recover for advances on account of the purchases and sales of grain for future delivery on the Chicago market), it was assumed that the rights of the parties were to be determined by the law of South Carolina; and it was held, applying that law, that a party in South Carolina, gambling in grain "futures" upon the Chicago exchange, by an agent, cannot be required, under the South Carolina statutes, to repay his agent advances made for his benefit, on the ground that such agent acted with the Chicago trader as a principal, and both had the bona fide inten-

Messrs. Edwards & Angell, for plaintiff:

The relation of principal and agent, or broker and customer, between the plaintiff's testator and the defendants, arose in Rhode Island, and transactions arising out of that relation are governed by the laws of this state.

Akers v. Demond, 103 Mass. 323; *Perry v. Mount Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Dacey*, Conf. L. p. 617; *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635.

Marginal dealings in stock, such as were had between Prescott & Company and the defendants, are valid under the laws of Rhode Island. The relation between the broker and customer, in a marginal transaction is that of pledgeor and pledgee.

Markham v. Jaudon, 41 N. Y. 235; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Gruman v. Smith*, 81 N. Y. 25; *Gillett v. Whiting*, 120 N. Y. 402, 24 N. E. 790; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104; *Cook, Stock & Stockholders*, § 457; *Dos Passos, Stock Brokers & Stock Exchanges*, p. 112; *Jones, Pledges*, § 495; *Hopkins v. O'Kane*, 169 Pa. 478, 32 Atl. 421.

The hypothecation or repledge of the stocks with banks to raise the purchase money in no way changes the nature of the transaction.

Skiff v. Stoddard, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104; *Bangs v. Hornick*, 30 Fed. 97.

The plaintiff will not be barred from re-

tion to deliver the grain at a specified future time.

In *Parker v. Moore*, 53 C. C. A. 369, 115 Fed. 799, the court said that the rule had been established in South Carolina that suits brought therein for the enforcement of any right or claim arising out of a contract for the future delivery of cotton, or the like, must be governed, as to the interpretation of the contract and the morality of the claim, by the laws of South Carolina, even though the contract was made and to be performed in another state, upon the ground that contracts which are regarded as *contra bonos mores* in one state cannot be recognized there, although they are regarded as valid in another state where made and to be performed. The court then said that the United States courts will follow the rules laid down by the highest court of a state in the matter of determining whether the *lex loci contractus* or the *lex fori* shall govern. It was held, in this case, however, that, even according to the law of South Carolina, the secret intention of the customer merely to speculate in the rise and fall of the market, with no intention to make delivery, did not prevent a recovery of the advances and commissions by the broker who conducted the transactions in good faith, and in the belief that an actual purchase was intended.

In *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703, the court held that the contract between the broker and his customer, there involved, was a Wisconsin contract, and was, therefore, subject to the direct operation of the Wisconsin statute; but the court further said that, if the contract were held to be an Illinois contract, it could not have been enforced in Wisconsin, because it is a universal principle that the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates public law.

The principle upon which the foregoing decisions rest was carried still further in *Minzhelmer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, *infra*, where it was held that a New Jersey court of equity would not lend its aid to the enforcement of a judgment, recovered in New York by a broker against his customer, for commissions and advances on account of transactions which were mere speculations on the rise and fall of the price of cotton on the 64 L. R. A.

New York exchange, even assuming that the transactions were valid according to the law of New York.

So, it was held in *Benton v. Singleton*, 114 Ga. 548, 58 L. R. A. 181, 40 S. E. 811, that a court of Georgia will not entertain an action to enforce an award in favor of a customer against a broker, made in New York under a voluntary submission to arbitration of the rights of the parties arising out of a gambling transaction in cotton "futures" upon the New York exchange. It was so held, even upon the assumption that, by the law of New York, it would be no defense to a common-law award that it was based upon a gambling transaction.

In *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839, it was held that dealings in "futures" or "options" are so opposed to the public policy of Illinois, as declared by its Criminal Code which makes such dealings a penal offense, that a court of that state will not entertain an action upon a note given in settlement of losses incurred in such dealings, notwithstanding that the plaintiff was a bona fide purchaser of the note without knowledge of the consideration, and that, under the law of the state where the note was made and was payable, the maker could not have availed himself of the illegality of the consideration as against a bona fide purchaser, though he could as against the original holder. The opinion in this case recognizes that, ordinarily, the law of the state where a note is made and payable will govern as to the defenses available to the maker, but holds that there is an exception to the rule when it conflicts with the public policy of the forum.

In *Sondheim v. Gilbert*, 117 Ind. 71, 5 L. R. A. 432, 10 Am. St. Rep. 23, 18 N. E. 687, however, it was held that it was not opposed to public morals, or violative of the public policy of Indiana, to enforce payment of a commercial note made and payable in New York, in the hands of an innocent holder, although it was given for the purpose of paying or securing losses or margins on contemplated dealings in "futures" on the New York cotton exchange, the same not being invalid, for that reason, by the law of New York, in the hands of a bona fide holder without notice of the nature of the consideration. The court seems to have assumed that this would be so, even upon the

covery in this suit under the laws of Rhode Island, unless the principal parties to the contract for the purchase or sale of stock did not intend that any stocks should be transferred, and such intention was known to the broker.

Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; *Ward v. Vosburgh*, 31 Fed. 12; *Dewey*, *Contracts for Future Delivery and Commercial Wagers*; *Young v. Glendinning*, 194 Pa. 550, 45 Atl. 364.

Transactions of this kind are presumptively valid, and the party assailing them has the burden of proving them illegal.

Bangs v. Hornick, 30 Fed. 97; *Ward v. Vosburgh*, 31 Fed. 12.

In Massachusetts it is held that the relation between a broker and his customer is not that of pledgee and pledgee.

Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446; *Re Swift*, 105 Fed. 493.

This difference between the Massachusetts rule and the one generally adopted simply brings into importance the question of intention as affecting the legality of the transaction between the broker and his customer. If they are not pledgee and pledgee, and are treated as holding the relation of principals towards one another, the question of the intention of the customer to take the stock from the broker becomes material. The testimony, however, is not sufficiently strong to taint the transaction with illegality so as to prevent the broker from recovering under the Massachusetts decisions.

Harvey v. Merrill, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49;

assumption that, if the note had been made and payable in Indiana, and the gambling transactions had taken place there, it would have been unenforceable, even in the hands of a bona fide purchaser. The court, however, recognizes the principle that a contract, though valid by its proper law, will not be enforced if contrary to good morals or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced; and, after commenting upon the language of the two statutes, says that they indicated such a coincidence in the policy of both states as that the courts of Indiana would not hesitate to enforce the liability of the maker of a note, such as that involved in the case at bar, in the hands of an innocent holder.

It was held in *Sullivan v. German Nat. Bank* (Colo. App.) 70 Pac. 162, that while, under the gaming statute of Colorado, an assignment of a negotiable instrument, in consideration of gambling losses, is invalid, even as against a subsequent bona fide indorsee, yet it is not contrary to the distinctive public policy of Colorado to apply the Texas rule upholding such an assignment in favor of a subsequent bona fide indorsee; and, accordingly, it was held that the validity, as against a subsequent bona fide indorsee, of the indorsement and assignment in Texas, in payment of gambling losses incurred there, of a certificate of deposit issued by a Colorado bank, was to be determined by the law of Texas, rather than the law of Colorado.

But, in *Savings Bank v. National Bank of Commerce*, 38 Fed. 800, it was held that, even assuming that an action would lie in Kansas by a second bona fide indorsee, in that state, of a certificate of deposit issued by a Missouri bank, and transferred to the first indorsee in Kansas in payment of losses incurred in a gambling game in that state,—a court of Missouri would, upon the ground of public policy, refuse to entertain the action. This decision, however, was upon the assumption that the certificate of deposit was not negotiable by the law of Missouri, where it was issued and payable, though it was by the law of Kansas, where it was transferred.

It will be observed that in the cases thus far cited in which the decision rests upon the ground of the public policy of the forum such public policy is applied merely with the re-

sult of denying any relief to either party; but in *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358, the court went further, and applied the public policy of the forum, with the result of granting affirmative relief to one of the parties. It was held in that case that where two residents of Vermont went into Canada for the purpose of making a wager upon the result of a presidential election the wager would be treated as illegal by a court of Vermont, without reference to the law of Canada; and it was further held that an action would lie in Vermont by one of the parties to the wager to recover the moneys from the stakeholder, the latter having been notified of the revocation of the wager before the occurrence of the event upon which it depended.

In most, at least, of the foregoing cases which have refused, upon the ground of the public policy of the forum, to entertain an action based upon a contract valid by the law of the place where made and performable, the attempt was to enforce the contract against a resident of the forum. That was true of the case of *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, which relied, in part, upon *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671, which, in refusing, upon the ground of the public policy of the forum, to uphold an assignment for the benefit of creditors, valid by the law of another state, limited the application of the doctrine to the protection of residents and citizens of New Jersey. In *Minzhelmer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, the defendant was a resident of New Jersey at the time she acquired the title to the property, which the complainant sought, by the suit, to have applied to the judgment recovered by him in New York upon the gambling contract, although she was not a resident of New Jersey when the suit was commenced. In reply to the contention that the refusal of the courts of New Jersey to aid such transactions arose solely out of a purpose to protect its own citizens, the court said that such refusal does not rest upon regard for the defendant, but is based on the unwillingness of the court to use the powers which were granted for the furtherance of lawful ends in aiding the schemes, the nature of which is condemned by the public policy of the state. And the court in the latter case held that the doctrine will be applied when it is apparent, from the real character

Barnes v. Smith, 159 Mass. 346, 34 N. E. 403.

A statute is not presumed to make any change beyond what is expressed in its provisions, or fairly implied in them, in the rules and principles of the common law.

Wilbur v. Crane, 13 Pick. 284.

The Massachusetts act is aimed at purely fictitious transactions where "there shall be no actual purchase or sale."

Com. v. Sylvester, 13 Allen, 247; *Alexander v. Alexandria*, 5 Cranch, 1, 3 L. ed. 19; *United States v. Freeman*, 3 How. 556, 11 L. ed. 724; *Grill v. General Iron Screw Collier Co. L. R. 1 C. P. 600*.

This statute does not apply to a suit in Rhode Island on a Massachusetts note given in a Massachusetts stockbroker's transaction, valid under the common law of Massa-

chusetts, and which would be valid under the law of Rhode Island.

Hancock Nat. Bank v. Farnum, 20 R. L. 466, 40 Atl. 341; *Fiske v. Foster*, 10 Met. 597; *Re Pulsifer*, 14 Fed. 247; *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Dacey*, Conf. L. pp. 711 *et seq.*; *Brown v. Thornton*, 6 Ad. & El. 185.

Messrs. C. M. Van Slyck and Charles C. Mumford, for defendants:

The note was given December 21, 1895, at the office of the broker, for an amount which the broker determined from figures which were presented to him by his clerk, and, by reason of an error made by the clerk, or bookkeeper, the amount of the note was \$1,500 more than it should have

of the transaction, that the enforcement thereof would violate public policy, notwithstanding that the defendant has not pleaded the defense.

It will be observed that, while it was held in *WINWARD v. LINCOLN* that the action would lie, that case is not opposed to the cases above cited, which declined to enforce the contracts upon the ground of the public policy, since the contract involved in that case was not invalid, even as tested by the law of the forum. The same is true of *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302, and *Williams v. Carr*, 80 N. C. 294, which also involved "future" or "option" contracts. In all three cases the implication is that, if the contract had been opposed to the law of the forum, or at least to the public policy of the forum, it would not have been enforced.

In *Scott v. Duffy*, 14 Pa. 18, it was held that money lent in New Jersey to bet upon a presidential election may be recovered in Pennsylvania, in the absence of proof of a law of New Jersey rendering such contract invalid. In reply to a contention that the case of *Edgell v. McLaughlin*, 6 Whart. 176, 36 Am. Dec. 214, had settled the law that all wagers are against sound morals and contrary to law, the court said that that case only settled the law in Pennsylvania; but then proceeded to point out that the present was not an action to recover money won on a wager, or to recover back money paid on a gaming contract; and intimates that the contract in question would not be invalid, even tested by the common-law rule prevailing in Pennsylvania.

Some of the cases, however, either hold or assume that a contract which is valid by the law of the place where it is made and performable will be enforced, though it is contrary to the statutes of the forum against gambling contracts. Thus, *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617, having held that the contract was valid according to the law of New York, assumed, without discussing the question of public policy, that it was enforceable in Missouri, notwithstanding that, if governed by the law of that state, it would have been invalid. The same is true of *Hawley v. Bibb*, 69 Ala. 52, and *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17; but in *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711, the court referred to the point, and intimated that, if the 64 L. R. A.

validity of the contract were not *res judicata* by a judgment recovered in another state, it might consider the question.

So, a contract for the purchase of cotton futures, made and to be performed in New York, is governed by the law of New York, and will be enforced by the courts of Georgia according to the legal status it would occupy in New York. *Champion v. Wilson*, 84 Ga. 184; but see *Benton v. Singleton*, 114 Ga. 548, 58 L. R. A. 181, 40 S. E. 811.

Thomas v. Davis, 7 B. Mon. 227, held that it was not contrary to the public policy of Kentucky to entertain an action upon a contract valid according to the law of Louisiana, by which the parties were to place a bet upon a horse race in the latter state and divide the winnings. The court admitted the principle that a court of one state is not bound by comity to enforce a contract which is against its public policy. It said, however, that the plaintiff was not seeking to recover money which he had won from defendant, but was merely seeking to recover money which the defendant had in fact received for his use and benefit. The intimation is that, if the former had been the case, the action could not have been maintained.

In *Quarrier v. Colston*, 1 Phill. Ch. 147, 12 L. J. Ch. N. S. 57, 6 Jur. 959, it was held that an action would lie in England to recover moneys loaned for the purpose of playing at a public gaming table in a foreign country, there being nothing to show that the games were not lawful in the country in which they were played. The court seems to have assumed that this would be true, even if the games were illegal by the law of England, though, as a matter of fact, it did not appear what games were played, and the court mentioned the fact that there was nothing to show that they would have been illegal, even in England.

A cause of action for the recovery back of the money lost, given by the law of the state in which a wagering contract was made, is transitory, and may be enforced in another state; but a law of the former state which merely gives the loser a right of action against the winner for a penalty cannot be enforced outside of the jurisdiction in which it was enacted. *Flanagan v. Packard*, 41 Vt. 561.

been. There was a total failure on the part of the broker to perform his promise to carry the account. This promise was the inducement which led the defendants to give the note, and the performance of the promise is a condition precedent to a recovery thereon.

Where it is the understanding of the parties in the beginning that the customer shall give orders to the broker from time to time to buy for him shares of stock, and that the broker, on receiving the orders, without buying the shares, shall be regarded as having bought them and as holding them for the customer until he shall receive the customer's order or consent to sell them, or until the customer, under the understanding, shall be obliged to submit to the broker's selling them, or rather to

his being regarded as if he had sold them, at which time the difference between the then market price and the market price as it was when the orders to buy were given shall be paid by the broker to the customer if the price has risen, and by the customer to the broker if the price has fallen, the contract is really a wager masked under the simulation of a sale, or of a sale and resale, and is null and void.

Flagg v. Gilpin, 17 R. I. 10, 19 Atl. 1084; *Weeden v. Wilcox*, App. Div. Sup. Ct., J. T. W. 384, Ex. 2, 559, unreported; *Grize-wood v. Blane*, 11 C. B. 526; *Jamieson v. Wallace*, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34; *Irwin v. Williar*, 110 U. S. 507, 28 L. ed. 229, 4 Sup. Ct. Rep. 160; *Rogers v. Marriott*, 59 Neb. 759, 82

b. Governing law when public policy of forum does not interfere.

Whether or not the law of the forum, denouncing gambling contracts, be regarded as such a distinctive part of the public policy of the forum as to prevent the enforcement of a contract contrary thereto though valid by its proper law, it may become necessary to determine what place furnishes the proper law of the contract,—that is, what place furnishes the law that would govern in the absence of any objection based upon the public policy of the forum; since a contract which is illegal or void by its proper law will not be enforced, though it would be legal and valid according to the law of the forum.

The weight of authority seems to favor the law of the place where the contract is to be performed, rather than that of the place where it is made.

Thus, a contract made by a Chicago company through its traveling salesman, with a purchaser in Iowa, to sell coal to be delivered on the cars in Chicago, is an Illinois contract, and the validity of an option to the purchaser to take an additional quantity of coal at the price agreed upon is to be determined by the law of Illinois. *Osgood v. Bauder*, 75 Iowa, 550, 1 L. R. A. 655, 39 N. W. 887. The decision is expressly put upon the ground that the contract was to be performed in Illinois, and is apparently upon the assumption that the contract was made in Iowa. By the law of Illinois the option was invalid.

In *Thomas v. Davis*, 7 B. Mon. 227, the court assumed that the validity of a contract made in Mississippi, by which the parties were to place a bet upon a horse race in Louisiana, and to divide the winnings, was to be determined by the law of Louisiana as the law of the place of performance.

A contract made in New York, whereby one party agrees to drive the horses of the other in races which are to take place in other states for bets or stakes, is not a violation of the New York statute prohibiting races for bets or stakes, nor is it against the public policy of such state; and, in the absence of proof that such contests would be illegal by the law of the state where they were to take place, the contract may be enforced in New York. *Harris v. White*, 81 N. Y. 532.
64 L. R. A.

Orders from parties in Illinois to their agent in New York, with reference to the buying or selling of commodities for future delivery, are governed by the law of New York, and not by the law of Illinois. *Postal Tele. Cable Co. v. Lathrop*, 33 Ill. App. 400. It was so held in an action against a telegraph company for damages sustained in consequence of errors in the transmission of despatches from Chicago to New York with reference to such purchases and sales.

Contracts for the future delivery of cotton, made by a commission merchant in New Orleans, and to be performed there, for his principal residing in Mississippi, are governed by the laws of the state of Louisiana, and, if valid in that state, will be enforced by the circuit court of the United States in the state of Mississippi. *Lehman v. Feld*, 37 Fed. 852.

The law of Massachusetts governs the interpretation of a contract made with a broker in that state for the purchase of stock on margin, and determines the nature of his ownership in the stock bought, and of his lien on the same. *Re Swift*, 105 Fed. 493. So far as appears, however, the contract was also performable in Massachusetts. The question seems to have been merely whether the contract was to be governed by the general principles of commercial law, or by local law.

The validity of a contract between brokers and a customer for the purchase and sales of futures, though made in Alabama, is to be tested by the law of New York, where all the acts or transactions in pursuance of it, including the advances or loans and the purchases and sales, were to be done and performed in the city of New York. *Hawley v. Bibb*, 69 Ala. 52. *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17, is to the same effect.

And in *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711, it was held that the validity of a contract made between a broker and a customer in Georgia, for the purchase and sale of cotton futures on the New Orleans exchange, was governed by the law of the state where it was to be performed; that is, by the law of Louisiana, where the purchases and sales were to be made.

Stebbins v. Leowolf, 3 Cush. 137, was an action by a broker against his customers to recover a certain amount as interest, commissions, and differences on a purchase and sale

N. W. 21; *Morris v. Western U. Teleg. Co.* 94 Me. 423, 47 Atl. 926; *Waite v. Frank*, 14 S. D. 626, 86 N. W. 645.

The contract was made in Massachusetts, and, by virtue of the statute of that state, the plaintiff is barred from recovery.

Perry v. Mount Hope Iron Co. 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Lyons v. Coe*, 177 Mass. 382, 59 N. E. 59.

Douglas, J., delivered the opinion of the court:

This action, commenced November 7, 1898, is brought by the administrator with the will annexed of Frank W. Prescott, who in his lifetime was a stockbroker in the city of Boston, doing business under the name of F. W. Prescott & Company, against Levi C. Lincoln and Charles H. Gorton, of Woon-

socket, Rhode Island, to recover the amount of a promissory note for \$1,503.21, bearing date Woonsocket, Rhode Island, December 30, 1895, made by the defendants, payable to their order, on demand, at any bank in Boston, and indorsed in blank by them. The declaration also contains the common counts for money had and received, for money laid out expended, for money lent and advanced, and for interest. The defendants plead the general issue, with affidavits of defense which set out, in substance, that the note was made without consideration; that it was given under a mistake of fact for a supposed balance of account due from the defendants to the plaintiff's intestate; that the account upon which the note was predicated represented only wagering contracts between the defendants

of certain stocks made by him under the order, and for the account, of the defendant. The contracts which the broker made for his principal, and out of which his claim against them arose, were unlawful under the statute of New York, where they were made and to be performed. The decision, which is against the broker, is formally put upon the ground that the contracts were entered into in New York, were made by parties resident there, were to be performed there, and were therefore peculiarly to be governed by the rules of law of that state. This decision also seems to make the validity of the broker's contract with his principals dependent upon the law of the state where the contract by the broker with the third persons was made and to be performed; but it was probably the case, although it does not expressly so appear, that the broker's agreement with his customers was itself made and to be performed in New York.

In *Champlin v. Smith*, 164 Pa. 481, 30 Atl. 447, which involved the right of the broker to recover upon a note to secure advances on account of transactions on the Chicago exchange, the rights of the parties were determined by reference to the law of Illinois; but in this case the contract between the broker and the customer, as well as the contracts of purchase and sale, were made in Illinois.

In *WINWARD v. LINCOLN* the broker's contract with his customer was made in Massachusetts, and the transactions by him in behalf of his principal also took place in that state; but the court said, incidentally, that it was the validity of the agent's acts, not of his appointment, upon which the consideration of the note given by the customer to him depended.

A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617, was an action by a Missouri brokerage company against a resident of Missouri for advances and commissions on transactions by the former for the latter upon the New York stock exchange. Their contract was made in Missouri, and no directions were given as to where the stock should be purchased, but it was in fact purchased upon the New York stock exchange. The customer's intention was merely to speculate in the rise and fall of the market, and he never at any time intended to receive the stock. It was admitted that, if the transactions in the purchase and sale of the stock had taken place in Missouri, 64 L. R. A.

they would have been invalid under the express provisions of the Missouri statute, which declares that such intention by one party shall be sufficient to invalidate the contract; and it was further conceded that, according to the Missouri statute, the plaintiff could not recover its advances and commissions. It was held, however, that the rights of the parties were to be determined by the law of New York, where the purchases of stock were made; and that, in the absence of evidence to the contrary, it must be presumed that the common law, which allows such recovery, prevailed in that state. The court does not expressly distinguish between the contract of the broker with his customer, which was made in Missouri, and the contracts which were made in New York in pursuance of that contract; and seems to assume that the place where the contracts of purchase were made and performable furnishes the law by which the respective rights of the broker and his customer were to be determined, although their contract was made in Missouri.

A contrary conclusion was reached in *Ball v. Davis*, 1 N. Y. S. R. 517, upon an almost exactly similar state of facts, it being held in that case (which was an action for the recovery of the broker's advances and commissions) that, the broker's contract having been made in New York, without any specification of the place of performance, it was governed by the law of New York, notwithstanding that the transactions were conducted by the broker for his customer upon the Chicago market.

So, in *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337, Reversing 21 Misc. 13, 46 N. Y. Supp. 852, the court assumed that the right of plaintiff to recover back money which he had sent to defendant to be used in the purchase of futures in grain on the Chicago market was to be determined by the law of the place where their contract was made; and the question discussed was merely whether the contract was to be regarded as made in New York or Pennsylvania.

No clear distinction is made in these cases between the contract of the broker with his customer, upon one side, and the contracts of purchase and sale made by the broker in behalf of the customer with third persons, upon the other side. Such distinction was, however, expressly made and relied upon in *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85

and the plaintiff's intestate upon the price of stocks, in pursuance of which settlements were agreed to be made on margins; that no stocks were actually bought and sold, and it was the intention of the parties that there should be no actual sales and deliveries; that the contract should be construed under the laws of Massachusetts, and under these laws is void.

The first claim is based upon the statement that the note in question was not given on the day of its date, but on December 21, 1895, and not in settlement of the account at all, but as an accommodation, on consideration that the plaintiff's intestate should carry the defendants' stock or account further. The testimony of the defendants upon this point is not consistent, with itself, nor with the undisputed facts in

the case. They say that they went to Boston by early train on December 21st; that a consultation was had between them and the broker, which resulted in their giving a note to be used by him to raise money to be applied as a margin for carrying their account further; that it was subsequently discovered that the note represented a sum \$1,500 larger than the balance really due from them; that the note then given is the note now sued upon. The defendants undoubtedly went to Boston on the 21st, as they say, and some arrangement with regard to their account was made; but we cannot believe, upon their uncorroborated testimony, that it was such as they claim. No doubt a rough statement was then made of their account, based on the closing quotations of the day before, and the proposi-

N. W. 703, which, upon its facts, was very similar to the cases just considered. It was held in the Bartlett Case that the right of a broker to recover commissions and moneys advanced under a contract made in Wisconsin, with a resident of that state, contemplating transactions in grain futures upon the Chicago exchange, was to be determined by the law of Wisconsin, upon the ground that the contract between the broker and his customer was made in Wisconsin, and that, while the transactions in the purchase and sale of "futures" were to take place in Illinois, the other acts, including the payment by the principal of all obligations incurred by his agent, were to take place in Wisconsin. The decision was referred to the general principle that, where a contract is to be partly performed in the state or country where made and partly in other states or countries, the law of the place where it was made will govern unless a clearly mutual intention is manifested that it shall be governed by the law of some other state or country.

The decision in the Edwards Case was criticised in an article in 54 Cent. L. J. 223, because of the failure of the court to make the distinction above pointed out, and because of its assumption that the place where the contracts of purchase and sale were made and to be performed furnished the law of the contract between the broker and his customer, and the opinion, in these respects, was contrasted unfavorably with the opinion in the Bartlett Case. The writer of the article referred to says: "The Missouri court entirely misapprehends the nature of the action, treating it as though it were an action by a third person against the principal on a contract made by the agent. But it was nothing of the kind; it was a suit on the contract of agency for services rendered and money expended for the principal's benefit and at his request." The writer, however, seems to have overlooked a material factor in the case. Section 3931 of the Missouri Revised Statutes of 1889 in effect declares that contracts and agreements for the purchase and sale of shares of stock, without any intention of receiving and paying for stock bought, or of delivering the stock sold, shall be illegal, and prescribes a penalty for the violation of the section. Section 3932 provides, *inter alia*, that any person "who shall communicate, receive, exhibit, or display in any manner, any such offer to buy

or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid [manifestly referring to the transactions contemplated by § 3931], shall, for each such offense, be deemed, and held to be, an accessory thereto, and, upon conviction thereof, shall be fined the same as the principal." Section 3936 provides that all contracts made in violation of the article in which the sections are included shall be considered gambling contracts, and shall be void. It is obvious that, in order to make the broker an "accessory" within § 3932, the purchases and sales must have constituted an offense within § 3931; but the purchases and sales in question did not come within the operation of that section because they were made and performable in New York, by the law of which they were valid. It would seem to follow, therefore, that the contract between the broker and his customer, though made in Missouri, was not void under § 3936. This is not to say that that contract is not, strictly speaking, governed by the law of Missouri. The question is, What is the law of Missouri as applied to this contract, in view of the fact that the contracts of purchase and sale were made in New York, and were presumably valid by the law of that state? Upon this hypothesis, there seems to be no law of Missouri which renders the contract between the broker and his customer invalid. If the purchases and sales, though made in New York, had been illegal by the law of that state, the contract between the broker and his customer might also have been held invalid and illegal, not because it came within §§ 3932 and 3936 above referred to, but because of the general principle which provides, even in the absence of a statute directed especially against the broker, that a broker who is *particeps criminis* in the illegal transactions cannot recover his advances and commissions. The criticism in the article referred to overlooks the fact that the contract may be governed by the law of a particular state, and yet the law of another state, operating upon transactions within that state, may have a decisive bearing upon the practical question, what the law of the former state is, as applied to the particular contract in question. Take, for instance, the supposed case (by which the writer seeks to illustrate the court's error) of a contract made in Missouri, where by one party agrees to pay the other commis-

tion was made to give a collateral note, to be discounted and used as margin, and such a note seems to have been given. But this was not the final arrangement. The note then given was probably a time note for a round sum, and would certainly not have been dated nine days in the future. Such a note as is now produced, if postdated, could not have been offered for discount at any bank, and would have been useless for the purpose suggested by the defendants. As a matter of fact, the stocks were sold the same day. According to the time which the defendants fix for their visit, the orders to New York must have been sent while they were in the broker's office, or immediately after.

Defendant Lincoln testifies:

Q. After you had signed the note, and

left Mr. Prescott's private office, where did you go?

A. We went through the outer office, and noticed the quotations on the stock—of these special stocks—at that time, which were much higher than the figures Mr. Prescott had figured them at. Then we passed on Tremont street. . . . We got on the train, and we took these figures and figured it out, and saw that Mr. Prescott had made a tremendous mistake. We came back to Woonsocket, and the first chance I got I wrote him that fact.

The other defendant testifies:

We left Mr. Prescott's office,—that is, his private office,—passed out in the corridor, and I said to Mr. Lincoln, "Let us look in the blackboard room." We looked in the blackboard room, and saw that the stocks

sions and expenses for the purchase of horses, and the purchase of horses pursuant to the contract in several different states. The writer says that, according to the Missouri doctrine, the right of the agent to recover his commissions and expenses upon each lot of horses would have to be determined by the law of the state in which that particular lot is purchased, and that there would be as many applicable laws as there were different lots of horses purchased. Theoretically, such result would not follow from the adoption of the Missouri doctrine, but it may be admitted that practically such result might follow. For instance, the contract, tested by the law of Missouri, might entitle the agent to commissions on each lot of horses to which he secured an unencumbered legal title; but it is obvious that the question whether, even for the purposes of the Missouri statute, he does procure a valid and unencumbered title to a particular lot of horses, may depend upon the law of another state in which that lot is purchased. The law of Missouri determines the construction of the contract, but it may be necessary to look to the laws of other states in which transactions under the contract are conducted in order to determine whether they come within the contract as so construed.

A distinction, bearing upon the point in question, is to be observed between the Edwards Case, upon one side, and the Bartlett and Ball Cases, upon the other side. While the Wisconsin and New York statutes involved in those cases are in general terms, they seem to be sufficiently specific to invalidate the broker's contract independently of the validity or invalidity of the future transactions themselves.

When, however, the rights of the parties depend upon common-law principles, it is not so clear that the broker's contract with his customer can be declared invalid, if the transactions in the futures are conducted by him in another state, by the law of which they are valid. Thus, *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160, puts the rule which denies the right of the broker to recover his advances and commissions on account of transactions which were invalid at common law as gambling contracts, upon the ground that he is a *particeps criminis* when he is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into

an illegal contract. In this view, the illegality and invalidity of the broker's claim seem to be dependent upon the illegality and invalidity of the transactions conducted by him. If they are legal and valid by the law of the place where they take place, there seems to be no ground for saying that the broker is a *particeps criminis* in an illegal transaction.

In *Stewart v. Schall*, 65 Md. 289, 57 Am. Rep. 327, 4 Atl. 399, however, it was held that the right of a broker to recover for advances made to customers on account of purchases and sales of stock and grain was to be determined by the law of Pennsylvania (where the contract between the broker and the customers was made, and where the settlement thereunder was to be had) as comprised in the decision of that state bearing on wagering contracts within its limits, notwithstanding that the purchases and sales took place in New York.

In *Ward v. Vosburgh*, 31 Fed. 12, a Federal court, sitting in Wisconsin, seems to have assumed that the right of a broker to recover his advances and commissions upon account of transactions conducted by him upon the floor of the Chicago board of trade, for a resident of Wisconsin, was to be determined by the law of Illinois, because the transactions took place there. Probably the contract between the broker and the customer was also made in Illinois, though it does not expressly so appear; and, as already stated, the decision seems to be upon the ground that the transactions conducted by the broker for his customer had their situs in Illinois.

The considerations above suggested in support of the assumption by the court in the Edwards Case, that the respective rights of the broker and his customer were primarily to be determined by the law of New York, where the transactions conducted by the former for the latter took place, notwithstanding that their contract was made in Missouri, does not, in the least, militate against the right of the court to decline to enforce the broker's contract with the customer, upon the ground that it was contrary to the public policy of the forum. This, as already pointed out (*supra*, I. a) was an alternative ground of the decision in the Bartlett Case; and, if the Missouri supreme court had seen fit to take this ground in the Edwards Case, it might properly have denied the broker's right

in which we were interested very much higher than the basis that had been told us that our account stood. . . .

Q. Did you do anything then,—go anywhere?

A. We went immediately back to Mr. Prescott's office.

Q. Together?

A. Yes, sir.

Q. Whom did you see when you went back to Mr. Prescott's office?

A. Mr. Prescott.

Q. What did you say to him?

A. We called his attention to the fact that the stocks were very much higher than he had given us.

Q. What did he say?

A. Mr. Prescott said: "It is all right, boys. I am glad of it. That lets us all

out." We asked him if he wanted our note then. He said, "No;" that is, said: "We will keep your note, because the market fluctuates so that it is liable to go considerable lower." And that was the understanding when we left the office, that he would return the note to us provided the stocks let us out.

One circumstance the defendants agree upon with absolute certainty, viz.: That the note made on the 21st was based on the quotations of December 20th, and that these were lower than those of the 21st and afterwards. It is certain, then, that the note now sued upon is not the note given on the 21st, as it represents the exact balance shown by the broker's books after the sale of the stocks at the prices of the 21st and

to recover, notwithstanding that, in its opinion, the law of New York would otherwise have been the proper law by which to determine the respective rights of the parties.

A Missouri statute declaring option sales and purchases of grain and contracts for the same criminal offenses has no extraterritorial operation, and does not apply where a telegram is sent from Missouri to a commission firm in another state to purchase grain on an option. *State v. Gritzner*, 134 Mo. 512, 36 S. W. 39.

New or substituted contract.

As a general principle, if an original contract is illegal and void by the law governing it, a new or substituted contract resting thereon is invalid, notwithstanding that it may have been made, and be performable, in a state by the law of which the original contract would have been valid.

There is, however, an apparent exception to this principle, as applied to a new or substituted contract for the payment of a broker's advances and commission upon account of transactions in "futures," assuming the correctness of the position taken in Alabama, that, in the absence of a statute declaring such transactions void, the broker may recover his advances and commissions, notwithstanding that the transactions are void by the common law as contrary to public policy, if the principal subsequently promises to pay them. (See *Hawley v. Bibb*, 69 Ala. 52; and *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711.) It will be observed that, according to this position, the new promise does not depend upon the validity or invalidity of the original contract between the broker and his customer, but upon the fact that the broker has rendered services, and incurred expenses, for the customer. Accordingly, it was held in *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711, upon the assumption that the common-law rule was in force in Georgia, that a note made and payable in that state, and a mortgage upon land in Alabama securing the same, were valid, notwithstanding that they were given for commissions and advances under a contract between a broker and his customer, which would have been governed by the law of Louisiana if that law had been proved, but to which, in the absence of such proof, the court applied the statute of 64 L. R. A.

Alabama (*les fort*), which declares "future" transactions, like those conducted by the broker for his customer, illegal, and prevents the broker from recovering his advances and commissions. The correctness of this decision, upon the hypothesis upon which it was rendered, depends upon the correctness of the foregoing statement of the common-law rule, and that is certainly open to question. The United States Supreme Court, in *Irwin v. Willmar*, 116 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160, referring to a case which was governed by the common law, and not by statute, after stating the general rule that a contract, the real intent of which is to speculate in the rise and fall of prices, is invalid, said: "But we are also of the opinion that, when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered, or losses incurred by himself on behalf of either in forwarding the transaction." *Harvey v. Mitchell*, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49, takes the same position. These cases are referred to merely to call attention to the fact that the common-law rule, as stated by the Alabama court, is open to question, and no attempt has been made to exhaust the authorities on the point.

In *Collins v. Merrell*, 2 Met. (Ky.) 163, it was held that a note executed in Kentucky, for money loaned in another state for the purpose of gaming there, was within the Kentucky statute declaring generally that every contract for the consideration of money lent for the purpose of gaming shall be void.

II. Lottery contracts.

A local statute declaring lotteries and lottery contracts void or illegal can have no direct operation upon a contract or transaction, no part or element of which had a local situs.

Thus, it has been held that a local statute forbidding the sale of lottery tickets does not apply to a sale completed in another state, where it was valid, by the mailing of a ticket in that state directed to a resident of the state enacting the statute. *M'Intyre v. Parks*, 3 Met. 207; *Case v. Riker*, 10 Vt. 482, 33 Am. Dec. 211; *McNight v. Blasecker*, 13 Pa. 328, *infra*; *Hatch v. Hanson*, 46 Mo. App. 323. The deci-

after a further credit of a dividend of \$40, payable on the 31st of December. The note made on the 21st, we think, was either returned to the defendants when the second note, which is now in suit, was made, or else was destroyed; for no trace of such paper has since come to light. We believe that the defendants, when they saw that their stocks were rising in the market on the 21st and went back into the broker's private office, consented to his selling, and afterwards, on the 30th of the month, when the account of sales was made up, gave the note now in suit. The expressions in Lincoln's letter to Prescott are consistent with this view of the facts. He says (December 24th): "Yours of 23d inst. rec'd. Mr. Gor-

ton and myself were just about to call you up by L. D. telephone when we received your letter. We were going to say to you that, if you really desired to help us out, for you to purchase back for us the stocks sold under the excitement of the moment before they reach their old price, and upon their present low basis. Your clerk the other day made an error of \$1,000 in his hurry, and the sum total as stated by him frightened us. The note given you covers amount due you and about \$1,500 over that amount." And again: "We are both sorry now that the stocks were sold out, as the note given amply covered them." This is not protest against the sales as unlawfully made, but the expression of a regret at what had been

sion in the last case was disapproved in *Roselle v. Farmers' Bank*, 141 Mo. 36, 64 Am. St. Rep. 501, 39 S. W. 272, *infra*; but it does not appear that the position of the appellate court upon the point in question was disapproved.

It is obvious, therefore, that a statute condemning lotteries and lottery contracts cannot affect the right to maintain an action upon a lottery contract in any state or country other than that which enacted the statute. When, however, an action is brought in the state or country which enacted the statute, the court may, upon the ground of public policy, refuse to entertain the action notwithstanding that the contract was made and performable in another state, and therefore was not within the *direct* operation of the statute.

Thus, in *Watson v. Murray*, 23 N. J. Eq. 257, it was held that, even if the partnership contracts with reference to lotteries to be conducted in other states were entered into in such other states, and were valid by the laws thereof, a court of New Jersey would decline, upon the ground of public policy of the forum, to entertain a suit based thereon. This right to refuse to enforce the contract upon the ground of public policy was also recognized in *M'Intyre v. Parks*, 3 Met. 207, though in that case it was held it was not contrary to the public policy of Massachusetts to enforce a mortgage assigned as collateral security for the purchase price of lottery tickets sold in New York to a resident of Massachusetts, although the vendor knew that the purchaser intended to sell them, or part of them, in Massachusetts in violation of the statute of that state.

So, *Jameson v. Gregory*, 4 Met. (Ky.) 363, held that notes and a mortgage given in payment for lottery tickets sold in Delaware, where such sales were authorized, might be enforced in Kentucky, notwithstanding that the vendor knew that the vendee intended to resell the tickets in Ohio, the law of which forbade the sale of such tickets, there being no stipulation in the agreement of sale that they should be resold in Ohio, or in any other place where their sale was prohibited by law.

In *Case v. Riker*, 10 Vt. 482, 33 Am. Dec. 311, it was held that an action could be maintained in Vermont for the purchase price of lottery tickets sold in Rhode Island, where such sale was lawful, although the vendor knew that they were to be resold in Vermont, if he was not, at the time of the sale, aware that the resale of such tickets in Vermont was prohibited by law. 64 L. R. A. -

Assuming that there is no objection, based upon the public policy of the forum, to the enforcement of a contract based upon a lottery contract if valid by its proper law, the question remains, What law determines the validity of the contract? In this connection, the rule is well established that a local statute forbidding the sale of lottery tickets applies to a local sale of a ticket in a lottery established in, and authorized by the laws of, another state or country. This is true, not only when the action is brought in the state or country which enacted the statute (*Horner v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; *Denca dem. Ridgeway v. Underwood*, 4 Wash. C. C. 120, Fed. Cas. No. 11,815; *Kitchen v. Greenbaum*, 61 Mo. 110), but also when it is brought in another state or country,—even when it is brought in the state or country in which the lottery is established and by the law of which it is legal. Thus, the Maryland court of appeals, in *Paine v. France*, 26 Md. 46, held that there could be no recovery upon sales of lottery tickets in states in which such sales were forbidden by statute, notwithstanding that the lottery was established in, and authorized by the laws of, Maryland (the forum).

When the contract is made in one state or country and is performable in another, its validity, so far as it is affected by the lottery element, is governed by the law of the place of performance. Thus, the validity of a bond, conditioned for the faithful performance of duties enjoined by the law of Kentucky and authorizing the obligees to sell lottery tickets, is to be determined by the law of Kentucky, whether the bond was executed there or in New York, since, in any event, it contemplates performance there. *Kentucky v. Bassford*, 6 Hill, 526.

So, in *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583, the court held, upon the assumption that no advertising under the contract was to be done in New York, that a contract made in New York to advertise a lottery was not governed by the statute of New York forbidding the advertising of lotteries. The decision is upon the ground that the law of the place of performance governs.

An exception should, perhaps, be made to the rule above stated, referring the contract to the law of the place of performance, when the local statute does not, as in the case last cited, merely forbid the acts, the performance of which is called for by the contract; but, in effect, forbids the making of the contract itself. Thus,

done by them all in haste; and the note covering a larger balance than was due after the 21st, and \$1,500 more, was not the note now in suit. Mr. Prescott replied on the 26th, as follows: "Yours of the 24th received. I can appreciate the position you and Mr. Gorton are in, and you can rest assured that I will do everything in my power to help you out. You can understand the excitement under which everybody labored when you were in the other day. We have been in quite a number of panics, but I never saw anything like the one we had this last week, and it was natural that mistakes should be made. When our clerk figured up your account, it was figured at extremely low prices, so as to include losses

and the margin required on the account. It would be better for you to come and see me personally, and explain the situation you are in. I shall probably not be in the office Saturday, but will be here the first of next week. Next Wednesday is a holiday in New York, and will be in Boston in this business. Please let me know when you think you will come up."

This is the last communication from Prescott which is in evidence, except one through his clerk of January 15th, which does not throw any light on the situation. Mr. Stonemetz, who was clerk for Prescott, testifies that the defendants came to Boston on Monday, the 30th of December, and settled their account with Prescott by giving the note

Thatcher v. Morris, 11 N. Y. 437, assumed that the right to maintain an action to recover money drawn by a ticket in a Maryland lottery should be determined by the law of the place where the ticket was purchased if such law was proved; though, in the absence of such proof, it was held that the rights of the parties should be determined by the law of the forum. This case, therefore, seems to imply that the law of the place where the contract, evidenced by the lottery ticket, is made, prevails over the law of the place of performance, since the contract in question, wherever made, was apparently performable in Maryland. There is an obvious distinction bearing upon the point in question between this case and the cases last above cited. In those cases the statute of the state where the contract was made did not forbid the making of the contract, but merely forbade the doing of the acts contemplated by the contract; but a statute forbidding the sale of lottery tickets strikes at the very foundation of the contract between the purchasers and the managers of the lottery, and in effect forbids the making of any such contract.

Even when the sale of a lottery ticket was consummated in a state by the law of which it was valid, a collateral contract relating thereto may be made and performable in another state by the law of which contracts, or other transactions based on lotteries, are invalid, in which case the rights of the parties, so far as they depend on the collateral contract, are, of course, to be determined by reference to the law of the latter state.

Thus, in *Roselle v. Farmers' Bank*, 141 Mo. 36, 64 Am. St. Rep. 501, 39 S. W. 274 (Affirming in banc [Mo.] 35 S. W. 1135), the court held that the validity of an agreement made in Missouri, by members of a club, to hold, as a joint venture, tickets in a Louisiana lottery, was to be determined by the laws of Missouri. This was upon the ground that the agreement between the members of the club was made in Missouri, and not upon the ground that the sale was made there. As a matter of fact, the sale of the tickets seems to have been consummated in Louisiana, the tickets having been forwarded from there by express to the purchasers in Missouri.

Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516, held that an action could not be maintained in New York, for the recovery of one half of the prize drawn by tickets in a Louisiana lottery, under an agreement made by the 64 L. R. A.

parties in New York for an equal division of the proceeds of any prize money drawn upon tickets purchased with their joint funds. This decision was upon the express assumption that the sale of tickets was completed in Louisiana, whence they were sent by express to New York, and that every part of the transaction which took place in Louisiana was perfectly valid. The decision is upon the ground that the agreement to divide was made and was performable in New York, and its validity must, therefore, be determined by the law of that state.

McNight v. Blesecker, 13 Pa. 328, was an action in Pennsylvania under an agreement made in that state for the division of the proceeds of a ticket in a Maryland lottery. The court held that there was nothing in the Pennsylvania statute for the suppression of lotteries forbidding a citizen of Pennsylvania from purchasing, or causing to be purchased, a lottery ticket in Maryland, where lotteries were authorized. It further held that the action would lie; but, so far as appears, the court determined the latter question by reference to the rule in Pennsylvania,—at least the decision upon this point was not expressly referred to the law of Maryland.

The distinction between the direct operation of a local statute upon lottery contracts having their situs within the state or country which enacted the statute, and which, therefore, furnishes its proper law, and the indirect operation of the statute which results when the court regarding the statute as declarative of a distinctive public policy, refuses to entertain an action based upon a contract made and performable in another jurisdiction and valid by the law of that jurisdiction,—is important; for, if the contract is within the direct operation of the statute, the statute must be applied when the action is brought in the state or country which enacted the same, and ought to, and generally will, be applied, even when the action is brought in another state or country. Thus, it was held in *Nebraska* that a note executed and payable in New York, based on a contract with reference to a lottery which was made and to be performed in New York, is governed by the law of New York. *Kittle v. De Lamar*, 3 Neb. 332. See also *Paine v. France*, 26 Md. 46.

Upon the other hand, even a court of the state or country which enacted the statute is not bound to apply it indirectly, but will be guided in this respect by general principles of comity.

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now in suit. The defendants both say they do not remember to have seen Prescott after the 21st, but do not positively deny that they visited Boston on the 30th. Mr. Stone-metz is strongly corroborated by the note and the account. The note was written by him and dated with the rubber stamp used in the office. If the date were not correct, it is strange that none of the parties noticed it. A statement of the account, striking a balance, was mailed to the defendants at 3:30 P. M. December 30th, as was natural if they had been in Boston and finally adjusted the matter that day. If the account were still running, the statement ordinarily would have been sent on the 31st,—the last day of the month. The statement itself contains items of interest reckoned to the 30th, which go toward determining the balance. The sale prices of the stocks are those of the 21st; but they are credited on the 23d, the next Monday, when actual deliveries and payments would be made. When the note was drawn the parties must have had these computations before them, and also had in mind the dividend of \$40 payable the next day, which is deducted from the balance shown by the account. We have little doubt that the note was given on the day that it bears date, and that in settling the amount any mistake in the account on which the former note was based was properly adjusted. After the death of Prescott, which occurred January 19, 1896, the defendants renewed their complaint that there had been a mistake in the account, and they were informed that they would be given an opportunity to straighten matters out; but it does not appear that at any time since then they have made any attempt to point out the alleged mistake. There is no evidence in the case to show what the mistake was, or what is the amount of it,—only the bare assertion that the note of \$1,503.21, is \$1,500 larger than it ought to be.

The defense of illegality is one which merits serious consideration. Upon this issue the plaintiff contends that the transactions between the parties are to be judged by the law of Rhode Island, but that, if tried by the law of Massachusetts, they are not unlawful. The question is not without difficulty. The note is clearly a Massachusetts contract. Though dated in Woonsocket, Rhode Island, it had no validity as a promise until negotiated, and was first given such validity when delivered to the plaintiff's intestate in Boston, Massachusetts. But the consideration for it was an indebtedness growing out of transactions in Boston and New York (or in Boston alone, if no actual purchases and sales were made); and these transactions were carried on by the plain-

tiff's intestate at Boston, as agent of the defendants, who lived in Woonsocket, and who gave orders to their agent by telephone or by letter from there. It is argued with plausibility that the relation of principal and agent was thus created in Rhode Island, and hence that the acts of the agent directed by the defendants in Rhode Island must be held valid, if not illegal there,—citing *Perry v. Mount Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635; *Dacey*, Conf. L. p. 617, title, *Contracts through agents*. We think the argument misinterprets the authorities quoted. The first case holds that a contract made by offer from Massachusetts, accepted by telegram from Rhode Island, was completed by the sending of the telegram. In the other case the contract was made in Rhode Island, to be performed in New York. The citation from *Dacey* relates to the appointment of an agent in the same country, and holds that the scope of his employment is governed by the law of that country.

Though in the case at bar the parties had some preliminary conversation together in Woonsocket, no order was given at that time and no relation of principal and agent was entered into. The plaintiff's intestate first became broker for the defendants when, in Boston, he received and accepted their first order. And in this case, also, the acts of the broker, as agent of the defendants, were performed in Massachusetts, and it is the validity of these acts, not of his appointment, upon which the consideration of the note depends. We think, therefore, that, if these dealings were not valid in Massachusetts, the note was without consideration. In the recent case of *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845 (opinion by Mr. Justice Peckham, May 27, 1901), which is very instructive on the whole subject of wagering contracts, the complainants were residents of New York, and the transactions in question were made by their brokers in Chicago, and the court considers these transactions as governed by the law of Illinois, including Mr. Justice Harlan, who dissented from the conclusion of the majority of the court on the merits of the case. If they were valid in Massachusetts, however, yet were contrary to the public policy of Rhode Island, no recovery can be had here. As was said in *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635: "A contract, however, may be valid by the law of both places [*i. e.*, the place where it is made and the place where it is to be performed], and yet fail practically, if the *lex fori* does not permit its enforcement;" citing *Leroux v. Brown*, 12 C. B.

301. See also *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 369.

As the alleged defect in the contracts made between these parties involves the questions of public policy, we must examine these transactions with reference to the law in both states at the time they took place. in Massachusetts at this time there was in force an act (Pub. Laws 1890, chap. 437), the material provisions of which are as follows:

"Sec. 1. In this act 'securities' shall mean and include all evidences of debt or property and options for the purchase and sale thereof, shares in any corporation, joint-stock company or association, bonds, coupons, scrip, rights, choses in action, and other evidences of debt or property and options for the purchase or sale thereof. And 'commodities' shall mean and include everything movable that is bought and sold.

"Sec. 2. Whoever contracts to buy or sell upon credit or upon margin any securities or commodities, having at the time of contract no intention to perform the same by the actual receipt or delivery of the securities or commodities, and payment of the price, or whoever employs another so to buy and sell on his behalf, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made or the value of anything delivered: Provided, such other party or other person so employed had reasonable cause to believe that no intention to actually perform existed."

"Sec. 4. In any proceeding under this act, the fact that the seller or the person employing another to sell in his behalf does not own the securities or commodities at the time of the contract of sale or at the time of the giving of the order to sell, and the fact that settlements had been made without the actual delivery and receipt of the securities and commodities bought or sold or ordered to be bought or sold, shall each of them be prima facie evidence against both contracting parties and against the person employed by either of the contracting parties to make such contract in his behalf, that no intention originally existed to actually receive and deliver the subject of the contracts, and that the contracting parties, the persons employed to make such contracts and any employee of them or either of them had reasonable cause to believe that no intention to actually perform existed; and the parties liable to an action under this act shall be jointly and severally liable."

Approved June 23, 1890.

If § 2 of this act must be construed according to its literal expression, it would give to the fraudulent purchaser of any 64 L. R. A.

commodity, e. g., a barrel of flour, the right to recover of the too confiding dealer any money which he had paid on account, if he could show that he had no intention of performing his bargain by payment of the price as well as by receipt of the goods, and that the dealer had reasonable grounds for believing so, but charitably suppressed his suspicions and granted credit. We cannot believe that the Massachusetts legislature intended thus to place a premium on trover and conversion. The evident meaning of the act is to effect ostensible contracts of bargain and sale which are not really such, where one of the parties does not intend that an actual receipt or an actual delivery shall take place, and the circumstances are such that a knowledge of such intention may reasonably be imputed to the other party. The intention as to actual receipt or actual delivery is the criterion; the law imputing to the purchaser an intention to pay if he has the intention to receive. This construction is given to the statute by the supreme judicial court of Massachusetts in *Davy v. Bangs*, 174 Mass. 238, 54 N. E. 536. That case was brought under the statute to recover the value of stocks which had been deposited with a firm of brokers as collateral security or margin for stock transactions. The plaintiff, for whom one Wiggins acted as agent with the defendants, claimed that she never intended to actually buy or sell, and that the brokers had reasonable cause to believe that no intention existed on her part to actually perform the contracts of purchase and sale which formed the transactions in question. The opinion approves the holding of the lower court that she could not recover, if either she or Wiggins intended such performance to be made either by her or by him, or by the defendants as her or his agents, and also the eighth request to rule, as follows: "That if the plaintiff intended that the defendants as her agents should receive the stocks which she ordered them to buy, delivery to them was delivery to her, and it was immaterial whether she intended to take manual possession of them." The seventh request to rule was as follows: "That the transactions would not be within the condemnation of the statute if the plaintiff ordered the defendants to buy and sell securities, and the defendants as her agents bought and received, sold, and delivered the securities, although it was agreed that the defendants should hold the stock purchased for her as security for advances made on her account, and should sell them when so ordered by the plaintiff, and account to her for the proceeds thereof." Upon this request, which was refused by the trial justice, the court says: "Assuming that the seventh request

properly states the law, we think it became immaterial upon the rulings and findings of the court." It was also held in this case that it was for the plaintiff to prove, both that her intention was not to perform, and that the defendants had reasonable cause to believe so. The only other case cited in this connection is *Lyons v. Coe*, 177 Mass. 382, 59 N. E. 59, where it was conceded in an agreed statement that the contracts were forbidden by the statute, and the only question was whether the broker could recover from the customer as well as the customer from the broker. The material question, therefore, under the Massachusetts statute, is whether or not the defendants intended that the plaintiff's intestate should make actual purchases and sales of stocks on their behalf, and should actually receive and deliver the same, and, if not, whether the plaintiff's intestate had reasonable cause to believe their intention to be such as it was. The 4th section of the act, which prescribes certain rules of evidence, can only have application in the courts of Massachusetts on the trial of cases brought under the statute. We are only concerned here with the implication of the statute which makes void the contracts it describes. We have nothing to do with the direct provisions which grant a remedy there to one wrongdoer against another. *Equitable Life Assur. Soc. v. Frommhold*, 75 Ill. App. 43; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Dacey*, Conf. L. p. 711; *Brown v. Thornton*, 6 Ad. & El. 185.

The account on Prescott's ledger begins August 6, 1895, by charging the defendants for 140 shares of six different stocks at various prices, amounting in all to \$10,938.75. A cash payment is credited the same day of \$700. On September 4th, 60 shares of stock are charged, and on September 17th, 120 more, amounting together to \$11,625, in addition to the August purchases. On September 17th is credited cash, \$900; and on the 20th, \$300; and on the 16th, dividend C. B. & Q., \$30. The above stocks are carried forward each month, and interest is charged on the last day of each month, until December. On November 30th a charge is made of cash, \$500. In October the credits are: 21st, Div. 90 St. P., \$90; 29th, cash, \$500. In November the credits are: 1st, cash, \$400, and dividend 60 R. I., \$30; 6th, cash, \$400; 20th, Div. 10 Mont., \$50. The December account starts with a debit balance from the previous month, \$19,996.08, represented by 90 Mo. P., 10 Mont., 10 Tam., 60 C. B. & Q., 90 St. Paul, 60 R. I. The credits are: December 3d, cash, \$450. 16th, Div. C. B. & Q., \$60. 20th, cash, \$800. 23d, 90 Mo. P., 20%, \$1,856.25; 10 Mont., 60, \$598.75; 10 Tam., 119, \$1,187.50; 60 C. 64 L. R. A.

B. & Q. 72%, \$4,357.50; 50 St. Paul, 62, \$3,093.75; 60 R. I., 61, \$3,652.50; 40 St. Paul, 61%, \$2,470. There is a charge of interest on the 30th of \$73.38, and the balance of \$1,543.21 is carried forward on the 30th to the 31st. On the 31st are credited: Div. 10 Tam., \$40, and bills receivable, \$1,503.21,—and the account is balanced. The journal shows that the items in the ledger were entered from day to day in the regular course of business. The bookkeeper who kept the account had no suspicion that the entries did not represent real transactions. The account appears to be a record of genuine purchases and sales, and belongs to a class of evidence which is given much weight by our court, especially after the party who kept it is dead. It seems to us quite improbable that dividends would have been credited on all these stocks, and shown on the journal as received, if the stocks had not been actually purchased. These purchases are claimed to have been made in pursuance of verbal or written orders from the defendants. Some of the written communications are in evidence. August 7th Lincoln writes: "I have not received a regular notice of purchase of stocks for Gorton and Lincoln that you told me had been sent. Please send same, so that I can show it to Mr. Gorton." On September 1st he writes again: "Buy for account of Lincoln and Gorton, at lowest market price possible, tomorrow (Tuesday) morning, at opening, 30 St. Paul, 30 No. Pacific." The other orders were, it is admitted, of similar tenor. Another circumstance shown by the account seems to us remarkable, if it represented fictitious transactions. The final sale was on December 21st, entered on Monday, the 23d. There were 90 shares of St. Paul sold,—50 at 62, and 40 at 61%. If the contract had been to close out imaginary stock at market quotations, the closing quoted price for the day would have fixed the price for the whole. While considering the question of the genuineness of these dealings, we cannot ignore the fact that the sale of the New York stocks, as most of these were, is corroborated by the books of Prescott's New York correspondent, who was a member of the exchange and received orders to be executed there, and that his bookkeeper testifies that in some cases the certificates were actually forwarded by Prescott to him. There is absolutely no evidence to contradict the natural inference from these premises, and we must conclude that Prescott as a matter of fact actually bought the stocks the defendant ordered him to buy, and actually sold, as his books show.

Did the defendants intend that he should do so?

Lincoln's testimony on this point is as follows:

Q. At the time you gave the order to buy it, had you any intention— What was your intention, rather, as to taking the stock and the certificate?

A. None whatever.

Q. What was your intention with reference to taking the stock or the certificates?

A. We had no intention of taking them.

Q. What was your intention with reference to the account?

A. To be carried on a margin and held for a rise.

Q. How to be settled?

A. Pay the difference.

Gorton testifies:

Q. Now, with reference to these transactions between F. W. Prescott & Co. and yourself with Mr. Lincoln, did you receive—did you ever take out—the certificates? Were they ever sent to you, or either of you?

A. No, sir.

Q. Did you ever ask for them?

A. No, sir.

Q. What was your expectation or intention, at the time you entered into the transaction, as to having a delivery of the stock made to you?

A. We never expected to receive any.

Q. Were you engaged in the previous transaction with F. W. Prescott & Company?

A. Yes, sir.

Q. The same one that Mr. Lincoln referred to in his testimony?

A. Yes, sir.

Q. When was that settled,—the account closed? (No answer. Objected to. The Court: What do we care about the previous one? Defendants' Counsel: As showing what the expectation of the other party was. Question repeated.)

A. At the difference between our buying price and the selling price of the stock, which was bought on margins.

Q. What do you mean by that, "at the difference?"

A. Quoted the difference of the day of the sale from the day of the buying.

Q. You mean that was paid out in money or by check?

A. Yes, sir.

Q. Did you take the certificates out, ever?

A. Never.

Q. Never ask for them?

A. Never.

Q. These you expected to be the same way?

A. Yes.

When we consider this testimony, it becomes evident that it proves nothing to the 64 L. R. A.

purpose. If the defendants had ostensibly bought stock of the plaintiff, and sold stock to him, then their intention to receive and deliver certificates would have been of importance. But, when they directed him to buy for their account, the question is, Did they intend that he should actually buy and receive the certificates? and, Did they intend that he should deliver certificates when they ordered him to sell? These questions the testimony does not answer. So in regard to the previous transactions. They say that these were settled by the payment of "differences." If, as we must presume, in the absence of any contradictory testimony, the former series of transactions consisted of orders to buy and sell, followed by a settlement after sale, we can conceive of no possible method of settlement except by differences,—i. e., by the agent paying his principals the balance due on their account. "If, however, the settlements were between a principal and agent, growing out of contracts made by the agent for and on account of the principal, it is apparent that any number of such settlements would have no tendency to prove that the contracts made by the agent were wagers." Dewey, *Contracts for Future Delivery and Commercial Wagers*, p. 217, citing *Thacker v. Hardy*, L. R. 4 Q. B. Div. 685, and *Sawyer v. Taggart*, 14 Bush, 727, 742.

The defendants urge, and some of the cases which they cite take the view, that the pecuniary inability of the defendants to pay the full price charged for the stocks bought ought to have great weight in inclining the court to believe that the intention was not to buy, but to fix a starting point for a wager. We do not find any force in this argument, particularly when the purchase is made through a broker, and the purchaser avails himself of the broker's credit and facilities for borrowing on the stocks themselves. It only indicates at the most that the customer is buying for speculation, rather than for permanent investment. Says Mr. Dewey (*Contracts for Future Delivery and Commercial Wagers*, p. 129): "The argument so strongly urged in these cases, that the party dealing in such enormous amounts is not able to pay for them, is without force, and has no necessary tendency to show the contracts were not bona fide. . . . These cases seem to have proceeded upon the theory that, because a man could not buy or pay for the articles he dealt in, he did not intend his contracts to be bona fide. When we consider, however, that a party buying stocks, for instance, can immediately, without any trouble and at a small interest, borrow money up to within 10 per cent, or even less, of the value of the stocks, . . . it

plainly appears that the force of this argument is broken. To say a man cannot buy what he is not able to pay for is to destroy the whole credit system, and in effect it would prevent the greater part of legitimate speculation and paralyze business." In the case at bar the broker bought stocks for the defendants, advancing on their account part of the price, holding the stock as security, or pledging it, perhaps, to a third party to raise the money, as he was permitted to do by the contract. Of course, the principals could not demand or expect to receive the certificates until they should pay the whole price advanced, and before they did so they ordered sales. When these sales were made, the money which came into the agent's hands was partly his and partly theirs, and he paid them what was theirs. In short, the statute deals with two classes of cases,—one, where the party himself buys and sells; the other, where he employs another to buy and sell. When he himself buys and sells, his intention to take and deliver is important. When he employs another to buy and sell, his intention as to what the agent shall do is material. The testimony which the defendants have given here would be pertinent in the first case, but has no relevancy to the second, which is the case at bar. *Thacker v. Hardy*, L. R. 4 Q. B. Div. 685. Neither defendant, though strenuously invited by the questions of his learned counsel, makes the plain statement, so easy to make, if it were true, that the former differences were not determined by actual purchases and sales. It is doubtless true that the selling price was identical with the quoted price; for actual sales on the exchange are immediately reported and these reports are "quotations." And that is all that the testimony of either defendant amounts to. If they had not intended their orders to Prescott to be carried out according to their terms, one would expect them to have given some notice of that fact when they received accounts of purchases and monthly statements, including charges of interest and credits of dividends. He very clearly thought, and had reason to believe, that the orders were made in good faith. The defendants have failed to establish either fact required by the Massachusetts statute.

The question remains whether these transactions were wagering contracts, such as are held by the common law to be contrary to public policy, and which cannot, therefore, be considered a valid consideration for a promise sued upon in any court where the common law prevails. Wagering contracts in general were formerly enforceable at common law; but by statute in England, and either by statute or by the general agree-

ment of the decisions of the courts in the United States, they are now held to be void and nonenforceable. In Rhode Island we have no statute condemning such contracts generally; but gambling and the making of many sorts of bets and wagers are made misdemeanors by statute, and the spirit of these laws makes it clear that in the opinion of the legislature public policy forbids the enforcement of all wagers by our courts, and it has been so held by this court. *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084. "A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them on the happening in the future of an event at the present uncertain, or upon the ascertainment of a fact in dispute." 4 Am. & Eng. Enc. Law, 2d ed. p. 5; *Harris v. White*, 81 N. Y. 539. This definition, though not exhaustive, sufficiently expresses what is meant by a wager. The essential elements of an ordinary wagering contract are (1) an agreement by one party to pay another a sum of money, or give something of value, if a certain event happens; (2) a reciprocal agreement by the second party to pay the first a sum of money, or give something of value, if a certain contrary event happens; and (3) that the events contemplated in the agreement shall be something other than the passing of a consideration between the parties. In a wagering contract upon the price of stocks, both parties assume the risk of gaining or losing. In a legitimate transaction through an agent or broker, the agent or broker assumes no risk, except that the principal may not be able to carry out his agreement. His compensation is derived from commissions on actual purchases and sales and from interest on money actually lent. The sole question in this, as in similar cases, is as to which class the transaction belongs. Nor should it be forgotten that the mere intention of either of the parties in entering into the contract, if not communicated to the other and made part of the bargain, is not the controlling circumstance to be considered. The question is, not whether the parties privately intended to enforce the agreement or to fulfil it, but, What did they bind themselves to do? This is well stated in *Harvey v. Merrill*, 150 Mass. 1, 6, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49, as follows: "If, however, it is agreed by the parties that the contract shall be performed according to its terms, if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance ar-

rives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract." When a mortgage is made to a savings bank to secure the payment of a promissory note in one year, as is customary in this state, it is rarely the intention of the mortgagor to pay the note according to its terms, or of the bank to enforce payment at the end of the year. Yet the obligation is enforceable according to the tenor of it; the intention of the parties to insist upon or waive their rights being no part or condition of the agreement which they have consented to. See also *Gregory v. Wendell*, 40 Mich. 432; *Irwin v. Williar*, 110 U. S. 507, 28 L. ed. 229, 4 Sup. Ct. Rep. 160; *Dos Passos, Stock Brokers and Stock Exchanges*, p. 419; *Lehman v. Strassberger*, 2 Woods, 554, Fed. Cas. No. 8,216.

It is not unlawful to buy stocks with the intention of selling again at a profit, nor to do this through a broker, nor to allow the broker to hypothecate the stock in the meantime to raise part of the purchase money. The law does require that the stock should be in existence, and that the customer should acquire such control by the purchase as to be able to deliver the title to it, if called for, when he sells. It makes no difference whether the certificates are delivered to the customer, if his agent, the broker, acquires dominion over them. *Young v. Glendinning*, 194 Pa. 550, 45 Atl. 364. The bargain must contemplate the actual delivery, if desired, and the actual payment of the whole price, if demanded. It must confer on the purchaser the right to have the stock transferred to him on payment for it. If it does, it is a purchase, whether the stock is actually transferred to him or not. It is lawful for a purchaser to pay a certain agreed amount on account of a purchase of stock, as it is for a purchaser of real estate to make a partial payment and to secure the balance by a mortgage to the vendor. If the agreement between the parties does not contemplate an actual purchase, but merely a payment by one party to the other, or by the ostensible purchaser to his broker, if the stocks decrease in market value, and a payment by the broker to his customer if the price rises in the market, then, no matter what form the transaction is put in, verbally or in writing, it is merely a wager on the fluctuation of market values, and not enforceable at law.

A transaction of the former class appears in the case of *Hatch v. Douglas*, 48 Conn. 64 L. R. A.

116, 40 Am. Rep. 154. The plaintiffs were stockbrokers in the city of New York. The defendant ordered them "to buy say 100 shares Union Pacific stock on margin," and asked if the brokers would take "1,000 first mortgage New York & Oswego Railroad as margin." The brokers replied that they would, and at once bought the stock. Other transactions were entered into, which resulted in a loss exceeding the value of the security held. This suit was brought for the balance due. Recovery was allowed. The court in its opinion says: "Now there are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant, through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery, not to the principal, but to the agents for the principal. . . . The most that can be said of them is that they knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral." There is a distinction between the two meanings of the word "differences." To contract with reference to the difference between market values, without making actual purchases, is wagering; but to buy at one price and sell at another, or, in the alternative, to accept or pay the difference between prices actually paid and received by an agent, is a valid transaction. In *Ward v. Vosburgh*, 31 Fed. 12, it is said (p. 13): "It has been of late repeatedly decided that, if the parties intend in fact to buy or sell property, to be delivered at a future time, agreed upon by them, it is not a gambling transaction, although they exercise the option of settling the difference in price, rather than make delivery of the property."

The latter class of the two we are considering is illustrated by the case of *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084. The court says: "The case alleged in the pleas is one where it was the understanding of the parties, in the beginning, that the defendant should give orders to the plaintiff, as broker, from time to time, to buy for him shares of stock, and the plaintiff, on receiving the orders, without buying the shares, should be regarded as having bought them, and as holding them for the defendant, un-

til he should receive the defendant's order or consent to sell them, or until the defendant, under the understanding, should be obliged to submit to his selling them, or, rather, to his being regarded as if he had sold them; at which time the difference between the then market price and the market price as it was when the orders to buy were given should be paid by the plaintiff to the defendant if the price had risen, and by the defendant to the plaintiff if it had fallen." In this case there was no evidence presented; the case coming up on demurrer to the pleas, which were thus taken to be true. They presented an unmistakable wagering contract, and the court decided that such a contract is void in Rhode Island.

The rapid fluctuations in the market price of stocks, and the ease with which transfers and hypothecations of stocks may be made, render them a favorite subject for speculation, either legitimate or otherwise; and, where there is suspicion that a given transaction in stocks is only cover for a wager, a court will very carefully scrutinize the circumstances of the case, and disregard the form, if the illegal substance appears. But the indicia of a wager upon the rise and fall in the price of stocks are no different from those of wagers upon any uncertain future event. And so lawful trading in stocks has the same characteristics as lawful trading in any commodity. *Mitchell, J., in Hopkins v. O'Kane*, 169 Pa. 478, 32 Atl. 421, says: "It ought not to be necessary to say again, after *Peters v. Grim*, 149 Pa. 163, 34 Am. St. Rep. 599, 24 Atl. 192, and other cases, that a purchase of stocks on margin is not necessarily a gambling transaction. Stocks may be bought on credit, just as flour or sugar, or anything else; and the credit may be for the whole price or for a part of it, and with security or without it. 'Margin' is security, nothing more; and the only difference between stocks and other commodities is that, as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions, to ascertain their true character. If they are real purchases and sales, they are not gambling, though they are done partly or wholly on credit."

In the cases cited by the defendants we find nothing to invalidate the propositions of law which we have recognized. In *Grise-wood v. Blane*, 11 C. B. 528, 540, the court found, in the words of Mr. Justice Williams, that there was ample evidence of a mutual understanding between the plaintiff and defendant that the contract of sale was colorable only. In *Wagner v. Hildebrand*, 187 Pa. 136, 141, 41 Atl. 34, 36, the court

says: "A purchase of stock on margin for speculation is not necessarily a gambling transaction. If it is the intention of the parties that a real purchase shall be made by the broker, although the delivery may be postponed or made to depend upon future conditions, the transaction is legal," etc. The court found in the case that no actual purchase and sale were intended. *Irwin v. Williar*, 110 U. S. 507, 28 L. ed. 229, 4 Sup. Ct. Rep. 160, holds that contracts for future delivery are valid, though the seller has not the goods at the time of the contract, if the parties intend actual delivery and receipt, and not a settlement by payment of the difference between the contract price and the market price. The case is decided on grounds not applicable to the case at bar. *Rogers v. Mariott*, 59 Neb. 759, 82 N. W. 21, relates to sales for future delivery, and the same discrimination is drawn between deliveries intended actually to be made and mere intended payments of differences. *Morris v. Western U. Teleg. Co.* 94 Me. 423, 47 Atl. 926, is a case where the contract was expressed in scrupulously legal form; but it was admitted "that 'in such a transaction or deal the method of business in the plaintiff's deal is as follows: Such trades are made on quotations only, no actual stock being in fact sold; but settlements of differences are fully made when the deals are closed as to profits and losses.' This admission," says the court, "is fatal to the plaintiff's case. It strips the transaction of the semblance of legitimate business, with which the memorandum endeavored to clothe it, and leaves it a naked bet or wager upon the rise and fall of the price of the stock, which the law terms a gambling contract, and pronounces immoral and void." *Waite v. Frank*, 14 S. D. 626, 86 N. W. 645, was a case of sale for future delivery. The same indications of a wagering contract were discovered as in the cases already referred to. In *Jamieson v. Wallace*, 167 Ill. 398, 59 Am. St. Rep. 302, 47 N. E. 762, the opinion begins by recognizing the well-settled proposition that, when the understanding of the parties is that a nominal contract of purchase and sale shall be in reality an agreement of settlement by payment of differences between market prices, the contract is a wager, and is void, and continuous: "In order to invalidate the contract, it must appear that neither party has the intention to deliver the property, and that both parties have the intention of settling the differences only." But the opinion ends by holding that under Ill. Crim. Code, § 130, which positively forbids all sales of options, the intent of the customer and the broker alone is material,

and it makes no difference if the broker actually purchases the stock.

This may be so under the Illinois statute, but is opposed to the great weight of authority, when the question of the validity of a transaction between a broker and his customer is judged by the common law. If we regard the customer and the broker as principals, the real question is, not whether the customer secretly intends to receive the stock, but whether he intends to bind himself to receive it; and if we regard the broker as an agent, as he certainly is in buying, we must examine his acts and contracts as such agent. *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403. Where the transaction is on its face a genuine one, the burden of proof is upon the party attacking it to show its falsity. *Bangs v. Hornick*, 30 Fed. 97. In this case Mr. Justice Brewer says: "If the deposition of Lester was properly admitted, an actual bona fide transaction was proven; if it was improperly admitted, there is no testimony to show any wrong on the part of Lester & Company, and the law does not presume a wrong. Counsel for defendant say that it is the absolute duty of the court to denounce this transaction, unless it clearly appears that it was a valid and honest one. I think the duty of the court is precisely the reverse, and that it is the duty of the court to uphold it, unless it appears that it was an invalid and dishonest one. The defendant has given his note. The law presumes that there was a consideration, and an honest one, and, unless he has shown the contrary, he should abide by the contract he

has made. Further, this is not a case where defendant, as principal on the one side, was dealing with Lester & Company as principal on the other. There was no contract of purchase or sale, real or pretended, between them. They were simply brokers, —agents to do his bidding in transactions, real or pretended, elsewhere. There is no presumption that an agent does not obey the instructions given or that he does not intend to obey them; and, it matters not what the intent or supposition of the principal may be, the law will presume that the agent obeyed the instructions that were given, and as they were given; and, if the contrary be alleged, it must be proved."

The many reported decisions on cases relating to this subject differ slightly in the fundamental principles announced, but mainly in the inferences of fact which the courts have drawn from the evidence before them. In the case at bar it is not necessary to recapitulate the evidence to support our conclusion that the transactions on which the note was based were actual purchases and sales, made by the broker in good faith upon orders given by the defendants with the intention that they should be executed. No case has been cited to us, and we have found none, where, these facts being established, the obligation has not been adjudged binding.

Judgment for plaintiff for the amount of the note, with interest from November 7, 1898, the date of the writ.

Petition for rehearing denied.

PENNSYLVANIA SUPREME COURT.

S. H. PETTIGREW *et al.*, *Appts.*,
v.
Margaret J. PETTIGREW *et al.*

(207 Pa. 313.)

1. A widow having by statute the primary right to administer upon the estate of her intestate husband has a right to control the interment of his body, and a waiver of the right to administer will not include a waiver of such right of control, unless it is made to do so expressly.
2. The direction of a person as to the disposal of his body after death is entitled to respectful consideration when the question comes before the court, whether it is controlling or not.

3. The duty of an executor or administrator terminates with the first interment of the body of the testator or intestate, and he has no right to a voice on the question of the removal of the remains.
4. There is no universal rule for governing the right to remove the remains of a deceased person after interment, but each case must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.
5. A widow should be permitted to remove the body of her deceased husband from the lot of his father, where she had consented to its burial, in order to place it upon a lot purchased by her for

NOTE.—As to right to control disposition of dead body, see also, in this series, *note to Larson v. Chase*, 14 L. R. A. 85, and the later cases of *Hackett v. Hackett*, 19 L. R. A. 558; *Choppin v. Dauphin*, 33 L. R. A. 133; *Thompson v. Deeds*, 35 L. R. A. 56; *O'Donnell v. Slack*, 43 L. R. A. 388; *Wright v. Hollywood Cemetery Corp.* 52 L. R. A. 621; *Enos v. Snyder*, 53 L. R. A. 221; and *McEntee v. Bonacum*, 60 L. R. A. 440.

son v. Deeds, 35 L. R. A. 56; *O'Donnell v. Slack*, 43 L. R. A. 388; *Wright v. Hollywood Cemetery Corp.* 52 L. R. A. 621; *Enos v. Snyder*, 53 L. R. A. 221; and *McEntee v. Bonacum*, 60 L. R. A. 440.

that purpose beside his only child, who desired it to be done, where the child and widow could not, for lack of room, be buried where the father was, and family hostility would probably prevent such course if it was physically possible.

(January 4, 1904.)

A PPEAL by plaintiffs from a decree of the Court of Common Pleas for Armstrong County refusing to enjoin the removal of the remains of James Pettigrew from the lot of his father upon which he had been buried. *Affirmed.*

The facts as stated by the trial judge in delivering the opinion awarding the decree were as follows:

Matthew Pettigrew, in his lifetime, was the owner of a lot in the cemetery at Whitesburg, Pennsylvania. After his death he was buried there, as were also his wife and two daughters. We have no testimony as to the size of the lot. On June 17, 1900, James Pettigrew, a son of Matthew, died, leaving to survive him a widow, Margaret J. Pettigrew, the defendant in this case; Jennie Pettigrew, their child, eleven years of age at the time of her father's death; a brother, Dr. S. H. Pettigrew, and two sisters, Mrs. Sarah Sturgeon and Mrs. Martha Shoemaker, the last three mentioned being the plaintiffs in this case. James Pettigrew died suddenly, without making any provision by will as to the place of his interment. The testimony is conflicting as to whether or not the widow desired his body to be interred in the Whitesburg cemetery. Dr. S. H. Pettigrew testifies that she said she would leave it all to him, while Mrs. Pettigrew testifies that it was only her intention to bury him there temporarily. James Pettigrew was buried in the Whitesburg cemetery on June 19, 1900. His only child, Jennie Pettigrew, died on May 12, 1901, and was buried in the Elderton cemetery at Elderton, about 5 miles distant from Whitesburg. It appears from the evidence that some time after the death of James Pettigrew his widow purchased a lot in the Elderton cemetery; the date is not given; that she purchased a monument for the purpose of erecting it at Elderton cemetery; that her daughter, Jennie, had picked out the lot, and that it was her last request that she be buried there, and that her father be brought and laid beside her; that she had picked out this lot before the death of her father, and talked to him about it; and that before her death the monument was ordered with the intention of setting it up on this lot at Elderton. Shortly after the death and burial of Jennie Pettigrew in the Elderton cemetery, Margaret Pettigrew had a grave dug beside the grave of her child for the purpose of reinterring the body

of James Pettigrew therein. When the plaintiffs, the brother and sisters of the deceased, learned of this, they had the present bill filed against the widow and the trustees of the Whitesburg cemetery to prevent the removal.

Messrs. McCain & Christy, for appellants:

A wife has no right or control over the body of her deceased husband after burial; the disposition of the remains of the deceased belongs thereafter exclusively to his next of kin.

Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506.

Messrs. M. F. Leason and Neale & Painter, for appellees:

The right of the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving wife.

Larson v. Chase, 47 Minn. 307, 14 L. R. A. 85, 28 Am. St. Rep. 370, 50 N. W. 238.

Fox v. Gordon, 16 Phila. 185, decides that questions as to the custody and disposal of the dead are determined by such considerations of propriety and justice as arise out of the particular circumstances of the case.

A husband may remove the body of his deceased wife from one burial lot owned by him to another lot owned by him, and a court will not, upon application of a brother and sister of the deceased wife, restrain such removal by injunction without good cause.

Cooney v. Lawrence, 11 Pa. Co. Ct. 79; *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558, 49 Am. St. Rep. 762, 26 Atl. 42; *Secor's Case*, 10 Alb. L. J. 71; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Gampfer v. Poulson & W. Cemetery Co.* 19 W. N. C. 230.

Mitchell, Ch. J., delivered the opinion of the court:

When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of. The duty of disposition therefore devolves upon someone, and must carry with it the right to perform. It is commonly said, being repeated from the early cases in England, where the whole matter of burials was under the jurisdiction of the ecclesiastical courts, that there can be no property in a corpse. But, inasmuch as there is a legally recognized right of custody, control, and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exer-

cise as shall be in conformity with the duty out of which the rights arise. Whether, however, the rights be called "property" or not is manifestly a question of words, rather than of substance. The general subject is treated historically with great learning and ability in *Re Beekman Street*, 4 Bradf. 503, by the referee, Hon. Samuel B. Ruggles, whose report is a storehouse to which all subsequent discussions have resorted for materials. An exhaustive catalogue of the law literature on burials, etc., will also be found in a note to *Johnston v. Marinus*, 18 Abb. N. C. 75. The principal judicial decisions on the subject are *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Fox v. Gordon*, 16 Phila. 185; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558, 49 Am. St. Rep. 762, 26 Atl. 42; *Secor v. Secor*, 18 Abb. N. C. 78, note; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; *Johnston v. Marinus*, 18 Abb. N. C. 75; *Renihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 21 Am. St. Rep. 249, 25 N. E. 822; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906; *Enos v. Snyder*, 131 Cal. 68, 53 L. R. A. 221, 82 Am. St. Rep. 330, 63 Pac. 170; *McEntee v. Bonacum* (Neb.) 60 L. R. A. 440, 92 N. W. 633.

It is not necessary here to go into a general discussion of the various questions raised in the decisions. They have been reviewed with admirable clearness and accuracy by Judge Thayer in *Fox v. Gordon*, 16 Phila. 185, *supra*. But certain deductions may be drawn and put into practical shape from the cases. The right of control and disposition, whether called "property" or not, springs, as already said, from the legal duty or obligation. In Pennsylvania, as generally elsewhere, that devolves on the executor or administrator. The statute puts the duty of paying the decedent's debts out of his assets on his executor, and expressly names funeral expenses as first in the order of priority of payment. Prima facie, therefore, the duty to determine when, where, and in what manner the body shall be buried rests with the executor or administrator. But his right is not absolute, nor his judgment conclusive. The determination must rest, as said in *Fox v. Gordon*, 16 Phila. 185, "upon considerations arising partly out of the domestic relations . . . partly out of the sentiment, so universal, . . . that the dead should repose in some spot where they will be secure from profanation; partly out of what is demanded by society for the preservation of the public health, morality, and decency; and partly often out of what is required by a proper respect for and ob-

servance of the wishes of the departed themselves." Under the statute in Pennsylvania the right to administration belongs first to the surviving husband or widow. To such survivor, therefore, belongs the right of control of the body for interment, and a waiver of the right to administer will not include a waiver of such right of control, unless it be express and absolute. In the exigencies of business and the interests of the estate it is not unfrequently desirable that a stranger, or even a creditor, should administer; but no court would sanction a disregard by such an administrator of the wishes of a widow, or even of the next of kin, as to the place and manner of burial.

How far the decedent's own wishes, or even his specific directions, are to prevail, must be regarded as unsettled. In *Williams v. Williams*, L. R. 20 Ch. Div. 659, Kay, J., held that the right of custody being incident to the duty of burial which is in the executors, a man in England "cannot by will dispose of his dead body." And in a note to a report of the same case in 21 Am. Law Reg. N. S. 512, Prof. Ewell seems to approve the ruling, though he admits that it is of first impression. The case grew out of the disinterment and cremation of the body by a stranger to the family, under written directions of the deceased; and with great respect for the tribunal I cannot help thinking that the decision was unconsciously influenced by the English conservatism in regard to burial, and the attendant reluctance to countenance in any way the innovation of burning. The clear trend, I think, of the American decisions, is to the contrary, notwithstanding the apparent assent in *Enos v. Snyder*, 131 Cal. 68, 53 L. R. A. 221, 82 Am. St. Rep. 330, 63 Pac. 170, where the cases cited do not support the *dictum*. See *Fox v. Gordon*, 16 Phila. 185, already cited; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Johnston v. Marinus*, 18 Abb. N. C. 75; *Secor v. Secor*, 18 Abb. N. C. 78, note; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906; *Louvy v. Plitt*, 16 Am. Law Reg. N. S. 155, and note by Mr. Francis Rawle. And, whether the decedent's directions are regarded as paramount or not, it is agreed in all the cases that they are entitled to respectful consideration whenever the question comes into court. In the absence of a surviving husband or widow, the wishes of the next of kin are entitled to be considered, with varying weight according to the nearness of the kinship and the personal relations between them and the decedent. A more distant relative, or even a friend, not connected by ties of blood, may have a superior right, under exceptional circumstances, to one nearer of kin, as was held in *Scott v. Riley*, 16 Phila. 106.

The foregoing observations relate chiefly to the first interment. A reinterment, involving a removal to another locality, stands upon a somewhat different footing, and has been the cause of most of the litigation on the subject. The duties of the executor or administrator terminate with the first interment, and on the question of removal he is not a party in interest. The controversy, if there be one, must be between next of kin. The presumption is against a change. The imprecation on the tomb at Stratford, "Curst be he that moves my bones," whether it be Shakespeare's own or some reverent friend's, expresses the universal sentiment of humanity, not only against profanation, but even disturbance. When a case comes into court, the chancellor will regard this sentiment, and consider all the circumstances in that connection.

The case of *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506, has been frequently cited, and is relied on by appellant here as deciding that the rights of the next of kin are superior to those of the widow. The reporter's syllabus apparently goes that far, but it is much too broad, and is an improvident generalization from the second conclusion of the referee in *Re Beekman Street*, 4 Bradf. 503 (quoted by Read, J.), that the right "belongs exclusively to the next of kin." But the *Beekman Street Case* was a claim by next of kin to be allowed to control the removal of a body which had been buried more than fifty years, and whose removal was made necessary by the widening of a street through the churchyard. There was no widow living, and the contest was an amicable one between the next of kin and the church to determine their respective rights. The referee held that in such case the rights of the next of kin were exclusive of those of the church, and it is said (*Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558, 49 Am. St. Rep. 762, 26 Atl. 42) that he added a note to his report explaining that his use of the term "next of kin" had no reference to any rights of a surviving husband or widow. The *Wynkoop Case* grew out of the attempt of the widow to remove the body of Col. Wynkoop, a distinguished soldier, more than a year after it had been buried, as claimed, by her consent, with the honors of war, and in accordance with his known wishes, in the city of his home. What the case really decides is that the rights of the widow as administratrix ended with the first interment, and as to her rights as widow the court was justified "in refusing permission to a removal under the circumstances." The case is not authority for anything more.

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The result of a full examination of the subject is that there is no universal rule applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. Subject to this general result, it may be laid down: First. That the paramount right is in the surviving husband or widow, and, if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor. Secondly. If there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as children of proper age, parents, brothers, and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent. Thirdly. How far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but, as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail. Fourthly. With regard to a reinterment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent, and reserving always the right of the court to require reasonable cause to be shown for it.

In the present case the court finds as facts that when the decedent died he left a widow and one child, his next of kin. The child died about a year afterwards, and was buried in a lot in another cemetery, purchased by the widow. The daughter, though young, appears to have had a sentiment on the subject, and desired her father to be buried with her. The decedent was buried in a lot belonging to his father's family, with the widow's consent, but whether her consent was more than for a temporary interment is disputed. Whatever may be the fact as to that, it is found by the court below that there is not room in the family lot for the burial of the daughter and the widow unless they be put in the same grave with the decedent, and the hostile feelings of the brother and sisters make it doubtful if even this privilege would be conceded. These facts more than justify the conclusion of the learned judge below that the right of the widow to remove the body to the new lot purchased by her for that purpose should not be interfered with.

Decree affirmed, at costs of appellants.

WISCONSIN SUPREME COURT.

Lillie BUSSE, by Guardian *ad Litem*,
Respt.,
v.

Harrie ROGERS *et al.*, *Appts.*

(.....Wis.....)

1. That the complainant in an action for injuries caused by the fall of an insecure timber from a lumber pile alleged that the timber was insecure because of the defective condition of the derrick by the chains of which it was partially suspended, will not prevent a recovery in case it is shown that the timber was not in the chains, nor will it prevent the introduction of evidence of other causes of insecurity, where it expressly alleges that the injury was caused by defendant's negligence and carelessness in placing and leaving the timber.
2. A finding of fact by the jury cannot be reversed by the supreme court on appeal, although it appears to be against the preponderance of evidence, if there is evidence to support it which cannot be said to be incredible, and it cannot be said that all the reasonable probabilities and inferences are against their conclusion.
3. One who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is liable for injuries caused by its fall upon a child who, while traveling along the street, follows its inclination to play, and attempts to climb upon the pile, and thereby causes the timber to fall.
4. The fact that at the time a child is injured by the fall of lumber wrongfully and negligently piled in a highway it has temporarily ceased to be a traveler, and turned aside to play, does not bar its right of recovery against the wrongdoer.

(February 2, 1904.)

APPEAL by defendants from a judgment of the Superior Court of Douglas County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

Statement by Winslow, J.:

This is an action to recover damages for personal injuries suffered by the plaintiff May 4, 1902, at which time she was a child of the age of about five years. At the date last mentioned, and for some time prior thereto, the defendants were copartners in the lumber business at Superior, Wisconsin, and maintained and operated a lumber yard

NOTE.—For other cases in this series as to liability for injury to child by fall upon him of lumber piled in highway, see *Kramer v. Southern R. Co.* 52 L. R. A. 359, and *Kessler v. Berger*, 61 L. R. A. 611.

As to right of children to protection against dangerous condition of highway generally, see *Gibson v. Huntington*, 22 L. R. A. 561, and *note*.

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at that city, which abutted for some distance on the west side of Grand avenue, a street of that city running north and south and 100 feet in width. The evidence shows that there was no fence on the west line of Grand avenue separating the defendants' lumber yard from the street, and that there was a space of 8 feet in width between the sidewalk on the west side of Grand avenue and the line of the defendants' property, which space was, in part at least, used by the defendants for piling lumber and as part of their lumber yard. One pile of timber, composed of large square timbers from 14 to 16 feet in length and about 12 inches by 12 inches square, was piled parallel with Grand avenue, and partially, at least, upon this 8-foot space, the outermost part of the pile being about 1½ feet from the sidewalk. The testimony further tended to show that the pile of timber in question had a steplike formation toward the street, so that it could be easily climbed upon, and that upon the top of the pile there were two timbers placed in an oblique position, and so that upon a very slight application of force they would lose their equilibrium and fall toward the street. It further appears that upon May 4th aforesaid the plaintiff, with another child, came along upon Grand avenue, and stopped at this pile of timber, climbed upon it, and began running and playing upon one of the top timbers, and that the timber rolled down toward the street with the child, and inflicted some personal injuries.

A special verdict was rendered by the jury as follows:

First. Was plaintiff, Lillie Busse, injured by a stick of timber rolling or falling on her at defendants' yard May 4th last?

A. (by the Court). Yes.

Second. Were defendants chargeable with want of ordinary care in permitting the stick or sticks of timber to be in the position it or they were?

A. Yes.

Third. If you answer above question "Yes," then answer this question: Was such want of ordinary care the proximate cause of the injury?

A. Yes.

Fourth. At the time of and immediately before the accident in question, was there a timber in any manner suspended in the derrick chains?

A. No.

Fifth. How far west of the sidewalk was plaintiff when the timber started to fall on her?

A. Six and one-half feet (6½ feet).

Sixth. What was the distance from the west side of the sidewalk to the timber pile in question?

A. One foot and one half (1½ feet).

Seventh. At what sum do you assess plaintiff's damages?

A. Three hundred dollars (\$300.00).

Upon this verdict judgment for the plaintiff was rendered, and the defendants appeal.

Mr. H. V. Gard, for appellants:

The evidence tending to show negligence or defective piling of timbers was not admissible under the pleadings.

Bean v. Percival Cooper Min. Co. 111 Wis. 598, 87 N. W. 465; *Duval v. American Teleph. & Teleg. Co.* 113 Wis. 504, 89 N. W. 482.

No other acts of negligence can be proved than those specific acts alleged in the complaint.

Pennington v. Detroit, G. H. & M. R. Co. 90 Mich. 505, 51 N. W. 634; *Batterson v. Chicago & G. T. R. Co.* 49 Mich. 184, 13 N. W. 508; *Schindler v. Milwaukee, L. S. & W. R. Co.* 77 Mich. 136, 43 N. W. 911; *Elliott v. Carter White-Lead Co.* 53 Neb. 458, 73 N. W. 948; *Carter v. Kansas City, St. J. & C. B. R. Co.* 65 Iowa, 287, 21 N. W. 607; *Toledo, W. & W. R. Co. v. Foss*, 88 Ill. 551; *McCain v. Louisville & N. R. Co.* 13 Ky. L. Rep. 809, 18 S. W. 537; *Houston City Street R. Co. v. Farrell* (Tex.) 27 S. W. 942; *Galveston, H. & S. A. R. Co. v. Herring* (Tex.) 36 S. W. 129.

The owner of the fee may make any use of his land within the limits of the highway which will not interfere with the use of the highway for travel, and an invasion of this unoccupied portion by a person for purposes other than travel is a trespass upon the fee.

15 Am. & Eng. Enc. Law, 2d ed. p. 416; *Andrews v. Youmans*, 78 Wis. 56, 47 N. W. 304, 82 Wis. 81, 52 N. W. 23.

Plaintiff was a trespasser, and, assuming defendants to have been negligent in piling the timber, they are not liable for injuries to the plaintiff, a trespassing child.

Klia v. Nieman, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Schug v. Chicago, M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090.

At law the infant trespasser is liable to the landowner alike with the adult.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745, is the real beginning of the doctrine of liability to trespassing infants.

The question of the plaintiff's trespass was not really in this case, it having been taken out—or, at least, the court considered that it was taken out—by the admission or disclaimer of the counsel.

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Lynch v. Nurdin, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 62 Am. Dec. 413; *Bird v. Holbrook*, 4 Bing. 628.

Bird v. Holbrook was a spring-gun case. *Lynch v. Nurdin* was based on gross negligence.

Every feature of the doctrine of the *Lynch Case*, if it had any which could be relied on to support the *Stout Case*, had already been repudiated by the English court.

Hughes v. Macfie, 2 Hurlst. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 339.

These cases were not overruled by *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, or *Harrold v. Watney*, [1898], 2 Q. B. 320.

Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261, involved the wrongful use of a roadway,—a private way it is true, and over his own ground, but in which plaintiff had a right to be.

Daley v. Norwich & W. R. Co. 26 Conn. 591, 68 Am. Dec. 413, is distinguishable in that in the *Daley Case* the negligence consisted in the manner of operating a train, and was thus active negligence. The doctrine of this case has already been repudiated by the Connecticut court.

Nolan v. New York, N. H. & H. R. Co. 53 Conn. 461, 4 Atl. 106.

With the exception of the *Daley Case*, which was doubtful authority at the time, and which has since been repudiated by the Connecticut court, there was absolutely no authority for the *Stout Case* at the time it was decided. The rule of the latter case, if it may be said to be a rule of law, raises a duty flowing from a landowner to children where none exists towards adults.

The doctrine of the *Stout Case* has been unconditionally rejected in New Hampshire, New Jersey, West Virginia, Rhode Island, Massachusetts, Michigan, and New York.

Clark v. Manchester, 62 N. H. 577; *Frost v. Eastern R. Co.* 64 N. H. 220, 10 Am. St. Rep. 396, 9 Atl. 790; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 76 Am. St. Rep. 163, 44 Atl. 809; *Turess v. New York, S. & W. R. Co.* 61 N. J. L. 314, 40 Atl. 614; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L. R. A. 911, 88 Am. St. Rep. 884, 40 S. E. 410; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Dicken v. Liverpool Salt & Coal Co.* 41 W. Va. 511, 23 S. E. 582; *Paolino v. McKendall* (R. I.) 60 L. R. A. 133, 53 Atl. 268; *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 336; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R.

A. 493, 60 Am. St. Rep. 364, 46 N. E. 115; *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764; *McEachern v. Boston & M. R. Co.* 150 Mass. 515, 23 N. E. 231; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Ryan v. Towar*, 128 Mich. 463, 55 L. R. A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; *Charlebois v. Goebic & M. River R. Co.* 91 Mich. 59, 51 N. W. 812; *Hargreaves v. Deacon*, 25 Mich. 1; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L. R. A. 640, 28 Am. St. Rep. 594, 30 N. E. 987.

Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361, and *Earl v. Crouch*, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770, are sometimes cited as upholding the doctrine of the *Stout Case*; but they have been overruled by the *Walsh Case*.

There is a class of states in which the doctrine of the *Stout* and similar cases has not been expressly rejected, but whose decisions, either by the facts themselves, or by reasoning in the opinions, repel the doctrine. In this class are: Maryland, Louisiana, North Dakota, Alabama, Virginia, Utah, and Connecticut.

Mergenthaler v. Kirby, 79 Md. 182, 47 Am. St. Rep. 371, 28 Atl. 1065; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714, 39 Am. St. Rep. 436, 26 Atl. 973; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, 10 So. 678; *Fredericks v. Illinois C. R. Co.* 46 La. Ann. 1180, 15 So. 413; *Culbertson v. Crescent City R. Co.* 48 La. Ann. 1376, 20 So. 902; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; *Alabama G. S. R. Co. v. Moorers*, 116 Ala. 642, 22 So. 900; *Clark v. Richmond*, 83 Va. 355, 5 Am. St. Rep. 281, 5 S. E. 369; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106; *Morgan v. Hollowell*, 57 Me. 375; *Louisville, N. O. & T. R. Co. v. Williams*, 69 Miss. 631, 12 So. 957; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120.

The states which have unconditionally adopted the doctrine of the *Stout Case*, both in its application to turntables and other dangers, are: Kansas, Illinois, Arkansas, Mississippi, Tennessee, Washington, California, and Colorado.

Chicago, K. & W. R. Co. v. Bockovon, 53 Kan. 279, 36 Pac. 322; *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99; *Lepnick v. Gaddis*, 72 Miss. 200, 26 L. R. A. 686, 48 Am. St. Rep. 547, 16 So. 213; *Whirley v. White-*

man, 1 Head, 610; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069.

In *Cooper v. Overton*, 102 Tenn. 211, 45 L. R. A. 591, 73 Am. St. Rep. 864, 52 S. W. 183, however, the doctrine of the early *Whirley Case* was much weakened.

Malloy v. Hibernia Sav. & L. Soc. (Cal.) 21 Pac. 525.

In a later case considerable doubt is thrown upon the wisdom of extending the doctrine beyond turntable cases.

Peters v. Bowman, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598; *Kopplekom v. Colorado Cement Pipe Co.* 16 Colo. App. 274, 54 L. R. A. 284, 64 Pac. 1047.

There is a class of states that have adopted the rule of the *Stout Case* in its application to turntables, and have refused to extend it to things other than turntables. In this class are the following states: Minnesota, Missouri, Texas, Nebraska, and Georgia. The turntable cases in these states follow:

Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393; *Kolsti v. Minneapolis & St. L. R. Co.* 32 Minn. 133, 19 N. W. 655; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402; *O'Malley v. St. Paul, M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 126, 44 Am. Rep. 586; *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 356, 19 Am. St. Rep. 755, 14 S. W. 26; *Ft. Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, 16 S. W. 1093; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Chicago, B. & Q. R. Co. v. Krayenbuhl* (Neb.) 59 L. R. A. 920, 91 N. W. 880; *Ferguson v. Columbus & R. R. Co.* 77 Ga. 102.

In Minnesota, while there has been no express limitation of the doctrine to turntable cases, it is a noticeable fact that in every instance in which it has been invoked in cases other than turntable cases the plaintiff has failed to recover.

Emerson v. Peteler, 35 Minn. 481, 59 Am. Rep. 337, 29 N. W. 311; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Kayser v. Lindell*, 73 Minn. 123, 75 N. W. 1038; *Dehanitz v. St. Paul*, 73 Minn. 385, 76 N. W. 48.

So in Missouri.

Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668, 28 S. W. 891; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 284, 59 Am. Rep. 16, 1 S. W. 865, 2 S. W. 417; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Williams v. Kansas City, S. & M. R. Co.* 96 Mo. 275, 9 S.

W. 573; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Curley v. Missouri P. R. Co.* 98 Mo. 13, 10 S. W. 593.

In Texas the court has not only refused to extend the doctrine of the *Stout Case* to other than turntable cases, but it has, both by word and principle, repudiated it altogether, though not in a turntable case.

Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 65, 32 L. R. A. 825, 36 S. W. 430; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 66 Am. St. Rep. 856, 41 S. W. 62.

Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289, 42 S. W. 959, discloses the fact that no encouragement is given to the doctrine of the *Stout Case*.

In Nebraska in every instance in which the doctrine of the *Stout Case* has been involved in other than the turntable cases the plaintiff has failed upon the merits.

Slayton v. Fremont, E. & M. Valley R. Co. 40 Neb. 840, 59 N. W. 510; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Omaha v. Bowman*, 52 Neb. 293, 40 L. R. A. 531, 66 Am. St. Rep. 506, 72 N. W. 316.

In Georgia the doctrine of the *Stout Case* has been limited to turntable cases.

Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82.

South Carolina belongs in a class by itself, in that it has approved the abstract doctrine of the *Stout Case* as applied to turntables, but the cases in which it was so approved were reversed on other grounds.

Bridger v. Asheville & S. R. Co. 25 S. C. 24; *Bridger v. Asheville & S. R. Co.* 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860.

There is a class of states often cited as upholding the doctrine of the *Stout Case*, wherein an examination of the cases discloses no authority whatever for it, and most all of them could with better reason be cited against it.

Indianapolis P. & O. R. Co. v. Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313, 21 Am. St. Rep. 211, 25 N. E. 156; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Rodgers v. Lees*, 140 Pa. 475, 12 L. R. A. 216, 21 Atl. 399; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784, 41 Am. St. Rep. 799, 19 S. E. 730.

Messrs. George C. Cooper and G. E. Dietrich, for respondent:

The moving causes of the injury may be 44 L. R. A.

one or more, and if several are set up in the complaint, and one only is proved, the complaint is sustained.

Harper v. Milwaukee, 30 Wis. 365; *Duell v. Chicago & N. W. R. Co.* 115 Wis. 516, 92 N. W. 269.

Plaintiff had a right, while waiting upon the sidewalk for another person, to play, as the evidence shows she did.

Reed v. Madison, 83 Wis. 171, 17 L. R. A. 733, 53 N. W. 547; *Blodgett v. Boston*, 8 Allen, 237; *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102, 11 N. E. 723; *Hunt v. Salem*, 121 Mass. 294; *Bliss v. South Hadley*, 145 Mass. 91, 1 Am. St. Rep. 441, 13 N. E. 352.

Though not a traveler, and though plaintiff might not for that reason have been able to recover damages against the city for any injury received on account of a defect in the highway, nevertheless, she has a cause of action against defendants for the reason that the pile of lumber, being in the street, was an obstruction to the street, and defendants were guilty of maintaining a nuisance.

Tinker v. New York, O. & W. R. Co. 157 N. Y. 318, 51 N. E. 1031; *Flynn v. Taylor*, 127 N. Y. 596, 14 L. R. A. 556, 28 N. E. 418; *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698, 4 N. E. 633; *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398, 29 N. E. 132.

Every actual encroachment upon a highway by the erection of a fence or building thereon, or any other permanent or habitual obstruction thereof, may fairly be said to be a nuisance, even though it does not operate as an actual obstruction of public travel.

Com. v. McNaugher, 131 Pa. 55, 18 Atl. 934; 15 Am. & Eng. Enc. Law, 2d ed. p. 444, note.

The right of the public to use a highway extends to the whole breadth thereof, and not merely to the part which is worked or actually traveled.

15 Am. & Eng. Enc. Law, 2d ed. pp. 492-493, note.

The ownership of the fee by the person creating an obstruction is no excuse for the obstruction.

Tinker v. New York, O. & W. R. Co. 157 N. Y. 312, 51 N. E. 1031; *Parker v. Van Houten*, 7 Wend. 145; *State v. Walters*, 69 Mo. 463; *Langdale v. Bonton*, 12 Ind. 467; *Montgomery v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95, 21 So. 452.

It is not unlawful, wrong, or negligent for children to play on the sidewalk.

Reed v. Madison, 83 Wis. 178, 17 L. R. A. 733, 53 N. W. 547; *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510; 15 Am. &

Eng. Enc. Law, 2d ed. p. 464, note; *Gibson v. Huntington*, 38 W. Va. 177, 22 L. R. A. 561, 45 Am. St. Rep. 853, 18 S. E. 44; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, 9 N. E. 155; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, 2 N. E. 267; *Straub v. St. Louis* (Mo.) 14 Am. Neg. Rep. 384; *District of Columbia v. Boswell*, 6 App. D. C. 420; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Kuns v. Troy*, 104 N. Y. 344, 10 N. E. 442; *Earl v. Crouch*, 40 N. Y. S. R. 847, 16 N. Y. Supp. 770; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Bransom v. Labrot*, 81 Ky. 438, 50 Am. Rep. 193.

Individuals or corporations may be liable for obstructions or defects in highways or streets for which they are responsible, even though there is no liability on the part of the town or city; but, in order to predicate such liability, the injury must result from their unlawful act, and not from defects in the highway itself.

Rea v. Jones, 3 Campb. 230; *Wood, Nuisances*, § 261; *Hussey v. Ryan*, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Rep. 721; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 453.

The owner of machinery or other property attractive to children is liable to children wrongfully interfering with it on his own premises.

Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 410; *Bird v. Holbrook*, 4 Bing. 628; *Harrold v. Watney* [1898] 2 Q. B. 320; *Whirley v. Whiteman*, 1 Head, 610; *Bates v. Nashville, O. & St. L. R. Co.* 90 Tenn. 36, 25 Am. St. Rep. 665, 15 S. W. 1069; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Barrett v. Southern P. R. Co.* 91 Cal. 206, 25 Am. St. Rep. 186, 27 Pac. 666; *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919.

Winslow, J., delivered the opinion of the court:

A number of detail errors are alleged, which will be considered before proceeding to the main question on the merits of the case. First it is claimed that it was error to admit evidence showing merely defective and unstable piling of the timber, because it is said that this was not the negligence complained of in the complaint. The consideration of this objection requires some further statement of the facts. In the complaint it is alleged that the defendants maintained a large crane or derrick in their yard near the pile of timbers in ques-

tion, which was used to unload cars, and which had a swinging arm and a windlass and cable to which were attached chains and hooks for lifting timbers from cars, and that "defendants piled a number of large timbers, about 14 feet long and 12 or 14 inches wide and of about the same thickness, in said yard, close to Grand avenue, so that said pile of timbers extended lengthwise with said avenue, and a few feet from said walk, and about 4 feet high; that defendants negligently and carelessly placed a large timber about 14 feet long and 12 or 14 inches wide and of about the same thickness in said chains upon the top of said pile of timbers above described, so that one end of said timber projected over said pile of timbers and slightly over said sidewalk, and negligently and carelessly allowed said timber so placed to remain partially suspended in said chains and partially supported by said pile of timbers, so that the same would upon the slightest application of force lose its position of equilibrium and fall over the edge of said pile of timbers, knowing said position and condition to be unsafe and dangerous prior to May 4, 1902, and negligently and carelessly allowed said timber to remain and be in such condition and position until the time of the injury hereinafter described, knowing such position to be dangerous." The complaint further states, in substance, that the timber in question fell upon the plaintiff "by reason of the defective machinery in said derrick, and the defective, negligent, and careless manner in which said timber was secured and placed as aforesaid, and by reason of the negligence and carelessness of defendants in so placing and leaving said timber." The defendants claim that these allegations distinctly charge that the only negligence relied on was the leaving a timber partially suspended in the chains of the defective derrick and partly supported by the pile of timbers, and that all testimony introduced by the plaintiff tending to show simply that the timber was obliquely placed on the pile in an unstable or "teetery" position was inadmissible, because this was not the negligence pleaded; and the defendants' further claim is that, the jury having found upon sufficient evidence, in answer to the fourth question of the verdict, that no timber was in any manner suspended in the derrick chains, all charges of negligence made in the complaint have been rebutted, and judgment should have been rendered upon the verdict for the defendants. We cannot accede to these propositions. In our opinion, such a construction of the complaint would be entirely too narrow and technical. It is true that the complaint charges at some length

that the unstable timber was partially suspended in the derrick chains, but, after all, we think it clear that the gravamen of the charge of negligence is that the timber was left in such a position upon the pile that slight application of force would cause it to fall. One of the reasons given for the instability was that the timber hung partially in the derrick chains, and this turns out to be unfounded; but still the material fact that the timber was in some manner very insecurely placed remains, notwithstanding the fact now appears that the chains of the derrick had nothing to do with the instability. In other words, it was the instability of the timber which was the gist of the complaint, and this may well have existed even though one alleged reason for the instability was not proved.

Another contention made by appellants is that the answer to the fifth question of the special verdict should have been stricken out, because there was no credible evidence to support it. By this answer the jury found that the plaintiff was 6½ feet west of the sidewalk when the timber started to fall upon her. The significance of this finding is that it determines the fact that the plaintiff and the timber which fell were within the limits of Grand avenue when the accident happened.

Examination of the record shows that there was much evidence to the contrary of this finding, and it might well be that, were the question an original one, we should be compelled to hold that the evidence preponderates against the finding; but there was evidence which tended to support the conclusion of the jury, and we cannot say that it was incredible, nor that all the reasonable probabilities and inferences were the other way; hence we cannot reverse the ruling of the trial court upon the question.

We pass now to the main question in the case, namely, whether a verdict for the defendants should not have been directed upon the uncontradicted evidence, or, in default of such a direction, whether judgment should not have been rendered for the defendants upon the special verdict and the uncontradicted evidence. The simple facts to be considered in this connection are that a child five years of age was playing upon a pile of timber left by defendants within the limits of the street, and was injured by reason of a timber falling upon her, which had been insecurely placed upon the pile; there being evidence tending to show, and the jury having found, that the insecurity of the timber was an act of negligence on the part of the defendants. The appellants claim that the question whether the pile of timber was within the limits of the highway or not is of no moment. The

traveled portion of the highway was of ample width, and was properly prepared for travel. The strip which the defendants used along the margin of their land upon which to pile lumber and timber, though within the limits of the street as dedicated, was used with the consent of the public authorities, and did in fact belong to the defendants, subject only to the easement of the public for travel; and the plaintiff was not using or attempting to use the place for travel, but for play, and hence was a trespasser. Assuming that she was a trespasser, and that the timber pile was rightfully in its position, the contention is that there can be no liability except upon the extreme theory of the doctrine of "attractive nuisances" as laid down in the line of cases generally known as "*Turntable Cases*." These cases are referred to in the case of *Klia v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223, as "a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it;" but they are not expressly approved or disapproved in that case, and in fact the question has never been directly considered and passed upon by this court, though the reasoning of the case cited would seem rather opposed to the doctrine than otherwise. The doctrine in these cases seems to be that by creating or leaving on one's premises a dangerous machine or thing which is especially calculated to attract children to play therewith one impliedly invites children on his premises, and is guilty of negligence, if he does not take precaution to protect such children from injury. *Thomp. Neg.* §§ 945-1024. This doctrine has been debated in many cases and in many courts with the result that there are many authorities supporting the doctrine in its broadest application, while many repudiate it entirely, and others give it qualified recognition, and practically limit it to railroad turntables. Appellants' counsel argue very strongly against the doctrine, and have submitted a markedly able brief reviewing the authorities on both sides of the question, and we shall direct that the citations be preserved in the report of the case. We do not, however, find it necessary to decide the question in the present case. This is not the case of an owner of land putting an attractive and lawful but dangerous machine or thing upon his own property and leaving it unguarded. It is the case of an owner placing an unlawful nuisance in the highway and leaving it unguarded. The defendants owned the land of the highway to the center line thereof opposite their premises, subject to the public easement

of travel. They might doubtless temporarily obstruct the sidewalk in the transaction of their business, but they had no right to permanently store a pile of timber in the limits of the highway, even opposite their own premises. The timber was wrongfully there, even had the public authorities assumed to consent to it. It was a nuisance in fact and in law. Had a loose timber fallen from the pile by reason of sole negligent piling, and injured a traveler passing on the sidewalk, there would be little doubt of the liability of the defendants, and of the city as well, provided the danger was one which had existed long enough so that the city officials should have known it. *Denby v. Willer*, 59 Wis. 241, 18 N. W. 169. Does the fact that the child was not then a traveler, but had turned aside for a moment to follow a natural and childish inclination to play, entirely relieve the defendants from liability? This is the simple question presented, and it is not entirely easy of solution. In this case it appeared affirmatively by the evidence that children were accustomed to play in and about the street and the lumber yard to the knowledge of defendants, and to such an extent that the defendants had found it necessary to direct their employees not to allow children to play in the yard for fear they would get hurt. But aside from these facts the fact must also be considered that children do play in the public highways, and will doubtless continue to do so as long as child nature remains the same as it is now. The child who lags unwilling on the way to school and chases a bright-winged butterfly, or plays a game of marbles, or climbs a tempting pile of timber in the highway to play seesaw for a moment, does not thereby become an outlaw, and when injured by another's negligence he cannot be turned aside with the curt remark that he has ceased to travel, and become a trespasser, and hence can complain of no one's conduct. His natural habits and instincts must be in some way and degree recognized. This court has said that "children playing in the street are entitled to consideration." *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6. The child has a right in the highway. It must be recognized that he will play therein if occasion offers. Indeed, we would not have it otherwise. The man or woman who would wish to wholly stop the flow of childish spirits while on the highway, and turn the little ones into men and women before their time, must either have had no childhood of his own, or must have forgotten the fact. It would not be accurate to say that the streets are made for children to play in, but it would be equally inaccurate to say that a property owner can totally disregard

the fact that children always have, and probably always will, play therein. He cannot lawfully lay anything like a trap for the child upon the highway, and escape the consequences by saying that the child would not have been injured had he confined himself to traveling exclusively. The case of *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6, is an illustration of the principle. In this case a man left a dog, which he knew to be ferocious, in his sleigh upon the public street, and a child passing upon the sidewalk turned aside and meddled with a whip in the sleigh, and the dog threw him down and bit him. A judgment for the plaintiff was affirmed. The contention here was that the child was committing a trespass when he meddled with the whip, and hence was entitled to no protection; but the argument was rejected, and it was said that the act of the child was one which might well be anticipated; that the child did not forfeit all claims to protection simply because he turned aside for a moment and touched the whip; and that the defendant had no right to leave a dog, which he knew to be ferocious, unsecured in the public street, where children were liable to be passing, and might be reasonably expected to indulge in such childish acts as the one in question. We regard the reasoning of the case as quite satisfactory, and, in substance, applicable to the present situation. The central idea is that children are liable always to be upon the public streets, and also are liable to turn aside from traveling and play or meddle with attractive things left thereon; that a reasonable man must bear this fact in mind, and hence may not negligently or wilfully place upon the street a dangerous animal or trap well calculated to arouse the admiration or curiosity of a child, and, when it has accomplished the natural result which might reasonably be expected, escape the consequences by saying that the injured child should not have yielded to his curiosity. It is well known that there is nothing much more attractive to children than a pile of lumber or timber, especially one which affords opportunities for a seesaw. This, according to the findings, was what the defendants placed in the street in the present case, so arranged that the heavy timbers would almost immediately fall when the childish amusement commenced. We think there was ample room for the jury to find, as they did, that the act of leaving the timber in the highway in this condition was actionable negligence, and that the result which followed was one which might reasonably have been anticipated by an ordinarily prudent man under the circumstances; and we also hold that the fact that the child

turned aside from traveling to play for a brief time in the highway does not necessarily prevent a recovery, although such might be the result in an action against the city to enforce the statutory liability under § 1339, Rev. Stat. 1898.

As previously indicated, we do not decide what would be the result had it appeared

that the pile of timber was not upon the street, but upon the defendant's premises; nor do we intimate any opinion thereon. In the present case the pile of timber was in the highway, and this fact must be kept in mind at all times in determining the effect of the principles laid down.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Clarence W. ROWLEY, Assignee, etc., of
Berkman Brothers,

v.

Michael F. D'ARCY.

Michael F. D'ARCY

v.

Clarence W. ROWLEY, Assignee, etc., of
Berkman Brothers,

(184 Mass. 550.)

1. A sale will be treated as made by auction where, at the time duly appointed and announced, property to which the vendor has a good title is put up and offered for sale, bids are made, and it is sold to the highest bidder, although some of the conditions which attended the sale may be unusual.

2. An auction sale by the assignee of property of an insolvent debtor is not rendered void by a combination between creditors of the estate to enhance the price by fictitious bids, which is not known to, or participated in by, the assignee.

(January 7, 1904.)

EXCEPTIONS by the purchaser at an assignee's sale to rulings of the Supreme Court for Suffolk County made during a trial of actions brought to enforce payment of the purchase price, and to rescind the sale, which resulted in a judgment requiring compliance with the contract. *Overruled.*

The facts are stated in the opinion.

Messrs. Frank N. Nay and Leon M. Abbott, for the purchaser:

This sale was in all essential respects an auction sale, and subject to the rules of law governing auction sales.

Bateman, Auctions, 1st Am. ed. p. 1; 2 Am. & Eng. Enc. Law, 2d ed. p. 488.

Bybidding and puffing are a fraud in the eye of the law.

Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; *Benjamin, Sales*, Bennett's ed. 1899, pp. 484, 485.

It is unnecessary, as matter of law, that Rowley should have been implicated in the scheme of the conspiring creditors to enable the defendant to avoid the sale. There was evidence, introduced or tendered, sufficient

to submit to the jury, that Rowley was implicated in this scheme.

Where the disposition of a party in a case must be shown, evidence relating to other acts than the one relied on in the case on trial, which tends to establish the disposition, is admissible.

Com. v. Durfee, 100 Mass. 147; *Com. v. Bean*, 137 Mass. 570; *Com. v. Damon*, 136 Mass. 448; *Com. v. Jackson*, 132 Mass. 19, 44 Am. Rep. 299, note; *Com. v. Bradford*, 126 Mass. 45; *Jordan v. Osgood*, 109 Mass. 461, 12 Am. Rep. 731; *Fowle v. Child*, 164 Mass. 210, 49 Am. St. Rep. 451, 41 N. E. 291; *Haskins v. Warren*, 115 Mass. 514; *Lynde v. McGregor*, 13 Allen, 172.

Fraud practised by a *cestui que trust* will void a sale honestly made by the trustee.

1 Bigelow, Fr. ed. 1888, pp. 253, 254; *Cheshire v. Booe*, 16 N. C. (1 Dev. Eq.) 22; *Fisher v. Hersey*, 17 Hun, 370; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Smith v. Harrison*, 26 L. J. Ch. N. S. 412; *Tyler v. Ulmer*, 12 Mass. 163; *Bayley v. Bryant*, 24 Pick. 198.

Messrs. George R. Swasey, Clarence W. Rowley, and John S. Slater, for the assignee:

The sale was not a public auction.

Bateman, Auctions, 1st Am. ed. 1; *Rea v. Taylor*, M'Clel. 362, 13 Price, 636; *Tyree v. Williams*, 3 Bibb, 368, 6 Am. Dec. 663.

In the case at bar everybody understood that the offers, while binding upon those making them, were not binding upon the assignee. He had the right to reject any and all offers. There was no fraud. At most the evidence tended to show nothing more than merely suspicious circumstances, consistent with the plaintiff's good faith, and not sufficient to taint the transaction.

International Trust Co. v. Wilson, 161 Mass. 80, 36 N. E. 589.

Fraud is not to be presumed.

Root v. Bancroft, 8 Gray, 619; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Lilienthal v. Suffolk Brewing Co.* 154 Mass. 185, 12 L. R. A. 821, 26 Am. St. Rep. 234, 28 N. E. 161.

If a contract is sought to be set aside on the ground of fraud, the burden of proof is upon the party alleging the fraud.

Story, Contr. 5th ed. § 625; *Beatty v.*

NOTE.—For a case in this series similar to the one above, holding that it is not contrary to public policy for persons entitled to the proceeds of an auction sale to engage a third person to run up the property to a specified price, see *McMillan v. Harris*, 48 L. R. A. 845, 64 L. R. A.

Fishel, 100 Mass. 448; *Stewart v. Thomas*, 15 Gray, 171; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Howe v. Howe*, 99 Mass. 88; *Shapira v. D'Arcy*, 180 Mass. 377, 62 N. E. 412.

Mere fraud of a third party which induced the purchase of goods will not give the purchaser a right to rescind the contract. If the seller is not a party to the fraud, the contract must stand.

Nash v. Minnesota Title Ins. & T. Co. 163 Mass. 574, 28 L. R. A. 753, 47 Am. St. Rep. 489, 40 N. E. 1039; *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596; *Root v. Bancroft*, 8 Gray, 619; *Martin v. Campbell*, 120 Mass. 126; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Ft. Dearborn Nat. Bank v. Carter, R. & Co.* 152 Mass. 34, 25 N. E. 27.

The assignee was the vendor. He alone had authority to sell.

Pub. Stat. chap. 157, § 51; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *Hunting v. Downer*, 151 Mass. 276, 23 N. E. 832; *McMillan v. Harris*, 110 Ga. 72, 48 L. R. A. 345, 78 Am. St. Rep. 93, 35 S. E. 334.

Knowledge of facts by a creditor of an insolvent estate is not notice to the assignee.

Morawetz, Priv. Corp. 2d ed. § 234; 1 *Lewin*, Tr. Flint's Notes, *234; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690.

If an auction sale is advertised or stated to be without reserve, the secret employment by the seller of puffers or bybidders renders the sale voidable by the buyer.

3 Am. & Eng. Enc. Law, 2d ed. pp. 504, 505; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Phippen v. Stickney*, 3 Met. 384; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Voase v. Williams*, 8 How. 134, 12 L. ed. 1018; *Thornett v. Haines*, 15 Mees. & W. 367.

The law forbidding bybidding and puffing is limited to unreserved auction sales.

Curtis v. Aspinwall, 114 Mass. 187.

The case at bar is clearly distinguishable from the class of cases which seem to hold that auction sales may be avoided on account of puffing on the part of persons having an interest in the proceeds of the sale.

Smith v. Harrison, 26 L. J. Ch. N. S. pt. 1, p. 412; *Fisher v. Hersey*, 17 Hun, 370; *National Bank v. Sprague*, 20 N. J. Eq. 159.

In this case there was not the same relation of principal and agent; nor could the creditors have prevented any of the bidders from incurring liability if the plaintiff Rowley chose to accept the bid.

National Bank v. Sprague, 20 N. J. Eq. 159; *East v. Wood*, 62 Ala. 313; *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *McMil-*

lan v. Harris, 110 Ga. 72, 48 L. R. A. 345, 78 Am. St. Rep. 93, 35 S. E. 334.

No matter what interest a person may have in the proceeds of the sale, or in the property which is going to be sold at public outcry, either at private auction or judicial sale, his right to become a bidder at the sale is well recognized.

Freeman v. Cooper, 14 Ga. 238; *White v. Crew*, 16 Ga. 416; *Buckner v. Chambliss*, 30 Ga. 652; *Kilgo v. Castleberry*, 38 Ga. 512, 95 Am. Dec. 406; *Kearney v. Taylor*, 15 How. 494, 14 L. ed. 787; *Richards v. Holmes*, 18 How. 143, 15 L. ed. 304; *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 887; *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43; *Smith v. Black*, 115 U. S. 308, 29 L. ed. 398, 6 Sup. Ct. Rep. 50; *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331; *Phippen v. Stickney*, 3 Met. 384; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. 576; *Thames v. Miller*, 2 Woods, 564, Fed. Cas. No. 13,860; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *East v. Wood*, 62 Ala. 313; *Williams v. Bradley*, 7 Heisk. 54; *Bateman, Auctions*, 120, 131, 133, 136.

Braley, J., delivered the opinion of the court:

The principal question in these cases is whether the defendant D'Arcy can be held to pay any further sum under a written contract of sale made between the parties, or is entitled to recover back what he has already paid, on the ground that he bought the property at auction, at which, unknown to him, fictitious bids were made to raise the price, and in consequence of which he was deceived and defrauded. As a verdict was ordered for the assignee, the evidence is to be considered in the light most favorable to this contention. It was understood by the parties to these suits that there was to be a final sale of the rights of the debtors in the property described in the contract, to be held at the office of the assignee, and at the time appointed they and other creditors of the debtors attended. The property was offered for sale by the assignee, and bids were called for, and made by different persons. And it appears that, in response to this call by the assignee, some of the creditors would bid; then the bidding would cease for a time, and they would leave the room, apparently for consultation between themselves, after which they returned, and bidding would be resumed. All the proceedings appear to have been conducted with great deliberation, and a period of four hours elapsed between the time when the property was put up and when it was sold. The conduct of the bidders and the

manner of bidding do not seem to have aroused at the time any suspicion in the mind of the defendant D'Arcy that the sale was not being fairly conducted; and it is to be noted, in this connection, that during all this period his counsel was present to assist and advise him, so far as advice might be deemed necessary. Finally the successful bid or offer was made by the buyer and accepted by the assignee in writing, and this was followed by, and formed the basis of, the contract in suit. While some of the conditions that attended the sale are unusual, yet the characteristic features of a sale by auction are found. At a time duly appointed and announced, property to which the vendor had a good title is openly put up and offered for sale, bids are made, and it is sold to the highest bidder. Such a sale must be considered and treated as having been made by auction.

It was clearly the purpose of the assignee and of the creditors present, and who made bids, to realize for the property the highest obtainable price; and in good faith, by proper means, they might lawfully carry out this purpose, in order to prevent a sacrifice of the estate of the insolvent debtors. *Phippen v. Stickney*, 3 Met. 384, 388, 389. But a combination by them to enhance the price to be obtained by fictitious bids at a sale to be made without reserve to the highest bidder would be a fraud practised upon those who bid without knowledge of the arrangement, and give to the buyer a right to avoid the sale. *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332. From the testimony of one of the witnesses, it might be inferred that some of the bids made by the creditors, and before the final bid of the defendant D'Arcy, to whom the property was struck off, were of this character; and in his answer in the first case, which must be taken to state the position taken by him at the trial, he relies upon this bybidding to avoid the sale. But he does not aver that these puffers were employed by the assignee, or acting in his behalf, or that their conduct was known to him. He alleges that they were employed by the creditors of the estate in whose behalf the property was put up and offered for sale. His offer of proof of evidence, which was excluded at the trial, does not aid him, for, if the evidence offered had been admissible under the pleadings, and is taken most strongly against the assignee, while he might, if the offer were true, be found guilty of grave misconduct in his office, there is no statement from which it can be specifically inferred that bybidders were to be employed by him, or with his knowledge or consent allowed to bid at the auction. If the scheme outlined was to be put through, bybidding 64 L. R. A.

would have been fatal to its success, as it was not desired to enhance the price of the property to be sold, but the purpose was to enable the defendant D'Arcy to get it as cheaply as possible, provided he made certain payments to the assignee. As assignee, the plaintiff Rowley held by a good title the property of the debtors, to be properly administered, and applied in their behalf to the payment of their debts, and also represented the rights of the creditors that all the property of the debtors should be ascertained, turned into money, honestly accounted for, and paid over to them to the extent of the indebtedness proved, less the proper expenses of administration and distribution; and, in all suits and proceedings in which the estate was involved, it was his duty to appear, represent, and act for them. Upon the assignment being made to him of the property of the insolvent debtors, he was vested with an absolute title to their estate, which he could sell either by public auction, or at private sale, so as to convey a good title to the purchaser. Pub. Stat. 1882, chap. 157, §§ 46-50; *Tuite v. Stevens*, 98 Mass. 305; *Crowley v. Hyde*, 116 Mass. 589. The control of the sale was wholly in his power and under his direction, and no other person, on the evidence, could legally release any bidder from the obligation incurred by his bid. And the creditors who made the fictitious bids could not, as between themselves, provide immunity from any risk of being held personally liable for their several offers. For anything that appears in the case, each bidder could have been held by the assignee to have taken and paid for the property, if it had been struck off to him. All of the evidence is recited in the exceptions, and fails to show any misrepresentations by the assignee, or that he knew of and participated in the conduct and purpose of the creditors at any time before the final bid was made and accepted, and the written contract executed and delivered. The essential element of fraud which must be shown on the part of the vendor, or of the person who absolutely controls and directs a sale by auction in order to avoid it, is absent. And as the assignee is not shown to have either procured or assented to the fictitious bids, the sale is not voidable on the part of the buyer, and must stand. *Peck v. List*, 23 W. Va. 388, 48 Am. Rep. 398; *National Bank v. Sprague*, 20 N. J. Eq. 159-165; *McMillan v. Harris*, 110 Ga. 72, 48 L. R. A. 345, 78 Am. St. Rep. 93, 35 S. E. 334; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Rigg v. Schweitzer*, 170 Pa. 549, 33 Atl. 116; *East v. Wood*, 62 Ala. 313; *Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018.

Exceptions overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

James GILBRAITH *et al.*, *Appts.*,
v.

STEWART TRANSPORTATION COMPANY, Claimant of the C. F. Bielman.

(57 C. C. A. 602, 121 Fed. 540.)

No compensation can be allowed the crew as special salvors for throwing overboard a cargo of coal from a stranded vessel which has not been abandoned, although the service rendered is hazardous and perilous and results in floating the vessel so that it is brought safely into port.

(October 7, 1902.)

NOTE.—Rights of seamen as salvors.

I. Introductory, 193.

II. General salvors.

a. The general rule, 193.

b. Exceptions to the general rule.

1. *Extraordinary services*, 193.
2. *Discharge of seamen*, 196.
3. *Abandonment by master*, 196.
4. *Recapture*, 199.

III. Compensation in the nature of salvage, 200.

I. Introductory.

The term "seamen," in the title of this note, is used in the broader sense, including the master or other officers of the ship as well as the members of the crew.

II. General salvors.

a. The general rule.

It is unquestionably admitted and understood that, under ordinary circumstances, seamen may not become general salvors of their own vessel.

This rule obviously arises out of the great desirability of avoiding any tendency to separate the seamen's interest from that of his ship, and is based upon the theory that, by his contract of service, he engages, for the wages stipulated, to render any services necessary in the ship's behalf.

A literal compliance with this rule, however, under all circumstances, is not deemed desirable by the courts, whose policy is to encourage attempts for the preservation of life or property upon the water, and, therefore, a number of exceptions have grown up, upon the theory that seamen may receive salvage for acts not within their contract of service, or performed after its dissolution.

b. Exceptions to the general rule.

1. Extraordinary services.

The exception sought, in numerous cases, to be established, that seamen may have salvage for extraordinary services beyond their duty under the contract of service, is admitted, *arguendo*, in several instances.

Thus, it is said, *obiter*, in *Browning v. Baker*, 2 Hughes, 30, Fed. Cas. No. 2,041, that salvors may be persons having some relation to the

APPEAL by libellants from a decree of the District Court of the United States for the Eastern District of Wisconsin dismissing a libel for salvage service. *Affirmed*.

Statement by **Grosscup**, Circuit Judge:

The steamer C. F. Bielman on a voyage from Buffalo to Milwaukee, carrying a cargo of 3,000 tons of soft coal, struck and lodged September 17th, 1900, on Fisherman's shoals, 2½ miles from shore, and 15 miles from Milwaukee, the nearest port.

The crew—sixteen in number—including appellants, were under articles as hired seamen, to make the round trip from Buffalo

ship, as passengers and the crew, in extraordinary circumstances.

And the faint possibility of seamen under most unusual circumstances becoming salvors is recognized by Lord Stowell, in the much quoted and cited decision, *The Neptune*, 1 Hagg. Adm. 227, in the following language: "I will not say that in the infinite range of possible events that may happen in the intercourse of men circumstances might not present themselves that might induce the court to open itself to their claim of a *persona standi in judicio*. But they must be very extraordinary circumstances indeed; for the general rule is very strong and inflexible that they are not permitted to assume that character."

So, while conceding that there may be cases in which seamen may become salvors of their own vessel the court says, in *The Massasoit*, 1 Sprague, 97, Fed. Cas. No. 9,260, that it may be so only in very extraordinary cases, where the services rendered are without the range of their contract, and therefore voluntary.

Arguendo, the court says in *Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 368, that seamen, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo; but that extraordinary events may occur in which their connection with the ship may be dissolved *de facto* or by operation of law, or they may exceed their proper duty, in which case they may be permitted to claim as salvors.

While the exception is thus admitted by *dicta* or *arguendo*, no decisions have been found in reliance upon it, although the probability that such decisions exist is intimated in one or two instances. It may be, however, that these cases refer to decisions allowing compensation in the nature of salvage for especially meritorious services. (*Infra*, III.)

Thus, it is said, *arguendo*, in *The Wave v. Hyer*, 2 Paine, 131, Fed. Cas. No. 17,300, that in general seamen, pilots, and passengers cannot sustain a claim for salvage for the ordinary assistance they may have afforded a vessel in distress, it being no more than their duty but for extraordinary exertions beyond their duty such a claim has been sometimes, although very rarely, allowed, accompanied always, however, by remarks showing the extreme caution with which such a claim is admitted.

to Milwaukee, and return to some Lake Erie port, at the wage of \$25 per month and board.

The steamer struck at about 11:30 P. M. September 17th. Notice having been sent to the underwriters at Milwaukee, the crew, under the direction of the captain, about 10 o'clock in the forenoon, September 18th, began to shovel the coal overboard. This however, was stopped at 6 o'clock in the evening of that day, when a schooner in tow of a tug, with forty longshoremen aboard, arrived to relieve the steamer of its cargo. About 1 o'clock on the morning of the 19th, the schooner having taken on board about 1,000 tons of coal of the steamer's cargo, left for Milwaukee, and after 8 o'clock of the same day, the crew and longshoremen

continued to shovel coal from the steamer into the lake.

About 12 o'clock the longshoremen, in company with the captain, went ashore, the crew remaining on the steamer shoveling coal, until 8 o'clock in the evening, when they were taken ashore by a United States Life Saving boat which had been lying off for that purpose.

On the 20th, the weather cleared. The crew returned to the steamer and continued to throw coal overboard until noon of the 23d, when the steamer, thus lightered, floated off, and was brought into the port of Milwaukee. There is no question that during the period of the ship's peril, just described, the crew worked with unremitting industry, and that the relief of the vessel was due

And the court says, *obiter*, in *Drew v. Pope*, 2 Sawy. 72, Fed. Cas. No. 4,080, that it is evident that cases where seamen may claim salvage from their own ship are rare and exceptional, and only where they, by some extraordinary exertions or signal display of gallantry and energy, may justly be deemed to have performed services beyond those to which their contract and duty bound them, and which therefore entitled them to an additional recompense.

It appears from the statement of the facts in *The Centurion*, 1 Ware, 477, Fed. Cas. No. 2,554, that such of the crew, including the pilot of the wrecked vessel, as aided in the salvage, were included in the distribution thereof. Their right to do so, however, is not a question in the case; but the court says, *arguendo*, that pilots, or the crew of the vessel lost, are ordinarily excluded from claiming as salvors, being allowed to do so only in peculiar cases, as those of extraordinary peril or gallantry, or when their exertions pass beyond the limits of the duty properly required by law.

The difficulty arises in determining where the line of the seaman's duty under his contract ends; and there is considerable authority for the doctrine that whatever is necessary to be done for the ship's safety, within the power of the seaman, is within his duty under his contract, and that for such acts, however gallant, he has no claim for general salvage.

Thus, while not denying that it might be possible for a seaman to render a service to his ship exceeding the duty which he owes by his contract, and thereby become a salvor, the court, in *The John Perkins*, 21 Law Rep. 87, Fed. Cas. No. 7,380, said that no such case had ever been presented to a court in England or this country, and then declared that it was not easy to see how such a case could arise while the seaman's contract continues in force, because while he might, no doubt, sometimes judge for himself whether he will or will not do an act of great peril to save life or property, nevertheless, if he does it to guard his vessel from destruction, however great it may be, he must be deemed to be acting under his contract, and in the gallant discharge of his duty, and not as a salvor.

And so it is said in *Curtis, Merchant Seamen*, 290, that when mariners may be said to have exceeded their proper duty, the legal relation, being still undissolved, is certainly not capable of 64 L. R. A.

of definition apart from circumstances; and that there is much intrinsic difficulty in the question.

In *Maier v. The Acorn*, 3 Ware, 87, Fed. Cas. No. 10,252, seamen were allowed salvage for services performed for the benefit of their ship under the following circumstances: The vessel becoming so surrounded by ice as to endanger its safety, the master and crew, with the exception of two seamen, went on shore. These seamen, later in the day, succeeded in averting a collision with another ship, rendered imminent by the drifting of the latter toward their boat upon the breaking up of the ice. Afterward they, too, went on shore and spent the night, but in the morning, seeing that the vessel was still intact, they again went on board at the request of the master, who was injured, and remained in care of the ship for several days until the return of the master and crew. It was held that the services performed by the seamen came within the exception to the general rule that a crew cannot entitle themselves to salvage against their own vessel; that where a seaman in a time of great peril and difficulty, in a spirit of daring gallantry, performs services above what could be fairly required from the strict and proper obligation of his contract, though that may be still in force, he may be awarded salvage. The court admitted that this exception stands almost entirely on the authority of *dicta* occasionally thrown out by courts, and admitted that it was unable to quote any express and well-considered decision as an authority. Upon appeal, however, reported in *The Acorn*, 21 Law Rep. 99, Fed. Cas. No. 30, the decree of the lower court was reversed, on the ground that, while the seamen remained on their ship, they were not absolved from their contract, but were bound to do all that they alleged was done for its safety.

Some of the objections to seamen becoming salvors of their own vessel are stated in the following language in *The Massasoit*, 1 Sprague, 97, Fed. Cas. No. 9,260: "Salvors are mere volunteers, and very liberal compensation is awarded to them in order to invite their exertions and secure their fidelity in the laborious and oftentimes perilous service of rescuing and preserving wrecked property. Shall, then, seamen be absolved from the obligations of their contract, and from all duty of obedience to their officers, at the moment when their services may be most needed for the protection of the

largely to the lightering thus accomplished. The claim urged below and here is, that they are special salvors. The district court dismissed the libel, and from that order the appeal was taken.

Argued before *Jenkins, Grosscup, and Baker*, Circuit Judges.

Mr. Francis Bloodgood, with *Mr. W. P. Bloodgood*, for appellants:

The services were supererogatory, and of so extraordinary and meritorious a character as to bring this case within the exception to the general rule, that a crew cannot be salvors of their own vessel.

Seamen cannot participate in general salvage as to their own vessel while their con-

tract of shipment is in force, but may in special, under the requisite conditions.

Hobart v. Drogan, 10 Pet. 108, 122, 9 L. ed. 363, 368; 2 Am. & Eng. Enc. Law, pp. 94 *et seq.*; 2 Parsons, Shipping, pp. 264, 265; *The Mary Hale*, Fed. Cas. No. 9,213; *Reed v. Hussey*, Blatchf. & H. 525, Fed. Cas. No. 11,646; *The Antelope*, 1 Low. Dec. 130, Fed. Cas. No. 484; *Gray v. Murray*, 3 Johns. Ch. 184; *The Two Catherine*, 2 Mason, 319, Fed. Cas. No. 14,288; *Taylor v. The Cato*, 1 Pet. Adm. 48, Fed. Cas. No. 13,786; *Giles v. The Cynthia*, 1 Pet. Adm. 203, Fed. Cas. No. 5,424; *Weeks v. The Catharine Maria*, 2 Pet. Adm. 424, Fed. Cas. No. 17,351; *Cartwell v. The John Taylor*, Newberry Adm. 341, Fed. Cas. No. 2,482; *The Wave*, Blatchf. & H. 235, Fed. Cas. No.

property of the owners? Shall they be at liberty, at such a time, to devote themselves at once of their allegiance to the ship and of the character of covenanted seamen, and assume, at their option, the character of salvors, claiming its large rewards, and subject to no control? This would not only be inconsistent with the contract of hiring, but a startling violation of that principle of maritime policy which sedulously endeavors to bind up the interest of the mariner with that of the owner. It would be, not only an inducement to relax his efforts in time of difficulty and danger, but a direct temptation to cause shipwreck and disaster, that he might successfully claim the large rewards of salvage service."

The principle is regarded as well settled in *Worth v. Mumford*, 1 Hilt., at page 24, that a seaman cannot claim as salvor for any services rendered to preserve his ship.

It was admitted, *arguendo*, in *Newman v. Walters*, 8 Bos. & P. 612, 7 Revised Rep. 886, where a passenger was held entitled to salvage, that, if the mate, under the same circumstances, had saved the ship, he would not have been entitled to claim salvage.

So, it is said, *arguendo*, in *The Clara*, 23 Wall. 15, 23 L. ed. 150, that seamen belonging to the ship in peril cannot, as a general rule, claim a salvage compensation, not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo go into the position of danger in order that by extreme exertion they might claim salvage compensation.

In holding that a seaman may receive salvage for services rendered another boat, although that boat belonged to the same owner, the court says that the true principle is whether the services rendered were services which under his contract a seaman was bound to perform and for which he was to be remunerated by wages; and the general rule was admitted that seamen cannot recover salvage for services connected with the saving of their own ship as long as the relation of master and servants between them and the owner, with reference to that ship, continues. *The Sappho*, 8 Moore P. C. C. N. S. 66, 40 L. J. Prob. N. S. 47, L. R. 3 C. P. 690, 24 L. T. N. S. 795.

And in holding that stevedores who were loading a ship had no claim for salvage in assisting in extinguishing a fire on board, the 64 L. R. A.

court says, in *Kidney v. The Ocean Prince*, 38 Fed. 259, that their relation to the ship was not essentially different from that of a sailor or passenger, which prompts them zealously to render all possible assistance under the force of a sense of duty inhering in a pre-existing covenant, rather than as voluntary adventurers.

The one well seaman on board a ship infected with yellow fever was held not entitled to salvage on account of the extra labor cast upon him by the sickness of the rest, on the ground that he did no more than he was bound by his contract to do under such circumstances. *Coffin v. The Akbar*, 5 Fed. 456.

In regard to the claim of the master and crew of a schooner to be paid a certain amount as salvage because of their refusal to leave their vessel and to go on board a salving steamship, as was desired, and in working on board the schooner while she was in tow of the steamer, it was held, in *The D. W. Vaughan*, 9 Ben. 26, Fed. Cas. No. 4,222, that the master and crew did no more than their duty, and could not claim salvage therefor.

A seaman who shipped "for the run" from Boston to New York at a stated sum was held to have no right to recover compensation for extra services rendered by him during a storm which delayed the vessel several weeks on the voyage. The court stated that no services were rendered by the seaman beyond what were required of him by his duty to the ship; that he was bound to the hazards of the voyage, and that detention through perils and disaster of the sea are risks assumed by seamen in every shipping contract; and that no legal right arises to them from those causes, or from their extra exertions to save the vessel, to demand an increased compensation. *Miller v. Kelly*, Abb. Adm. 564, Fed. Cas. No. 9,577.

Dr. Lushington, in *The Vrede*, Lush. Adm. Cas. 322, 30 L. J. Prob. N. S. 209, says, *arguendo*, that a master cannot be a salvor so long as he is performing his duties as master; nor can a mariner, until his contract is at an end.

A seaman claimed salvage for a boat in which he reached shore after the burning of the vessel upon which he served as second mate, but the court dismissed the libel, saying that, as the boat appears to have saved him quite as much as he saved the boat, that account was in equilibrium. *Price v. Sears*, 2 Low. Dec. 553, Fed. Cas. No. 11,416.

Even ship's surgeons or pilots, who render aid

17,297; *The Dawn*, 1 Ware, 485; Fed. Cas. No. 3,665, 2 Ware, 126, Fed. Cas. No. 3,666; *The Nippon's Crew*, Brun. Col. Cas. 577, Fed. Cas. No. 10,277; *The Massasoit*, 1 Sprague, 97, Fed. Cas. No. 9,260; *The D. M. Hall v. The John Land*, Fed. Cas. No. 3,939.

Extraordinary supererogatory services are those for which admiralty gives the seaman his equitable lien on the property rescued, whether part of the ship or the cargo. His lien for wages under his contract has always been confined to the vessel or parts thereof.

The Dawn, 1 Ware, 485, Fed. Cas. No. 3,665, 2 Ware, 126, Fed. Cas. No. 3,666.

Mr. George O. Markham, with *Mr. Tallmadge Hamilton*, for appellee:

A voluntary or exacted offer, promise, or

agreement of the captain or master of a vessel to the crew by way of extra or additional compensation beyond the agreed amount of stipulated wages, made for the performance of an imperative obligation arising after the commencement of a voyage and during the prosecution thereof, creates no valid obligation of, or lien on, the vessel.

The John Perkins, 21 Law Rep. 87, Fed. Cas. No. 7,360; *The Shawnee*, 45 Fed. 769; *Miller v. Kelly*, Abb. Adm. 564, Fed. Cas. No. 9,577; *The Potomac*, 19 C. C. A. 151, 38 U. S. App. 219, 72 Fed. 535; 2 Parsons, Shipping, pp. 42, 43, note 1.

There was not a total loss of the vessel or cargo, nor such a loss as to warrant an

to the ship in time of need outside the special services for which they are employed, have been held not entitled to salvage as for extraordinary services performed.

Thus, it was contended in *Mesmer v. Suffolk Bank*, 1 Law Rep. 249, Fed. Cas. No. 9,498, that a second pilot on board a steamboat wrecked in collision, who afterwards assisted in saving property therefrom, was entitled to claim as a salvor on the ground that his services were extraordinary and foreign to the line of his duty, he not being bound to the exertions, labor, and hazard which are incumbent upon ordinary seamen; but the court refused to sustain the contention on the ground that the pilot of a steamboat, being one of the ship's company, stands on a different footing than a pilot who in ordinary navigation is engaged occasionally for particular service; and that in shipwreck or destruction, on account of his intimate relation to the ship, he is bound to like exertions for preservation of life and property as if belonging to the ship's company in common navigation. Engineers or other officers belonging to the steamboat were also considered within the same rules.

And a surgeon on board a ship which had been captured, but subsequently released under a ransom bill, was held not entitled to salvage for services rendered by him after the capture and release, on the homeward voyage, on the ground that, although employed exclusively as a surgeon, he was bound to do what he could for the ship in times of danger, and was entitled to no salvage for what was merely the faithful discharge of his duty. *Phillips v. McCall*, 4 Wash. C. C. 141, Fed. Cas. No. 11,104.

Decisions, showing that a special or qualified salvage or recompense, or compensation in the nature of salvage, is sometimes awarded to seamen for especially meritorious services in saving the ship or cargo, are not so rare, as will be seen by reference to III., *infra*. The distinction between general salvage and compensation in the nature of salvage, or special or qualified salvage, although somewhat vague, seems to be mainly the difference in the comparative amount awarded, and in the fact that the allowance of the latter is very much more largely in the discretion of the court, it seeming to be considered that a slight recognition of especially gallant services, made only when considered advisable by the court, will not operate as a temptation to seamen to put their

ship in danger for the sake of the recompense gained for meritorious efforts in extricating her.

2. Discharge of seamen.

Written discharges given the seamen by the master upon the wreck of their vessel were held such a dissolution of their contract as would entitle them to a reward in the nature of salvage out of goods and fragments of the wreck subsequently saved by them, notwithstanding a suspicion in the court's mind of the bona fides of the master's act, it not appearing that the seamen were parties to the fraud, if any existed. *The Warrior*, Lush. Adm. Cas. 476, 6 L. T. N. S. 133.

3. Abandonment by master.

There is no doubt that an abandonment, by the master, of the crew and ship operates to dissolve the seamen's contracts of service, so that for services thereafter rendered in saving the ship and cargo they may claim salvage as volunteers.

Seamen, who were attached to a ship at the time of its wreck and abandonment, and were thereafter appointed by the master to guard the property during a severe winter on an uninhabited northern coast, were held entitled to salvage for their services in that regard, on the ground that their connection with the ship in the capacity of seamen was dissolved upon its abandonment by the master and crew. *Coady v. 1,200 Barrels Oil*, 2 Hawaiian Rep. 34.

Seamen of a wrecked vessel were held not entitled to any reward for their services in attempting to save the ship and property on board, before the master abandoned the voyage, any further than the property saved furnished means for a payment of their wages, since their utmost exertions were due to the ship in time of peril. The court conceded, however, that when the contract ceases to be binding on the seaman, he may then become a salvor, although the voyage has not been completed. *Burrmeister v. The Speedwell*, 2 Hawaiian Rep. 420.

It is said, *arguendo*, in *The Barney Eaton*, 1 Bliss 242, Fed. Cas. No. 1,028, that part of a crew, who remained on board after abandonment by the master and the rest of the crew, and under such circumstances that the abandonment was justifiable, are entitled to salvage

abandonment of the same to the underwriters.

Monroe v. British & F. Marine Ins. Co. 3 C. C. A. 280, 5 U. S. App. 179, 52 Fed. 777; *Wallace v. Thames & M. Ins. Co.* 22 Fed. 66; *Bradlee v. Maryland Ins. Co.* 12 Pet. 378, 397, 9 L. ed. 1123, 1131; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67-76, 31 L. ed. 63-67, 8 Sup. Ct. Rep. 68; 1 Am. & Eng. Enc. Law, 2d ed. pp. 5, 22, 26.

A crew of a vessel can become salvors only after the vessel has become in fact a shipwreck *in toto*, without hope of recovery, and has been conclusively abandoned by all, and the crew unmistakably discharged from further service of the vessel.

Robert v. Drogun, 10 Pet. 108, 121, 9 L. ed. 363, 368; *The Holder Borden*, 1 Sprague,

144, Fed. Cas. No. 6,600; *The D. M. Hall v. The John Land*, Fed. Cas. No. 3,939; *The John Perkins*, 21 Law Rep. 87, Fed. Cas. No. 7,360; *The Potomac*, 19 C. C. A. 151, 38 U. S. App. 219, 72 Fed. 535; *The C. P. Minch*, 61 Fed. 511, Affirmed in 20 C. C. A. 70, 38 U. S. App. 536, 73 Fed. 859.

Grosscup, Circuit Judge, delivered the opinion of the court:

The crew of a vessel, under articles for wages, can become general salvors only after the vessel has become a shipwreck, without hope of recovery, and the crew discharged from further service. This general doctrine is not disputed. But it is insisted that, under certain circumstances, the crew, though under articles for wages, may be

compensation if they performed valuable services; that while a contract of a sailor excludes salvage compensation, it may, nevertheless, be allowed in extreme cases.

One case, *The Robert & Anne*, 1 Stuart Adm. Rep. 258, appears to disregard the doctrine that abandonment of the ship by the master dissolves the seamen's contracts, for the chief mate and part of the crew, who remained on board after the abandonment of the ship by the master and remainder of the crew under the belief that she was a total wreck, were denied salvage for their services in getting her off with no very great damage and proceeding with her to her destination, on the ground that their connection with the vessel was not dissolved *de facto* or by operation of law, and therefore they did not exceed the duty which devolved upon them under their articles to labor in the preservation of the vessel and cargo. The court says: "The seamen did their duty, and stuck to the ship, and got her off the rocks, and brought her to port; and their wages justly continued until the voyage ended. But there was nothing extraordinary in the case, and of so perilous a nature as to entitle them to compensation beyond their contract. If the ship had not been recovered, but had perished on the rocks where she was stranded, notwithstanding all the faithful and strenuous efforts of the crew, and there had been property saved, then the crew might possibly have had an equitable claim, which would have been felt by a court of admiralty, for compensation out of the property saved, for their particular services."

Considerable difficulty is encountered by the courts in determining whether the facts before them constitute an abandonment.

The elements indispensable in an abandonment, in order to so dissolve the seaman's duty toward the ship that he may become a salvor of it, were stated by Dr. Lushington, in *The Florence*, 16 Jur. 572, 20 Eng. L. & Eq. 607, to be, first, that the abandonment must take place at sea, and not upon a coast, for, if the ship becomes a wreck upon a coast, and the mariners escape to the shore, the contract endures to the extent, at least, that, if they successfully act as salvors, so as to save enough to pay their wages, they will be entitled to them, though not to salvage, and, if they do not so exert themselves, their wages are lost; second, the abandonment must be *sine spe revertendi*, as a temporary abandonment such as occurs in 64 L. R. A.

collisions from immediate fear, before the state of the ship is known, will not vacate the contract; third, the abandonment must be bona fide, for the purpose of saving life; fourth, it must be by order of the master. In this case the crew, who, having abandoned their ship by order of the master, again met it while being conveyed to England upon another boat, and, voluntarily going aboard, succeeded, with the assistance of other boats, in bringing the abandoned vessel into a port, were held entitled to salvage therefor, on the ground that the circumstances of the abandonment were such as to dissolve their contract of service with the vessel.

So, where the crew of an endangered vessel, together with some of the cargo, were taken on board another ship, and, several days after, upon again meeting with their abandoned vessel, they assisted the crew of the other ship in saving more of the cargo, they were allowed one-half share each of salvage in addition to wages until their arrival in port. *Taylor v. The Cato*, 1 Pet. Adm. 48, Fed. Cas. No. 13,786.

Where the master and crew, with the exception of the mate and two men, abandoned the ship when it struck upon rocks, without hope that it could by any possibility be saved, and the master urged those remaining to come with him, but they refused, being determined to stay by the ship and "see the last of her," it was held, in *The Umattilla*, 29 Fed. 252, that the facts showed a discharge by the master of all claim under the seamen's contracts for their further services, and, therefore, that they might claim salvage for great exertions and gallantry subsequently displayed, whereby they succeeded in getting the vessel into port. In the language of the court, it is said that, "where the master and the rest of the crew have quit- ted the ship, renouncing all hope of saving her, and some have remained, in spite of his ex- postulations and almost his commands, to con- front dangers which he declined to encounter, and by so doing have saved the ship, justice, as well as the true interests of owners and in- surers, demand that the courts should recog- nize as a legal right the seamen's claim to a liberal compensation for his supererogatory services."

A seaman's contract of service was held dis- solved, so that he might be entitled to salvage, where, after a collision, the master and all of the crew with the exception of himself got on

come special salvors. Such relation arises, it is said, when the service rendered is arduous, perilous, and meritorious, and under circumstances extraordinary in character. The argument is based for authority chiefly upon a *dictum* of Justice Story, in *Hobart v. Drogan*, 10 Pet. 122, 9 L. ed. 368.

None of the cases actually decided exemplify the application of any such rule. It is needless to restate their facts in detail. In none of them was there given to the claimants more than their transportation from the place of accident to their homes, and their sustenance, or such sums as would equal their sustenance, during that interval.

board the colliding vessel which refused to delay longer in order to save him, whereupon he used his utmost exertions for the preservation of the vessel until he finally received help from shore. *The Triumph*, 1 Sprague, 428, Fed. Cas. No. 14,183.

The departure of the master and crew, except the mate, from their vessel after a collision, was held such an abandonment as to dissolve the contracts of the seamen, and to entitle the mate, who voluntarily remained on board, to salvage for meritorious services rendered, which resulted in the vessel's preservation. *Le Jonet*, L. B. 3 Adm. & Ecc. 556, 41 L. J. Prob. N. S. 95, 27 L. T. N. S. 387, 21 Week. Rep. 83, 3 Asp. Mar. L. Cas. 438.

So, in *Mason v. The Blaireau*, Fed. Cas. No. 9,230, affirmed in 2 Cranch, 240, 2 L. ed. 266, the ship being in imminent danger of sinking, the captain and crew went on board another ship leaving one man, who, being prevented by force from getting into the first boat, afterwards refused to go in the second boat, being determined to remain on board *The Blaireau*, where, after doing what he could, he hoisted a signal of distress, and was found the next day by another ship which brought the damaged vessel into port. It was contended that the contract which the seaman had entered into bound him to continue his endeavors to bring the vessel into port, and that principles of general policy forbade the allowance of salvage to a mariner belonging to a ship which has been preserved; but the court held that the departure of the captain and crew from the ship discharged the remaining seaman from all further duty under his contract as far as any act whatever could discharge him, and salvage equal in amount to what was awarded the seamen of the salving vessel was granted him.

Where all hope of saving the ship, or of continuing the voyage, had been abandoned, and most of the sailors had been rescued and taken to land, it was held that those who remained should be treated, not as seamen remaining on wages, but the same as any other persons would be; and, therefore, that they might be allowed compensation as salvors for their efforts in saving a valuable part of the cargo. *The Aguan*, 48 Fed. 320.

But the ship's master, who superintended the saving of part of the cargo after the abandonment of the ship without hope of saving her, was held not entitled to salvage for his services, on the ground that he is the agent of the cargo as well as of the ship; and, therefore, that it is his duty to provide for the safety of the cargo so far as preservation is possible. *Ibid.* 64 L. R. A.

But even this, meagre as it appears, is said by counsel to be a species of special salvage, and to illustrate the principle, if not the measure, of compensation that ought to be applied to the case under consideration. The argument has not won our concurrence. We do not doubt that, under the law, pre-existing the recent legislation of Congress, freight was regarded as the mother of wages, and, upon the loss of freight, wages ceased. But though in that state of maritime law, transportation home, and sustenance during that interval, were not, in strict logic, the payment of wages, they need not, by that fact alone, be attributed to the

The pilot of a vessel greatly injured by fire was held entitled to salvage for important services rendered by him after the delivery of the ship by the captain into the hands of the master and crew of another steamboat that they might do whatever was expedient to assist her. It was held that the pilot's original contract with the boat upon which he was employed was virtually dissolved by its surrender into the possession of the salving ship. *Montgomery v. The T. P. Leathers*, Newberry Adm. 421, Fed. Cas. No. 9,736.

Where, upon the departure of the captain, after the wreck of his ship, to secure aid on a distant island, he liquidated the seamen's past wages, and promised them remuneration by way of salvage for all property saved after he left the wreck, to which the seamen acquiesced, it was held that their connection with the ship was dissolved, and that they might claim as salvors of the property saved, which was small in amount. *Connor v. The Virginia*, 2 Hawaiian Rep. 171.

But the seamen may have no salvage where it does not appear, unquestionably, that the departure of the master from the ship was without hope of recovery or return.

Thus, where the captain and crew of an endangered ship went on board a salving ship in compliance with a demand of the captain that they should do so or he would not give them his assistance, which was absolutely necessary to them, it was held, in *The D. M. Hall v. The John Laud*, Fed. Cas. No. 3,989, Hoff. Op. 96, that there was not such an abandonment of the ship by the master and crew without hope of recovery or of returning to her as would vacate the contract of service on the part of the seamen, so that they might be allowed salvage for services thereafter rendered in behalf of their endangered vessel. The court remarks that, if the rule of law which does not allow seamen to become salvors in the ordinary course of things, and while in the performance of their duty, whatever may have been the perils or hardships or gallantry of their service in saving the ship and cargo, has any solid foundation in true policy, the same principle demands that they should not be permitted to assume that character on the ground that their contract has been vacated, except in extraordinary cases, where their relation to the vessel has been finally and unequivocally dissolved, and where the master has permanently renounced all hope of recovering or returning to her.

And the departure of the master and crew at night from their vessel, wrecked on a rocky beach, leaving two men on the beach to keep

enforcement of any doctrine recognizing special salvage. The feeling underlying these early decrees was the dictate of humanity that shrinks from leaving a shipwrecked sailor on a distant shore, and, in cases of such catastrophe, added to the obligation of the master to pay wages, the further obligation to bring his crew home. To reach such a result there existed no need to build up a doctrine of special salvage, or in other ways than the one object to be attained, break into the settled law of ship and crew.

But though the argument be accepted, the element upon which it is based is wanting

in the case under consideration. There was no abandonment of the steamer *Bielman*. The seamen lost nothing by the loss of freight; for, under existing law, the running of their contract for wages continued. The service rendered, in lightering the vessel, was different in degree only from the usual service in boisterous weather. What appellants did plainly was within their duty as seamen, and was therefore paid for by the wages stipulated in the articles of employment.

The decree of the District Court is affirmed.

watch, was regarded as not such an abandonment *sine spe recuperandi* as dissolved the seamen's contracts, so that they might recover salvage for further services thereafter rendered in saving goods and materials from the ship. *The Warrior*, Lush. Adm. Cas. 476, 6 L. T. N. 8. 133.

So, where one of the crew of a fishing schooner remained on board because he considered it safer than to attempt to reach shore, and the rest of the crew went on shore intending and expecting to return when the gale should have abated, it was held, in *The John Perkins*, 21 Law Rep. 87, Fed. Cas. No. 7,860, that there was no dissolving of the contract relations of the crew which would absolve the one remaining on board from his duty as a seaman, and, therefore, that he could not claim salvage for anything which he might find necessary to do for the safety of the vessel.

And the departure of the captain and three men from a schooner which had been swung around by the wind so that it was pounding on a bar of sand and gravel was regarded by the court, in *The C. P. Minch*, 61 Fed. 511, as not such an abandonment of the ship as released the remaining members of the crew from their obligations under their contracts; and, therefore, they were refused compensation in the nature of salvage for skillful, rather than perilous, services, which resulted in extricating the vessel from its hazardous situation. The court stated that, even upon the assumption that the master did abandon the ship either because he was panic stricken or deliberately intended to wreck her, such conduct would not absolve the crew from their duty to the vessel. This decision is distinguished by the court from *Mason v. The Blaricau*, 2 Cranch, 240, 2 L. ed. 286, *The Umattilla*, 29 Fed. 252, and *The Triumph*, 1 Sprague, 128, Fed. Cas. No. 14,183 (*supra*, this division), where, as the court points out, the vessels were seriously injured and in imminent peril, the master and crew had deserted her, the voyage was actually broken up, no wages were received, and the libellants' services were of the most meritorious character, they having braved great dangers, suffered severe hardships, and contributed to save the ship from destruction. Upon appeal, the court, after a review of the authorities, came to the conclusion that the only cases where compensation in the nature of salvage has been awarded to seamen were where the voyage had terminated by the shipwreck of the vessel, or where she had been abandoned by all except the salvors under circumstances which showed conclusively that the abandonment was absolute, beyond hope or ex-

pectation of recovery, or where the seamen had, by the master, been unmistakably discharged from the services of the shipowner; and, the facts of the case at bar not being regarded by the court as coming within any of the classes above shown, the decree of the lower court was affirmed.

Where, after a collision, all on board left the injured boat under an apprehension that she was sinking, and many went on board the other ship, but the master and a portion of the crew remained about their ship, and, finding it did not immediately go down, entered on board again and saved a large portion of the property thereon, it was held that there was not such an abandonment of the ship by the master and crew as would change their position and character so as to entitle them to salvage as general salvors. *Mesmer v. Suffolk Bank*, 1 Law Rep. 249, Fed. Cas. No. 9,493.

And salvage may not be had where the master's abandonment was not the result of actual danger and in order to save life.

Thus, while admitting that seamen may be salvors of their own ship when their contract has been dissolved either voluntarily by the master or by the effect of a *vis major*, it was held in *The Olive Branch*, 1 Low. Dec. 286, Fed. Cas. No. 10,490, that the departure of the master from a fishing schooner upon its return trip, near the home port, was not sufficient to dissolve the seamen's contract; and, therefore, that their services to the ship during a storm, which soon after arose, were such, only, as were due under their contract, and for which they were not entitled to salvage.

4. Recapture.

The recapture of their ship from pirates, enemies, or belligerents, by seamen, is also held to entitle them to salvage on the ground that by the capture their contracts of service are dissolved, or at least suspended.

It is said, *obiter*, in *The Florence*, 16 Jur. 572, that by capture, whether by enemies or pirates, the seaman's contract is at once put an end to.

But the capture of a ship is stated, *arguendo*, in *The Two Catherineas*, 2 Mason, 819, Fed. Cas. No. 14,288, to work a suspension of the contracts of its seamen rather than an utter dissolution of them,—the rescue of the ship, however, by the original crew is admitted to be a meritorious case of salvage.

In regard to the situation and character of members of the crew who recaptured their vessel from captors, it is said in *The Two Friends*,

1 C. Rob. 271, that such an attempt is to be regarded as a perfectly voluntary act, in which each individual is a volunteer, and is not acting as a part of the crew of the ship, or in discharge of any official duty, either ordinary or extraordinary.

The cook, the steward, and the mate, who, with the aid of several passengers, succeeded in recapturing their ship from French officers and seamen who were in possession, were allowed salvage in *Clayton v. The Harmony*, 1 Pet. Adm. 70, Fed. Cas. No. 2,871, on the ground that the contract between the mariners and the shipowners was dissolved, or at least suspended, by the capture, so that they were under no more obligation to thus hazardingly serve the owners than the crew of another ship would be. The court further declared that the recovery of the ship and cargo from enemies was no part of the original contract of the seamen.

The master, crew, and passengers, who recaptured their ship from French captors who were in possession, were awarded one sixth of the value of the ship and cargo, as salvage, in *The Walker*, Stewart Vice-Adm. Rep. (Nova Scotia) 105.

And a master and boy who recaptured their ship from the possession of five Frenchmen were considered salvors, and entitled to one sixth of the value of the property saved, in *The Beaver*, 3 C. Rob. 292.

So, a seaman who aided the captain to recapture their vessel from French captors who were in possession was allowed salvage, in *Kennedy v. Ricker, Smith* (N. H.) 432, Fed. Cas. 7,705, notwithstanding a convention entered into between England and France, which, however, was not finally ratified until after the hearing of the libel for salvage. The right of salvage existing in mariners as well as strangers, in cases of rescue and recapture, was declared to be well established by judicial decision, and to be founded upon principles of justice and equity.

The captain, a seaman, and the cook, who succeeded in recapturing their ship from nine Frenchmen who were in possession of it, were allowed salvage in *Brevoor v. The Fair American*, 1 Pet. Adm. 87, Fed. Cas. No. 1,847. The court viewed the case as one in which great gallantry and good conduct, as well as great suffering, were exhibited and endured, and stated that salvage is not given as a mere compensation for labor and services, but is increased far beyond this claim as an incentive to stimulate others to meritorious and gallant exertions.

The mate and part of the crew, allowed to remain on board after the capture of their boat, by the governor of the Falkland Islands, were allowed salvage for recapturing and bringing home the boat, as appears from the facts in *Williams v. Suffolk Ins. Co.* 3 Sumn. 510, Fed. Cas. No. 17,739.

And the master of a British ship loaded with fruit, which was captured by an American privateer, and part of the fruit taken, but the remainder presented to the master on condition that he convey the crews of other prize ships to England, claimed for himself a salvage for recapture from the enemy, upon arrival in England, which was reached after a perilous voyage, and was allowed £30 and his expenses. *The Sir Peter*, 2 Dodson Adm. 73.

So, too, the recapture of a ship by the crew from the possession of a usurping government was held to entitle them to salvage, in *Williams* 64 L. R. A.

v. Suffolk Ins. Co. 3 Sumn. 270, Fed. Cas. No. 17,738.

And the capture of a ship by a belligerent was held to suspend, if not terminate, the contracts of the seamen; and, therefore, it was held that the captain and crew are entitled to salvage for the recapture of their ship from the captors; and, although the captain is part owner of the ship, he is entitled to salvage for the recapture of the cargo, since the belligerent capture which releases him as master from his duties to the ship also discharges him from his duties as a common carrier. *Strout v. The Cuba*, Fed. Cas. No. 13,549.

But no salvage is due on the recapture of a ship from a neutral or friendly power. *Peck v. Randail*, 1 John. 165.

And a crew who had rescued their ship from mutinous Malays aboard were denied the right to salvage therefor in *The Governor Raffles*, 2 Dodson Adm. 14, on the ground that it was their bounden duty to give every assistance in their power to quell a mutiny, or preserve or recover the possession of the goods of their employers. A distinction is made between this case and that of rescue from an enemy, because, under such circumstances, the court declares that the moment the capture is made the crew are discharged from their duty to their employers, and are no longer the crew of the vessel, but become prisoners of war.

Also the fact that a vessel was under arrest was held not to annul the master's contract in regard to her, so as to entitle him to salvage for services performed at a time when the ship was in danger. *The Nebraska*, 21 C. C. A. 448, 24 U. S. App. 559, 75 Fed. 598.

III. *Compensation in the nature of salvage.*

Although the danger of placing a salvage reward before seamen's eyes as the result of meritorious services in rescuing their ship from peril is ever in mind, the reluctance of courts to pass by unheeded any acts of genuine heroism and faithfulness in connection with extreme peril on the water has led them sometimes to award what is variously called, compensation in the nature of salvage, special or qualified salvage, days' wages, expenses home, salvage measured by wages, etc. The fact that American decisions recognize two classes of civil salvage is pointed out in *Mesmer v. Suffolk Bank*, 1 Law Rep. 249, Fed. Cas. No. 9,493, *vis.*, general salvage, which is awarded to one who performs useful service to a ship in distress without any particular relation or duty thereto; and special or qualified salvage, which is awarded to seamen against property saved by their exertions from a ship to which they belonged; and that a suit under the latter class is ordinarily limited to wages due; but that it is understood to be proper for the court to award additional recompense in cases of extraordinary danger and gallantry.

This recognition by the courts of meritorious services is in no way an exception to the general rule that seamen may not become salvors of their own vessel, since general salvage and compensation in the nature of salvage are inherently dissimilar, not only as to comparative amount, but also in their relation to the applicant therefor; the former being awarded to one entitled thereto more certainly, and as a matter of right, while the granting of the latter to seamen seems to be purely discretionary with the court.

The perfectly settled right of seamen, in cases of shipwreck, to recover their wages out of the proceeds of the wreck saved by them, and in some cases an additional amount to pay the expense of their return home, was declared in *The John Perkins*, 21 Law Rep. 87, Fed. Cas. No. 7,360, not to change or trench upon the settled rule that a seaman acting under a subsisting contract has no standing in a court of admiralty as a salvor of his own ship.

The conclusions of the court in *The Dawn*, 2 Ware, 126, Fed. Cas. No. 3,666, after an exhaustive review of the Maritime Codes of most of the countries of Europe, are that in cases of distress the crew are bound to stay by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done they are always entitled to full wages if enough is saved for that purpose, but, if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But the court further says that, if they do not rest satisfied with saving only what is sufficient to pay their wages, but persevere so long as the chance of saving anything remains, the law, from motives of policy, allows them, according to the circumstances and the merits of their services, a further reward in the nature of salvage, which is a general charge upon the whole mass of property saved. They may not, however, claim as general salvors, nor be entitled to be rewarded at the same liberal rate, because, were that so, a crew might be willing to see their vessel placed in danger at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her; but they are to be paid a reasonable compensation *pro opera et labore*, and, if the disaster happens in a foreign country, it ought to be at least a sum to pay the expense of their return home. The court admits that the above conclusions have not been directly, to the full extent, sanctioned by any judicial decisions in this country, but states that the reasoning of the courts leads thereto.

The doctrine of *The Dawn*, 2 Ware, 126, Fed. Cas. No. 3,666, is reaffirmed in *The Bowditch*, 8 Ware, 71, Fed. Cas. No. 1,717, that in cases of shipwreck seamen are bound to remain by the wreck and render their best services to rescue the property from destruction; and, if this service is faithfully performed, they are entitled to their full wages out of the remains of the wreck to the time of the disaster; and that, according to the circumstances of the case, they may be entitled to an additional compensation in the nature of salvage, which would be measured by the circumstances of danger and labor which attended the service, but ought in all cases to be sufficient to pay their expenses home.

The doctrine is declared, *arguendo*, in *Clayton v. The Harmony*, 1 Pet. Adm. 70, Fed. Cas. No. 2,871, that, although seamen are bound, if possible, to save a ship and goods wrecked, or lose their wages, they are also entitled to further compensation by way of salvage; that in some countries they have daily wages by special ordinances or practice, but in all countries they are allowed more than their wages if the property saved warrants this extra claim.

The allowance to seamen of a recompense for extraordinary danger and gallantry in addition to wages seems to be considered proper, within the discretion of the court, in *Mesner v. Suffolk Bank*, 1 Law Rep. 249, Fed. Cas. No. 9,493, although the demand therefor should be made
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in connection with the suit for wages, since then all the parties and interests are before the court, and the merits of the parties are then more readily comprehended and ascertained. It appearing in the case at bar that the seamen had received wages without claim of any further demand, and that their vessel was wrecked in collision, for which there was some evidence that it was at fault, and it not appearing that the seamen were at any time in very imminent danger, their libel for salvage was dismissed.

According to *Abbott, Shipping*, 790, in the colony law of Massachusetts there was a provision requiring mariners to save the vessel and goods in case of shipwreck, "out of which they shall have a meet for their hazard and pains."

The court refused to enforce an agreement made by salvors and the master of the distressed ship to pay the crew, who refused otherwise to assist, \$2 a day for their services while the ship was on a reef, saying that they should be punished, instead of paid, for such insubordination, since they were bound by their articles and their duty to stand by their master as long as two planks of the ship remained together to stand on, and then, that, if the ship were at last lost, and they had behaved well, they might perhaps be entitled to some compensation for extraordinary services rendered in saving any portion of the materials and cargo. *The York*, 3 Adm. Rec. 821, Fed. Cas. 18,140.

Four seamen, who were discharged from a United States man-of-war in order that they might go on a whaling ship in need of assistance on account of loss of men and damage by the sea, and who did so, and remained with the ship until the end of the voyage, when they were given their discharges, having performed their duty to the entire satisfaction of the captain, were held entitled, not only to the highest rate of seamen's wages then paid, but also to an additional sum of \$35 each as salvage. *The Harvest*, 1 Sprague, 537, Fed. Cas. No. 6,176.

After an award to salvors of a moiety of the property saved, the members of the crew were allowed extra compensation for extraordinary labor performed by them in pumping the vessel to keep her free, and for their faithfulness in the discharge of their duty in other ways during the time the ship was in danger. *Anonymous*, Fed. Cas. No. 430.

The services of the mate and four seamen of a wrecked vessel in crossing the Gulf in an open boat to procure assistance were held extraordinary and beyond the line of their duty, and sufficient to entitle them to compensation in the nature of salvage. One hundred dollars was awarded the mate, and \$50 to each of the men. *The Mary Hale*, 5 Adm. Rec. 471, Fed. Cas. No. 9,213.

A case is referred to by the reporter in 1 Stuart Adm. Rep. at p. 255, as *The Flora Wilson*, reported in the *Nautical Magazine*, February, 1833, vol. 2, No. 12, p. 87, where the chief and second mates and the ship's carpenter were allowed one third of the gross proceeds of the sale of articles saved from the wreck by their meritorious services.

This compensation sometimes takes the form of days' wages,—especially for seamen's services in rescuing the cargo after a shipwreck.

Thus, seamen who were employed eight days in saving materials from their wrecked ship

were allowed salvage at the rate of 5 shillings a day, in *The Sillery*, 1 Stuart Adm. Rep. (Lower Canada) 182, their wages having been paid in advance up to the time of the loss of the ship.

But days' wages seem to be awarded sometimes upon the theory that the shipwreck is a *vis major*, operating to annul the contracts of service.

Thus, it is declared in *Roberts v. The Ocean Star*, Fed. Cas. No. 11,908, that seamen are entitled to the reward of salvors only for very extraordinary services, in which case a small additional sum may be rightfully allowed; but that, after a total wreck, if the master and crew labor in saving the cargo, they must then be regarded, not as the crew of the lost vessel, but as the agents or servants of the shippers, and, therefore, entitled to wages by the day at the rate of their monthly wages, or other reasonable compensation.

And it was ordered in *Bridge v. Niagara Ins. Co.* 1 Hall, 423, that the master and seamen, after becoming disconnected from their vessel by shipwreck, were entitled to compensation as laborers, or salvors, for their services in transporting and in saving the cargo, to be allowed according to the nature of the services.

And in *Reed v. Hussey, Blatchf. & H.* 525, Fed. Cas. No. 11,646, extra compensation in the nature of days' wages for the time spent in laborious and perilous exertions in saving the wreck was considered properly allowable. In this case a shipwreck is regarded as a *vis major*, which breaks up a seaman's contract.

The crew of a whaling bark were held to have no right to salvage, but were allowed the amount coming to them, under a promise of the master that they should have days' wages if they would work faithfully in saving the property, the binding force of which promise was not disputed by the shipowner. The court says, however, in regard to the ship master's promise, that want of consideration might have been urged against it. *The Antelope*, 1 Low. Dec. 130, Fed. Cas. No. 484.

The question whether seamen might have their wages in the event of a shipwreck was one which long occupied the attention of courts, until it was at last settled by statutes in England and America. One theory promulgated was that, although the right to wages was lost upon the occurrence of a shipwreck resulting in the loss of freight, since "freight is the mother of wages," a new equity arose in the seamen whereby they might realize as salvage the amount due them for wages out of fragments of the wreck and cargo saved by their perseverance.

In *Brackett v. Hercules*, Gilpin, 184, Fed. Cas. No. 1,762, it was held that where a portion of a vessel or her cargo was saved by the meritorious exertions of the seamen, a new lien arose thereon,—the original contract being canceled, —although no freight was earned.

In *Dunnett v. Tomhagen*, 3 Johns. 156, an action for wages by a mariner on board a ship which was wrecked, it appearing that a few boxes of goods had been saved from the cargo, Chief Justice Kent said that the seamen might, perhaps, have had a valid lien on the goods saved for an equitable compensation in the nature of salvage, but that this gave them no right of action on the contract for wages, since freight is the mother of wages, and no freight was earned in this case because the voyage was not performed.

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Abbott, Shipping, p. 788 (*631), says that in case of shipwreck it is the duty of the seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo, and that, if the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, upon principle the seamen are entitled to a proportion of their wages; and that for their labor in saving the cargo or remains of the ship, they, as well as other persons, may be entitled to a recompense by way of salvage, if the circumstances do not entitle them to wages.

The doctrine of *The Isabella*, 1 Stuart Adm. Rep. (Lower Canada) 281, is that, upon the occurrence of a *vis major* depriving seamen of their wages, they will be allowed salvage, regulated by the amount which would have been due for wages, out of the fragments and materials of the wreck saved by them.

The doctrine of *The Two Catherine's*, 2 Mason, 319, Fed. Cas. No. 14,288, is that the crew are not *ipso facto* discharged from their contract by shipwreck, and are still bound to labor for the preservation of the ship and cargo, but that their right to wages depends upon the earning of freight, so that by the very nature of the case they may be excluded from wages. If, however, they have been instrumental in preserving the property, or gathering up the fragments of the wreck, they are entitled to compensation therefor by way of salvage, and the wages they are entitled to are the measure of the salvage awarded them, except, in cases of extraordinary danger and gallantry, where life is preserved or property of great value is at stake, an additional recompense may be allowed.

A crew, in *Cartwell v. The John Taylor*, Fed. Cas. No. 2,482, Newberry Adm. 341, who had worked with energy and fidelity in saving the tackle and apparel of their wrecked vessel, were allowed compensation in the nature of salvage at the rate of the wages which they had been receiving, the continuance of those wages being allowed them up to the time when the tackle, furniture, and materials saved were taken into the custody of the marshal of the court. This decision is based upon the doctrine maintained by Justice Story in *The Two Catherine's*, 2 Mason, 319, Fed. Cas. No. 14,288, that, since freight is the mother of wages, if the ship be lost during the voyage, so that no freight is earned, the mariners lose their wages; but that, in place of that loss, they are entitled to salvage for their labor, and services in saving the wreck of the ship and cargo, or either.

But in several decisions this theory is expressly condemned as being wrong in principle and in derogation of the rule that seamen may not claim salvage out of their own vessel.

Thus, the crew of a ship which was wrecked were held entitled to compensation for their services, not merely from the time of the casualty, but for the voyage, in *Daniels v. Atlantic Mut. Ins. Co.* 24 N. Y. 452; but the court stated that the compensation was as wages, and not in the nature of salvage, for the reason that an allowance to seamen as for salvage services would be less safe to shipowners than the allowance of wages, since in the latter case there is no temptation to throw the ship into situations of danger with a view to extravagant salvage.

Seamen succeeding in saving portions of the ship in case of wreck were held entitled to receive their wages as such, rather than a compensation in the nature of salvage, or salvage.

measured by *quantum meruit*. This decision was based on the ground, briefly, that a seaman has a right to cling to the last plank of his ship in satisfaction of his wages or part of them, and also, that any compensation in the nature of salvage to a seaman is based upon a wrong principle, tending to present a temptation to throw the ship into situations of danger. *The Neptune*, 1 Hagg. Adm. 227.

The court remarks, *arguendo*, in *Giles v. The Cynthia*, 1 Pet. Adm. 203, Fed. Cas. No. 5,424, that the sailors must assist in saving the ship and goods, or so much thereof as possible, so as to entitle them, by way of encouragement, to their wages out of the property saved.

The officers and crew of a whaling ship which was wrecked upon a desert island were held not entitled to salvage for rescuing a large part of the cargo of oil, and fragments and furniture from the ship, in *The Holder Borden*, 1 Sprague, 144, Fed. Cas. No. 6,600. This decision is based largely, however, upon the fact that in whaling voyages the compensation of a mariner is a specific share of the net proceeds; and, therefore, in taking the oil from the wreck the seamen were laboring to secure the proceeds of the voyage upon which their compensation depended, which was enhanced by every barrel ultimately saved.

In still other decisions, however, whether the compensation is regarded as wages or as salvage measured by wages is considered entirely immaterial, since there is in reality no difference, from a practical standpoint, between the two.

The court says in *The D. M. Hall v. The John Land*, Fed. Cas. No. 3,939, Hoff. Op. 96, that seamen in case of shipwreck are bound to remain by the wreck and assist in preserving the fragments; and that, if they do so, they are entitled to their wages out of the savings; and that, whether this allowance should properly be deemed wages or a salvage compensation is but a shadowy distinction, for in practice the allowance rarely exceeds the amount which would have been earned as wages.

The question whether the compensation recognized as due seamen who have assisted in preserving fragments of the wreck is to be deemed wages earned under their contract or compensation in the nature of salvage is declared by the court in *Drew v. Pope*, 2 Sawy. 72, Fed. Cas. No. 4,080, to be of little practical importance, since it is admitted by those who maintain that the compensation is in the nature of salvage, that the amount to be paid is merely the wages due.

According to *Reed v. Hussey, Blatchf. & H.* 525, Fed. Cas. No. 11,646, the rule that seamen on a whaling voyage, who are to be compensated by a share of the proceeds of the voyages, cannot, in case of wreck, claim for salvage services, is regarded as invariable; but the voyage as a shipping adventure is regard-

ed as ending with a shipwreck, which is a case of *vis major*, which breaks up the seaman's contract and deprives him of the wages agreed upon, except that there remains in him an equity proportionate to his demands under his contract, which adheres to the net proceeds of the cargo or ship which may be saved, and that it matters not whether the recompense be made in the name of wages or salvage.

In *The Massasoit*, 1 Sprague, 97, Fed. Cas. No. 9,260, after the ship went ashore the crew remained on the wreck performing all their duties until they were taken off by a life boat barely escaping with their lives. At the time of their rescue the owners of the ship arrived with another crew, and thus superseded the wrecked seamen in the work of saving the wreck. In holding that the seamen were entitled to wages out of the remnants of the vessel, although no freight had been earned, the court declared that it had long been a question whether in cases of shipwreck seamen were entitled to compensation in the form of wages or in the nature of salvage; that the giving of wages in such instances was opposed to the maxim that "freight is the mother of wages;" and that the giving of salvage was in opposition to the principle that seamen may not become salvors of their own vessels; that seamen, under such circumstances, were entitled to some reward for laborious and hazardous service, successfully performed, was undoubted, and therefore, although sometimes called salvage measured by the stipulated wages, sometimes quasi salvage or wages in the nature of salvage, the court stated that the practical result to which the courts generally came was that the compensation awarded should be that which the contract prescribed, and therefore, having no quality in the nature of salvage excepting that something must be saved, and being, not for voluntary, but for covenanted, service, therefore not enhanced by peril and gallantry, and not affected by the value of the property saved, provided it was not less than the amount of the wages.

The facts that in *GILBRAITH V. STEWART TRANSP. CO.* the ship's difficulty, though serious, was temporary, not resulting in shipwreck or abandonment, and that the seamen had engaged by the month for the sum specified, concurred to support the court's conclusion that the services rendered, however meritorious, must be considered as remunerated by the wages received; and the award of a special compensation would not have been justified; since, while a special salvage compensation is perhaps advisable under extraordinary circumstances, the general policy of the courts is to refrain from exciting in seamen an expectation of reward for the mere performance of duty, even though it be under difficult circumstances.

M. M. M.

ARKANSAS SUPREME COURT.

STATE of Arkansas, *Piff. in Err.*,

v.

D. F. COLLETT.

(.....Ark.....)

The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late to repair it on Saturday with the appliances at hand, and the owner of the mill was not negligent in not having foreseen the accident, or having appliances at hand to repair it immediately.

(February 20, 1904.)

ERROR to the Circuit Court for Clark County to review a judgment acquitting defendant of the charge of Sabbath breaking. *Affirmed.*

Statement by **Riddick, J.:**

In this case the defendant, D. F. Collett, was indicted by the grand jury of Clark county for Sabbath breaking by causing work and labor to be performed on Sunday. The defendant was the foreman of a large sawmill which had over 200 employees. On Saturday, the 25th day of July last, the belt for the edger of the mill got out of repair. The mill was shut down at 4:30 P. M. of that day, and the millwright and his assistant worked until after 6 o'clock to get the belt ready to put in a splice, and got it partially prepared for the splice. But to make the glue used in splicing the belt hold it was necessary to take the oil out of the belt. Gasoline was required for this purpose, and it was discovered that there was none on hand. After supper the defendant endeavored to procure the gasoline at Arkadelphia, the largest town in the county, being a place of some 3,000 inhabitants, but none could be obtained. Gasoline was obtained early the next morning, though in what way the agreed statement of facts does not show. But the agreed statement of facts shows that it is not safe to use a belt in less than eighteen hours after a splice is made, for the glue must have that time to harden. Not being able to complete the repair of the belt on Saturday night on account of the lack of gasoline, the defendant had the work completed early Sunday morning in order to give the glue

the necessary time to harden so that the mill might run on Monday. It was agreed that, had this not been done, not only the sawmill, but all the other departments of the mill plant depending upon the sawmill for lumber, would have been closed down for a day, and that over 200 men would have lost a day's work and a day's wages. Under these circumstances the circuit judge to whom the case was submitted on an agreed statement of facts found that the work was one of necessity, and that the defendant was not guilty, and the state appealed.

Mr. G. W. Murphy, Attorney General, for plaintiff in error:

The agreed statement of facts showed a plain violation of the statute.

State v. Goff, 20 Ark. 289; *Quarles v. State*, 55 Ark. 10, 14 L. R. A. 192, 17 S. W. 269; *Shipley v. State*, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107.

Mr. J. H. Crawford for defendant in error.

Riddick, J., delivered the opinion of the court:

The only question in this case is whether the evidence was sufficient to justify the finding of the circuit judge that the work which the defendant caused to be done on Sunday was a work of necessity within the meaning of our statute forbidding work and labor to be done on the Sabbath. Leaving out the religious view of the matter, it is no doubt good public policy to require one day of rest each week, for that much rest is needed by most men; and in this age of fierce competition, if one man labors on Sunday, it tends to force other men in the same business profession to do likewise, in order to keep on even terms with him. But while for this and other reasons Sunday laws should be enforced, yet there are certain exceptions to the law forbidding work and labor on Sunday, based on reasons as sound as those upon which the law itself rests. One of these is that in a case of necessity one may labor on the Sabbath, and the defendant here undertakes to justify his act on the ground that it was a matter of necessity.

In a recent case we said that "courts in construing the term 'necessity,' as employed in these Sunday statutes [which, with cer-

NOTE.—For other cases in this series as to what are works of necessity within the meaning of the Sunday laws, see *Western U. Teleg. Co. v. Wopst*, 3 L. R. A. 224; *Handy v. Globe Pub. Co.* 4 L. R. A. 466; *Com. v. Waldman*, 11 L. R. A. 563; *Com. v. Matthews*, 18 L. R. A. 64 L. R. A.

761; *Ex parte Kennedy*, 51 L. R. A. 270; *Arnheiter v. State*, 58 L. R. A. 392; and *State v. McBee*, 60 L. R. A. 638.

As to Sunday labor generally, see *note to Quarles v. State*, 14 L. R. A. 192.

tain exceptions, forbid work and labor to be performed on the Sabbath], have generally given it a liberal, rather than a literal, interpretation," and that "it is not an absolute, unavoidable, physical necessity that is meant, but rather an economic and moral necessity." *Shipley v. State*, 61 Ark. 219, 32 S. W. 489, 33 S. W. 107. The court in that case sustained a conviction for Sabbath breaking, where the defendant labored in operating the pumps and fans of a coal mine to prevent the accumulation of water and gas in the mine, because the proof did not show that the defendant could not, by a reasonable expense, have employed some other device to keep the water and gas out of the mine, and thus obviated the necessity of working on Sunday. So, in an earlier case, the court held that the defendant was guilty of violating the Sabbath by cutting his wheat on that day, though the same may have been wasting from overripeness. It was there said that "the husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath." *State v. Goff*, 20 Ark. 290. In neither of those cases was it a matter of necessity to work on the Sabbath, for the reason that the contingency should have been foreseen, and could have been obviated by the use of reasonable exertion or expense. But the necessity which required the work to be done on the Sabbath in this instance was not the result of natural causes which anyone should have foreseen, but was the result of an unexpected defect in the edger belt, which became known on Saturday, and made the repairs necessary. These repairs could then have been completed before Sunday but for the lack of gasoline, which the defendant tried to obtain in Arkadelphia, the nearest large town, but could not do so. The evidence, we think, justified the court in finding that the defendant was not to blame in failing to foresee that the edger band would

get out of repair on Saturday, or for the failure to procure the gasoline earlier than he did, as one would reasonably suppose that gasoline could be procured in any town of 3,000 or 4,000 inhabitants.

As the evidence is sufficient to support the finding that he was not to blame in either of these respects, the question we have here is not whether one can labor on Sunday in order to save work on Monday, but whether it is justifiable for a few men to work a few hours on Sunday in order to save the work and wages of a large number of men for the whole of Monday. For although it required but a small amount of work by a few men to splice this belt, yet by reason that it took eighteen hours for the glue to harden so the belt could be used after being spliced, if the work had been postponed until Monday, over 200 men would have been thrown out of work for the entire day, and would have lost their wages on that day. We are not sufficiently acquainted with sawmills to see very clearly how the breaking of an edger belt could have had such an effect upon the operation of other portions of the plant as to throw so many men out of work and cause such a loss. But, while we feel a little skeptical on that point, it is thus written in the record, both parties agreeing that this was so, and this was one of the material facts upon which the court below based its judgment. Though, under the law of this state, we have the power to reverse judgments of acquittal in prosecutions for misdemeanors and order a new trial, yet where the question is one of fact entirely we should do so only in those cases where justice clearly requires it. But under the circumstances of this case we are of the opinion that the finding of the circuit court that the work performed on Sunday was one of necessity has evidence to support it, and should be sustained.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

James SIMMONS, *Appt.*,

v.

SOUTHERN TRACTION COMPANY.

(207 Pa. 589.)

A street-car conductor in charge of an extra car, whose duties require him to run

onto a single track extending beyond the termination of the double tracks of the road, which the rules of the company require to be occupied by only one car at a time, takes the risk of injury from the absence of signals at the termination of the double tracks or schedules for extra cars for giving notice when the extension is occupied by such cars.

(January 4, 1904.)

NOTE.—For *volenti non fit injuria* as defense to actions by injured servants, see also note to *O'Maley v. South Boston Gaslight Co.* 47 L. R. A. 161.
44 L. R. A.

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, for

Allegheny County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank M. McKelvey and Joseph A. McDonald, for appellant:

Where employees are subject to dangers which the employer ought to provide against, and an accident happens to an employee from a want of proper provisions against such dangers, the employer is liable.

Pittsburgh & O. R. Co. v. Sentmeyer, 92 Pa. 280, 37 Am. Rep. 684.

Where an appliance, which evidently guards against dangers, is in general use, it is obligatory upon employers to use such device; and a failure to so use it, causing injury, or permitting such to occur, renders the employer liable.

Lehigh & W. B. Coal Co. v. Hayes, 128 Pa. 306, 5 L. R. A. 441, 15 Am. St. Rep. 680, 18 Atl. 387.

Messrs. Clarence Burleigh and James C. Gray for appellee.

Fell, J., delivered the opinion of the court:

The plaintiff was employed as a conductor on a branch of the defendant's road which extended from Pittsburg to the borough of Sheraden. There were two tracks on most of the branch roads, but in the borough and in one or two other places there was only a single track. On the evening of the accident the plaintiff was in charge of an extra car or tripper, which ran between regular cars. While the car was on the single track in the borough, the trolley slipped from the feed wire, the car stopped, and its lights were extinguished. The plaintiff got down on the track in order to replace the trolley, and while standing back of his car he was struck and injured by the car that followed it. He had been in the employ of the company, running extra cars on this part of the road, for twenty-seven days. The streets of the borough were lighted by electricity, but an arc light near the place of the accident happened not to be burning.

In support of his contention that proper appliances had not been furnished, the plaintiff made an offer to show that, by the rules of the company, only one car was allowed to be on the single-track extension at a time; that no signal box or other appliance was placed at the end of the double track to

warn motormen that the single track was occupied, and no schedule was in use for extra cars; and that signal boxes or other appliances were in general use, and were necessary to avoid accidents where schedules failed to provide for such single-track use. This offer was overruled, and a nonsuit entered. If the testimony offered had been admitted, it would not have made out a case entitling the plaintiff to go to the jury. Whatever danger there was in the use of the single track without signals was obvious, and as fully known to the plaintiff before as after the accident, and the risk was voluntarily assumed by him. In *Brossman v. Lehigh Valley R. Co.* 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226, a brakeman who had been employed by the railroad company for six months, and whose duties required him to be on the top of box cars, was injured by striking a bridge which was only 4 or 5 feet above the tops of the cars. Others had been injured before in this way. In holding that there could be no recovery, it was said: "When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge, from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain." In *Fulford v. Lehigh Valley R. Co.* 185 Pa. 329, 39 Atl. 1115, an engineer who had been employed on the road six weeks was not allowed to recover, where his injury was caused by striking his head against the side of a bridge which was dangerously near the side of the passing cab, and 2 or 3 feet nearer than was usual in the case of the other bridges on the road. To the same effect are the decisions in *Belkows v. Pennsylvania & N. Y. Canal & R. Co.* 157 Pa. 51, 27 Atl. 685, and *Fletcher v. Philadelphia Traction Co.* 190 Pa. 117, 42 Atl. 527. In the latter case a conductor familiar with the road was killed while standing on the side step or running board of an open summer car, and engaged in putting down curtains during a thunderstorm, by being struck by a car on the other track. The tracks were only 37 inches apart, and the conductor's experience had been in running closed cars, and he had had no warning or instruction as to open cars.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

ST. LOUIS MINING & MILLING COMPANY of Montana *et al.*, Appts.,
v.

MONTANA MINING COMPANY, Limited.

(51 C. C. A. 530, 113 Fed. 900.)

The owner of a mining claim, who has a right to pursue a vein apexing within it, beyond its side lines, is confined to operations within and upon the vein itself; and he cannot drift a tunnel from his claim into the adjoining one for the purpose of intersecting the vein in its descent.

(March 10, 1902.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the District of Montana enjoining them from proceeding to construct a tunnel through plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Argued before *Gilbert, Ross, and Morrow*, Circuit Judges.

Messrs. E. W. Toole and Thomas C. Bach, for appellants:

The portion of the vein which the tunnel will intersect has its apex within the boundaries of, and runs lengthwise with, the side lines of the St. Louis mining claim.

The plaintiff in error is the owner thereof on its dip beyond the side line of the St. Louis claim within the planes referred to.

Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 415, 102 Fed. 430.

There is no allegation in the pleadings that the work done in extending the tunnel results in any irreparable injury to the complainant. In so far as the extension of the Transcontinental tunnel is concerned, this injunction should be reversed, or so modified as to permit the plaintiff in error to mine and operate through said tunnel all that portion of the vein, lode, or ledge apexing inside of the vertical planes referred to in the answer.

We must go to the description of the premises contained in the grant to ascertain what passes by the patent, as this can in no way be enlarged or curtailed by the action of the Land Department in the conveyance of the premises granted.

Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Heath v. Wallace*, 138 U. S. 584, 34 L. ed. 1068, 11 Sup. Ct. Rep. 380; *Francœur v. Newhouse*, 40 Fed. 618.

NOTE.—As to right to follow vein or lode on its dip beyond the surface lines of the location, see, in this series, *Parrot Silver & Copper Co. v. Heinze*, 53 L. R. A. 491, and *note*; also *Atax Gold Min. Co. v. Hilkey*, 62 L. R. A. 555, 64 L. R. A.

If there was any ambiguity as to what was intended to be granted, the eminent propriety of leaving this barren underground region common, instead of exclusive, property, is patent to anyone having a fair conception of practical and economical mining.

The tunnel of defendant is being constructed for development purposes, and the right to extend it upon the unappropriated public domain is conceded by § 2323, 2 Rev. Stat. (U. S. Comp. Stat. 1901, p. 1426).

Montana v. Clark, 42 Fed. 626; *Leadville Min. Co. v. Fitzgerald*, 4 Morrison Min. Rep. 380, Fed. Cas. No. 8,158; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177.

It required an express grant in order to confer the right to hold and use mines.

New Orleans v. United States, 10 Pet. 662, 9 L. ed. 573; *United States v. Castillero*, 2 Black, 17, 17 L. ed. 360; 1 Bl. Com. 295; 1 Greenleaf's Cruise, Real Prop. 38.

By U. S. Rev. Stat. § 2322 (U. S. Comp. Stat. 1901, p. 1425), a grant is made to a locator of the exclusive right of possession and enjoyment of all the surface of the land within the lines of his location, and all veins, lodes, or ledges the tops or apexes of which are inside of such surface location, and confers upon him the right to follow such veins or lodes in their course downward laterally inside of the end lines of the location, even though they may so far depart from a perpendicular as to enter beneath the surface location of another.

The issuance of the patent to defendant mining company in this case is conclusive evidence of the grant contained in the section of the statute referred to, and is conclusive evidence that the patentee, or his grantors, had, in all respects, complied with the law in making the location and securing the exclusive right to the possession and enjoyment of the surface and veins, lodes or ledges, included within the lines of its location, but of no others. It is not claimed or pretended that the projection of the tunnel has, or will, interfere with the surface, or injure any vein, lode, or ledge having its top or apex in complainant's claim.

Montana Min. Co. v. St. Louis Min. & Mill. Co. 42 C. C. A. 415, 102 Fed. 430; *Freeman, Cotenancy & Partition*, § 435; *Canfield v. Ford*, 28 Barb. 339, Affirming 10 How. Pr. 473.

Messrs. W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for appellee.

Gilbert, Circuit Judge, delivered the opinion of the court:

The St. Louis Mining & Milling Company

is the owner of the St. Louis lode mining claim, and the Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour lode mining claim, which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward, and into the Nine Hour claim, for the purpose of reaching and mining a lode which had its apex in the St. Louis claim, and which they had the right to pursue on its downward course, as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode, or ledge. At the suit of the owner of the Nine Hour claim, the circuit court enjoined the appellants from proceeding further with said tunnel. From that decree the present appeal is taken.

The case involves the interesting question whether the owner of a mining claim, who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim, is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes, or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that, since the mining law confers the general right to explore and purchase the mineral lands of the United States, the appellants, in this instance, have the right to explore within the Nine Hour claim, and thereby to reach their own property, so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute (U. S. Rev. Stat. § 2322 [U. S. Comp Stat. 190], p. 1425), and the patents thereupon issued, confer upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface lo-

cations;" and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim, except the veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. This is their right, and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (§ 2319 [U. S. Comp. Stat. 1901, p. 1424]) declares "the lands" in which valuable mineral deposits are found to be open to occupation and purchase; and § 2325 (U. S. Comp. Stat. 1901, p. 1429) provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the "veins, lodes, and ledges" is for the purpose of defining what is granted in addition to the land; namely, the right to pursue such veins, lodes, and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 53 L. R. A. 491, 87 Am. St. Rep. 386, 64 Pac. 326, the

supreme court of Montana held, in substance, that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said: "Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant." Of similar import is *State ex rel. Anaconda Cop-*

per Min. Co. v. District Court, 25 Mont. 504, 65 Pac. 1020.

In *Doe v. Waterloo Min. Co.* 54 Fed. 935, Judge Ross said: "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law."

In *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540, Judge Hawley said: "Hands off of any and every thing within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

We find no error in the decree of the Circuit Court. *The decree is affirmed.*

Affirmed by Supreme Court of United States May 2, 1904.

COLORADO SUPREME COURT.

CLIPPER MINING COMPANY, *Piff. in Err.*,

v.

ELI MINING & LAND COMPANY *et al.*

(29 Colo. 377.)

1. The rejection by the Land Department of an application for a patent for a placer mining claim for the reason that there was not such a showing by the applicant as entitled him to a patent is not conclusive against the validity of the claim in a subsequent proceeding before the courts to establish it against subsequent locations of lode claims.

2. An entry upon a placer location to prospect for unknown lodes is a trespass, and no valid title to a lode claim can be initiated thereby, unless the placer owner has abandoned his claim, waives the trespass, or is estopped to complain of it.

On Rehearing.

3. Leave to file a supplemental record in support of a petition for rehearing will not be granted to bring up proceedings of the trial court which occurred subsequent to the final judgment, if the matters were all within the knowledge of the plaintiff in error before the original bill of exceptions was approved and signed.

(*Steele, J., dissents.*)

(April 8, 1902.)

ERROR to the District Court for Lake County to review a judgment in favor of plaintiff in an action brought to establish title to a mining location. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas, Bryant, & Lee, with *Messrs. Hall & Babbitt*, for plaintiff in error.

Messrs. John M. Maxwell, John A. Ewing, Charles Cavender, and Walter W. Davis for defendants in error.

Campbell, Ch. J., delivered the opinion of the court:

The plaintiff in error (defendant below) owns four lode mining claims, situate in Lake county, called the "Capital," "Clipper," "Congress," and "Castle" lodes, and the defendants in error (plaintiffs below) own the "Searl" placer mining claim, within the boundaries of which these lode claims are located. The present controversy relates to the territory thus in conflict. The placer was the prior location, and was made in the year 1877. The plaintiff in error having made application in the Land Office for patent of its lode mines, the defendants in error filed therein an adverse claim, and within the statutory time brought this action in the district court of Lake county to enforce it. The plaintiffs rely upon a prior location of the conflicting territory as part of their placer claim. The complaint is in the ordinary form in actions of this character. After a general denial of the material allegations of the complaint, the answer sets up four separate defenses, all of which grow out of the following facts, which, in varying language, are set up in each defense: On the 12th of December, 1877, A. D. Searl and others located the Searl placer, and on the

NOTE.—As to lodes or veins within placer claims, see also, in this series, *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 50 L. R. A. 289, and *note*.

5th of July, 1878, applied for a patent therefor. Numerous protests were made against it, and on the 10th of November, 1882, an amended application was filed, against which protests were likewise made, upon the ground that the same was not placer ground, and was only valuable for lode claims, or town site purposes. The Land Department ordered a special investigation to ascertain the character of the ground and the good faith of the applicant. The special agent declared that the land was not placer ground, and on the strength of his report a hearing was ordered before the local land office of the district, the result of which was a dismissal of the application; for it was not then made to appear, as a present fact, that the ground was distinctively valuable for mining purposes, or that the applicant had made the improvements required by statute. This ruling was affirmed by the commissioner of the Land Office, and in turn by the Secretary of the Interior. Twelve days after the latter's decision, the grantors of defendant company entered upon the ground within the boundaries of the placer location, and thereafter located thereon the lode claims in question. The special defenses sought to be interposed were substantially: First, that plaintiff was not entitled to recover, because, upon the previous application for a patent of the Searl placer, there was a decision of the Land Department that the ground included within its boundaries was not placer ground, and the attempted location was for that reason void, and such decision was *res judicata* of the present controversy; second, assuming the existence of a prior valid placer location, nevertheless defendant, prior to the time patent was asked, went upon the placer surface area, and made locations of lode claims, which were then and theretofore known to exist, and, therefore, in law, the same were a part of the unappropriated public domain, and subject to location as lode claims. There was a replication by plaintiffs, denying the new and special matters of defense, and upon the issues thus joined, in a trial to the court without a jury, the findings were that the Searl placer was duly located as required by law in the year 1877, and thereafter the annual labor had been performed as the statute provides, and that defendant's grantors had discovered the lode claims within the boundaries, and subsequent to the location, of the Searl placer. Based upon these findings of fact, the conclusion of law was drawn that a prior location of a placer carries with it the exclusive right of possession of the surface included within the exterior boundaries, and a prospector might not enter thereupon and prospect for, or discover, a lode claim before application for the placer patent is made,

unless by abandonment the placer claimant has lost his rights; and, there being no evidence of such loss, it was accordingly held that the acts of defendant in entering upon the valid subsisting placer location did not initiate any right whatever. Judgment was therefore entered in favor of the owner of the placer location, and to reverse it this writ of error is prosecuted.

1. It is insisted by plaintiff in error that the Land Department, with which is intrusted the determination of such questions, has declared this placer location void, because not on placer ground, and that such determination is decisive of the present controversy. It is unquestionably the law that findings of fact by the Land Department as to matters within its jurisdiction are conclusive upon the courts whenever a collateral attack is made upon them. They may, in a proper proceeding, be impeached for fraud or mistake, but not in actions like the present. This rule, however, has no application to the facts in this record. The application for a patent to the placer was rejected, but there was no decision that the ground in question was not placer ground, but merely that, as a then present fact, there was not such a showing by the applicant as entitled him to a patent. Amended applications for a patent of a mining claim are permissible under the practice in the Land Department. There was no attempt finally or definitely to determine that the ground was not placer ground, or that the location was void; and to that effect are its own decisions, as will be seen by reference to the official reports. 7 Copp. Landowner, 36; *Re Searl Placer*, 11 Land Dec. 441; *Re Clipper Min. Co.* 22 Land Dec. 527. In the last case, the Secretary of the Interior, in speaking of the contention made in this very case, says: "The judgment of the Department in the *Searl Placer Case* went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." See also *Clipper Min. Co. v. Searl*, 29 Land Dec. 137. Indeed, the question as to the character of the land sought to be appropriated by claimants under the public land laws is reserved,—unless under the law referred to some court,—and may be passed upon by the Department until patent issues. *Barden v. Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030. This court in *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948, held that a decision of the Land Department like the one in question is equivalent to nothing more than a judgment as of nonsuit, and not conclusive upon the Department itself, or upon the parties. An additional reason why

the plea of *res judicata* cannot be sustained is that in the former proceeding the parties are not the same as those in the present action.

2. The principal question involved is much more important and difficult of solution. In discussing this feature of the case, it must be considered as established that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. We make this statement, as counsel for plaintiff in error themselves admit that such issue was present in the case, and was determined by the trial court upon conflicting evidence, and, as bearing upon this point, they make no question but that the same was rightly determined. The question, therefore, is presented whether, and, if so, in what circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter and thus made of a vein or lode therein. In *Aurora Lode v. Bulger Hill & N. Gulch Placer*, 23 Land Dec. 95, it was held by the Secretary of the Interior that the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with, and incident to, the use and operation of the same as a placer mining claim, but that such location does not operate to give the right of possession to known veins or lodes within its limits, or preclude the right of discovery and location thereof by others. It was also held that a judicial award of the right of possession to an adverse placer claimant, as against a lode applicant, does not preclude subsequent departmental inquiry upon the allegation of the lode claimant that the placer claim embraced known lodes or veins, where it appears that such question was not at issue before the court for determination by its judgment. This case was referred to with approval by this court in *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245, 56 Pac. 176. In the latter case the facts were that lode claims were known to exist, and were also duly located within the limits of a previously located placer claim before patent of the latter was applied for. A patent for the placer having been issued in such circumstances, it was held that, inasmuch as the applicant did not at the time mention the lode claims, or claim them by virtue of lode locations, they were excluded from the grant of his patent; and, as it further appeared that the locators of these lode claims went upon the placer ground, and made locations upon veins

known to exist before the application for patent was made, the conclusion was that the patentee of the placer could not recover possession of the lode claims, for they were properly located. The court said that in making them no right of the placer owner was invaded, and that their validity was not affected by the fact that they were made within the surface boundaries of a prior placer location. For the purposes of the case, it must have been assumed as true that when the entry by the locators of the lode claims was made the lodes themselves were known to exist. If the facts of the case at bar were the same as those in the *Mt. Rosa Case*, we would, under its doctrine, be obliged to reverse the judgment; but they are essentially different, in at least one particular, to which we shall hereafter refer. But, before passing to that, we notice the contention of defendants in error that in *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, 59 Pac. 607, 618, we have virtually held that one who has made a valid location of a placer claim has for all purposes exclusive right of possession thereto, so long as he complies with the law, and that the territory embraced therein is not subject to adverse location by a claimant of the same ground, under a subsequent lode location, though the lode is known to exist before application for patent is made. Our decision in this case was not intended to qualify the doctrine established in the *Mt. Rosa Case*. In the *Calhoun Case*, where a lode location was involved, we were not considering, as was true in the *Mt. Rosa Case*, the kind or extent of possession which follows a valid location of a placer claim. What was said in the *Calhoun Case* was true as applied to a lode claim, for the right of possession of the lode claim includes the entire surface area. In the *Mt. Rosa Case*, however, wherein were defined the rights of a placer claimant, we said that a placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give the right of possession to known veins within its limits. It is obvious that the facts of the case in hand do not bring it within the principles laid down in the *Mt. Rosa Case*. If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the *Mt. Rosa Case* the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the

right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins, and the entry for prospecting was a trespass, and no title could thereby be initiated. As the evidence was not brought up in the bill of exceptions, we must assume, in support of the judgment below, that the proof was against the defendant upon this point. Indeed, the specific finding of the trial court that defendant's grantors went upon plaintiffs' prior existing placer location and discovered and located lodes therein involves the finding that the lodes were unknown at the time of the entry; for if they were known, they were not discovered by the prospectors, but were already subject to location by them, and if then unknown, the placer owner was entitled to their exclusive possession, and entry upon them by others constituted a trespass, and could not initiate title. Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for the purpose of locating a lode, it went too far; yet, as general language in an opinion must be taken in connection with the facts of the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown lodes or veins; and, to uphold the judgment, we must presume that the evidence before the trial court showed that the veins or lodes upon which defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting. The mere fact, then, that the judgment may have been based upon a legal proposition—too broadly stated as a universal rule—that in no case may a location of a lode claim be made within the boundaries of a prior valid placer location,—a legal conclusion which, as we have said, is only partially right,—is not, under the facts of this case, sufficient to work a reversal; for certainly a lode location may not thus be made except of a known lode. Though a prospector may believe that within the limits of a placer location a lode may exist, and by development work be disclosed, he has not the right to enter thereupon for the purpose

of exploiting the ground to confirm his belief.

The judgment is affirmed.

A petition for rehearing having been filed, the following response was handed down March 3, 1902:

1. After the petition of plaintiff in error for a rehearing was presented, it asked leave to file a supplemental record to bring up proceedings in the district court which occurred subsequent to final judgment, in which, for the first time, alleged errors of that tribunal are called to our attention. These proceedings were attacked by motions below, upon which the rulings were against plaintiff in error. The objections and exceptions thereto were not preserved by a bill, as required by our practice, and for this reason alone they might now be disregarded. But, in addition to this, some of the matters embodied in the supplemental transcript were within the knowledge of plaintiff in error at and prior to the trial below, and all of them before the original bill of exceptions was approved and signed by the trial judge, and long before the original transcript was lodged in this court. They were, therefore, as well known to plaintiff in error before the cause was argued and submitted in this court, and before the original opinion was handed down, as they were when this application was made. It is clear that the request should be denied. Our practice precludes a party, upon a petition for a rehearing, to raise new questions. *Lamar Canal Co. v. Amity Land & Irrig. Co.* 26 Colo. 370, 77 Am. St. Rep. 261, 58 Pac. 600; *Orman v. Ryan Bros.* 25 Colo. 383, 55 Pac. 168; *Water Supply & Storage Co. v. Larimer & W. Irrig. Co.* 24 Colo. 322, 46 L. R. A. 322, 51 Pac. 496.

2. The petition for a rehearing is based upon three propositions: (a) The court erred in holding that the Secretary of the Interior, in the matter of the protest against Searl's application for a patent, did not decide that the ground was not placer ground, and that said judgment of the Land Department was not conclusive; (b) there was error in holding that, as matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and that there was further error in holding that a lode location cannot be made within the limits of an existing placer location except upon a known lode or vein; (c) the court misconstrued the effect of the decisions in the cases of *Aurora Lode v. Bulger Hill & N. Gulch Placer*, 23 Land Dec. 95; and *Mt. Rosa Min. Mill. & Land Co. v. Palmer*, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245, 58 Pac. 176.

(a) We can add nothing under this head

to what is contained in the foregoing opinion. No authority is cited, and no argument now made, which were not before us upon the original hearing. The authorities already referred to clearly refute the position of plaintiff in error. The decision of the Land Department in the case at bar was precisely the same in principle as that considered in the case of *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; and plaintiff in error concedes that, if this court still adheres to the doctrine of that case, as it does, the present contention falls. In this connection we may add that, if the position of plaintiff in error is sound, it has no standing in this court; for the first decision ever made by the Land Department with respect to the mineral character of the Searl placer was in favor of the placer claimant in a contest between him and a town-site claimant. See 7 Copp, Landowner, 36. Such being the first decision of the Land Department, if, as plaintiff in error contends, it is *res judicata* as to the mineral character of the placer claim, the controversy is ended, and plaintiff in error cannot reopen that question.

(b) Where in the original opinion it is intimated that plaintiff in error admits that the trial court rightly determined that the Searl placer was an existing valid location at the time of the attempted location of the lode claims, it was not our intention to say that the admission was voluntary, but only that the finding having been made upon conflicting evidence, under the established rule in this jurisdiction the plaintiff in error, as well as the court, for the purposes of this review, is concluded by it. The transcript does not purport to contain all of the evidence. The abstract recites that certain evidence was introduced in behalf of the plaintiffs tending to establish their cause of action, and certain other testimony in behalf of the defendant to establish its defenses. In such circumstances, we cannot investigate to ascertain on which side the preponderance of the evidence is. Indeed, there has never been any serious contention that the findings of fact of the trial court were not sustained by the evidence. In the case of *Fanny Rawlings Min. Co. v. Tribe*, 29 Colo. 302, 68 Pac. 284, it was said: "Appellate courts must assume, in the absence of specific and unambiguous findings of fact to the contrary, that the lower court intended to find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered." Let this rule be applied to the case at bar. The defendant alleged, and the plaintiffs denied, that the lode claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had

not the right to go upon the territory included within the placer location for the purpose of prospecting and locating lodes. Possibly we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims,—the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the Secretary of the Interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location. It may be true, as counsel for plaintiff in error says, that a belief existed in Leadville that this territory was underlaid with mineral; but, so far as we are able to determine, there does not seem to have been any knowledge of that fact, so far as the territory in controversy is concerned, until after the entry by defendant's grantors. At all events, the application for a placer patent was made eleven or twelve years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Sullivan v. Iron Silver Min. Co.* 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555. And, in order to uphold the judgment, we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon the placer claim to prospect until years after its owners had applied for a patent. And, for aught that appears to the contrary,—which is the contention of defendants in error in argument,—the lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.

(c) Counsel insists that we have misconstrued the decisions in the cases of the Aurora Lode and the Mt. Rosa Company, upon which we commented in the former opinion. We have given attentive consideration to their argument in that behalf, and, after carefully rereading the opinions, are satisfied that we have not misconceived their effect. In the syllabus of the *Aurora Case* it is said that the location of a mining claim "does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others." This language

seems to be taken substantially from what is said in the opinion of the Secretary of the Interior at page 101 of the official report. The statement, removed from its proper setting, may be broad enough to include unknown, as well as known, veins or lodes; but, considered, as it should be, in connection with the context, it is clear that the Secretary intended it to apply only to known lodes, for he expressly says, in speaking of the general rule, if the veins or lodes were "not known to exist at that date [i. e., when patent for placer claim is applied for], the placer patent will carry the title to them." This can mean nothing else than that, if lodes or veins are not known to exist within the limits of a placer location at the time when patent for the latter is applied for, they belong to the placer claimant, and one may not thereafter make an entry upon the placer claim for the purpose of discovering and locating them. But if the decision of the Secretary of the Interior in this case can, by any canons of construction, be considered authority for the contention of plaintiff in error here, that a prospector may, without restriction, within the limits of a prior valid placer claim, prospect for, and thereafter lawfully locate, lodes not known to exist at the time of the application for a placer patent, its binding effect would seem to be overcome by the decision of the Supreme Court of the United States in *Bennett v. Harkrader*, 158 U. S. 441, 39 L. ed. 1046, 15 Sup. Ct. Rep. 863, and in many other decisions of that and other courts. The learned counsel for plaintiff in error were permitted, *amici curiæ*, to file a brief in the *Mt. Rosa Case*, and we then had the benefit of their learning and research, and the record in the case at bar was before us when that opinion was prepared by Mr. Justice Goddard. It was with full knowledge of the issues herein, and as particularly applicable to the argument of this plaintiff in error made in that case, which is the same as it is here, that the following language found on page 61, 26 Colo. page 296, 50 L. R. A., page 250, 77 Am. St. Rep., and page 178, 56 Pac., was used: "While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent, and, appellant not having taken the necessary steps to obtain them, they were open to location by others at the time they were located by the grantors of appellee. In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact 64 L. R. A.

that they were made within the surface boundaries of a prior placer location." We then had in mind, as we do now, the distinction between the facts of that case and the case at bar. There it was unquestioned that the lode claims were known to exist within the limits of the placer location before an application for patent for the latter was made. In the case at bar, as we have seen, the findings of fact of the trial court, which upon this review are conclusive upon us, are that the lode claims were not known to exist until long after the application for the placer patent was filed. The distinction is vital, and the rule in the two cases is different. In *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, the court, in making answer to questions certified to it by the United States circuit court of appeals of the eighth circuit, said that "the lines of a junior-lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location." And this answer, plaintiff in error now contends, is authority for its contention to which we have just referred. With this we cannot agree. Mr. Justice Brewer, who wrote the opinion in that case, expressly recognizes the fact that no rights can be initiated as the result of a trespass, and on page 79, 171 U. S., page 82, 43 L. ed., and page 904, 18 Sup. Ct. Rep., says that the form in which the question is put excludes any impairment or disturbance of the substantial rights of the prior locator; and he quotes with approval the statement from 1 Lindley, Mines, § 363, that "a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent." While the learned judge was speaking of lode claims, the principle is just as applicable to a placer claim, to the extent of the surface rights which belong to it. So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within its limits for the purpose of prospecting for, and with the hope of discovering and locating, them.

The application to file a supplemental record and the petition for a rehearing, are each denied.

Steele, J., dissents.

Affirmed by Supreme Court of United States, May 2, 1904.

ILLINOIS SUPREME COURT.

DEACONESS HOME & HOSPITAL, *Appt.*,
v.

Amelia BONTJES.

(207 Ill. 553.)

1. A decree enjoining the operation of a hospital in a building during the continuance of its relative proximity to complainant's residence, and of the present internal and external construction of the building, sufficiently corresponds with a prayer that defendant be enjoined from further operating the hospital.
2. Equity will not wait for the determination of the fact of nuisance in an action at law before enjoining the operation of a hospital in close proximity to a private residence, where the evidence clearly shows that it not only destroys the peace, quiet, and comfort of those living in the residence, but seriously and injuriously affects their health, and occasions irreparable injury.
3. A hospital will not be permitted to be conducted in such proximity to a private residence that the sights, sounds, and smells which are a necessary part of its operation become an intolerable nuisance to those dwelling in the residence.
4. That the persons responsible for the management of a hospital were not aware that it was being conducted so as to be a nuisance to adjoining property owners is no objection to the granting of an injunction against its operation in such manner.

(February 17, 1904.)

A PPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Peoria County enjoining the operation of a hospital. *Affirmed.*

Statement by Scott, J.:

Mrs. Amelia Bontjes, a widow, bought a half lot, 50 feet wide and 323 feet deep, upon a bluff in a residence district in the city of Peoria, at a cost of over \$5,000, and in 1894 built thereon a dwelling house, which she has ever since occupied as her home. She also built a barn. She expended about \$13,000 in improvements. Her family consists of herself, her daughter, her daughter's husband, and their little child. When she bought this tract and built her house thereon, the lot next east, 100 feet wide, had upon it a brick house, designed for and occupied by a private family. Its main

rooms and most of its windows faced west. Mrs. Bontjes built her house with the rooms and windows mainly on the east side. Thus the living apartments and most of the windows of the two houses face each other. There is a space of 30 or 35 feet between the two houses, 2 or 3 feet of which is owned by Mrs. Bontjes and the rest is part of the lot on which the brick house stands. Next to the brick house is a walk by which to pass between the front and rear of those premises, and between that walk and Mrs. Bontjes's lot line is a driveway for teams and carriages, used in connection with the brick house, and the only means of access to the brick house for conveyances. The front of each lot is occupied by a terraced slope to the street, which is nearly 100 feet below. In October, 1898, a corporation was organized under the laws of this state, named the "Deaconess Home & Hospital of the Central Illinois Conference," having its office and principal place of business at Peoria. Its purpose was declared to be "to establish and maintain a Deaconess home and hospital in co-operation with the Methodist Episcopal Deaconess Society," and "to provide for and carry on all the varied religious, educational, humane, and philanthropic work which may properly come within the province of such an organization, in accordance with the discipline of the Methodist Episcopal Church of the United States." In November, 1898, the society purchased the brick residence and the lot on which it stood for \$12,000, and established there a Deaconess home. In the spring of 1900 it made some changes in the interior of the building, and on May 24, 1900, it opened there a hospital for the care and treatment of the sick and injured, which it has ever since maintained. On November 1, 1900, Mrs. Bontjes filed a bill in the court below to enjoin the Deaconess Home from further carrying on and operating said home and hospital. The facts which she claimed entitled her to that relief are set out at length in the bill. The defendant answered, admitting some allegations and denying others. The cause was referred to a master to take and report proofs, with his conclusions of law and fact. The proofs were taken from January to May, 1901. The master's report was in favor of complainant. Defendant filed objections thereto, which the master overruled. The report was filed in court, and defendant filed exceptions thereto. The court did not act directly upon these exceptions, but entered a decree finding the facts in detail, ending with the conclusion that defendant's hospital is a private nui-

NOTE.—As to right to recover damages for erection of smallpox hospital near private property, see, in this series, *Frazer v. Chicago*, 51 L. R. A. 308.

For injunction against maintenance of pest house, see *Baltimore v. Fairfield Improv. Co.* 40 L. R. A. 494.
64 L. R. A.

sance, and ought to be abated; that the equities are with the complainant, and she has no adequate remedy at law. It was decreed that defendant be permanently restrained from carrying on or operating a hospital in the building on defendant's said premises "during the continuance of the relative proximity of the complainant's said residence and the building of defendant heretofore used on its said lot as a hospital, and of the present internal and external construction of defendant's said building." This is an appeal by defendant from said decree.

From the time the hospital was opened till the testimony was closed the hospital had been run at substantially its full capacity. During the first ten months it had 150 to 160 patients. The barn back of the brick house was made an annex to the hospital to increase its capacity. From complainant's living rooms, up stairs and down, the operations of the hospital were often visible day and night. What was said in the operating room during an operation in summer time, when the windows were necessarily open, was often heard in the bedrooms in complainant's house. The inmates of complainant's house, looking from its rooms, saw patients in the hospital entirely nude and others partially disrobed while surgical and other operations were being performed upon them. They saw surgical instruments, naked human limbs held aloft, and a fountain syringe used upon patients. They saw the bedding changed under patients too ill to be removed from the bed. They heard moans and groans, and patients crying and vomiting. When surgical operations took place at night, they were performed under a bunch of six electric lights, which made complainant's rooms opposite light enough to read by, unless the reflection was excluded by keeping the shades down, which was not practicable in warm weather, when ventilation made it necessary to keep complainant's windows open. Soiled and bloody bandages and other unsightly articles from the sickroom were deposited in a receptacle in the back yard, and afterwards taken out by a scavenger in such a way as to make the sight offensive. Whenever a patient died or recovered, the mattress, quilts, and sheets and the rubber cloth used on the patient's bed were ventilated in the back yard near complainant's yard, and in full view. As defendant's barn or annex was only 50 feet from the hospital proper, the space for such ventilation was limited. This airing of bedding was of daily occurrence. The odor of iodoform and other drugs from the hospital pervaded complainant's house, passing through the

open windows in the summer time and through the cold-air duct in the winter; this effect being afterwards obviated for the winter by taking in the cold air for the furnace from a different side of the house. Ambulances conveying sick patients or persons injured in accidents came in over the driveway at all hours of the day and night, passing close to complainant's living rooms and bedrooms. Physicians were daily driving in over that driveway, hitching their horses there, and frequently driving away late at night or in the early hours of the morning, after attending patients and performing surgical operations. If it was warm weather, complainant's windows were necessarily open, and also the hospital windows, and the sounds connected with the receipt and handling of persons seriously hurt or very ill, both outside and also inside the hospital, would very often be heard in complainant's house. From time to time coffins were brought to the hospital, and afterwards removed with dead bodies in them. This was generally done at night, in which case complainant and her family were usually awakened by the noises and aware of the cause. It has, however been done several times during the mealtime, and the ambulance would be but a few feet from complainant's dining room. Sometimes the dead patient was not removed in a coffin, but on a litter, the form showing through a cloth laid over the body. Patients who had sufficiently recovered to take exercise were caused to walk back and forth between the houses, attended and supported by a nurse. In such cases sometimes the patient was wrapped in a blanket or the head was bandaged. In very warm weather patients were brought out and placed on the front porch or in the front yard, and placed in easy chairs and hammocks. The nurses fanned the patients, and administered medicines to them, and took their temperature, in the front yard. Women about to be confined, and who had come to the hospital for confinement, sat upon the front porch in hot weather, clad in loose garments. These uses by defendant of its front yard and porch precluded complainant and her family from using her adjoining front yard and porch, and especially were they debarred from entertaining their guests and callers upon her front yard and porch. We have not stated all the offensive details given in complainant's proof, but only an outline thereof. Defendant's proof did not overcome the case thus made. Two persons who have at different times acted as superintendent of the hospital testified they were unable to see how some of those things could have occurred, and that some others

must have arisen from disobedience of rules by attendants, and officers of defendant expressed their desire to do what they reasonably could to avoid giving offense, but no substantial attempt was made to deny the main specific facts detailed in complainant's proof. The events and incidents we have referred to greatly disturbed the comfort and nerves and sleep of the inmates of complainant's home, and she and her family were greatly annoyed and distressed in mind. Complainant was deprived of the ordinary use and enjoyment of her property. In the main these sights and sounds and smells were not abnormal, but were the usual and necessary accompaniments of a busy hospital, conducted with a view to the proper treatment of persons who are in great pain and distress.

The foregoing statement of the facts of this case appears in the opinion of the appellate court herein, and such statement has been adopted by us. It further appears that typhoid fever and erysipelas were treated at this hospital, and the medical evidence was to the effect that these diseases were contagious, and might be contracted in the Bontjes residence when the windows of the hospital were open and the wind was blowing from that direction. It further appears that both appellee and her daughter were made sick and nervous by the sights, sounds, odors, and influences to which they were subjected by this institution; that neither was able to regain her health at home, but both were obliged to go elsewhere for several weeks to recover. The appellate court affirmed the decree rendered on the circuit, and the case comes to this court by a further appeal.

Messrs. Sheen & Miller and Winslow Evans, for appellant:

Courts of equity leave the question of nuisances and their damages to courts of law, except where the injury is irreparable or permanent, and results from a wrongful act.

Wahle v. Reinbach, 76 Ill. 322; *Barrett v. Mt. Greenwood Cemetery Asso.* 159 Ill. 391, 31 L. R. A. 109, 50 Am. St. Rep. 168, 42 N. E. 891.

Where not a nuisance *per se* the nuisance must be admitted, or irreparable injury alleged and clearly proved.

Oswald v. Wolf, 129 Ill. 200, 21 N. E. 839.

The injury complained of must be permanent or continuous, and such as cannot be prevented except by injunction.

Nelson v. Milligan, 151 Ill. 467, 38 N. E. 239.

The use of property, to be a nuisance, must 64 L. R. A.

be unwarrantable, unreasonable, or unlawful, and must result in injury to another.

Laflin & R. Powder Co. v. Tearney, 131 Ill. 326, 7 L. R. A. 262, 19 Am. St. Rep. 34, 23 N. E. 389.

A person cannot obtain relief in court against an injury that might be prevented by that person's own effort.

Hartford Deposit Co. v. Calkins, 186 Ill. 104, 57 N. E. 863; *Kramer v. Northern Hotel Co.* 185 Ill. 612, 57 N. E. 847.

A jury trial is generally allowed in cases of alleged nuisances where they are not nuisances *per se*.

Dunning v. Aurora, 40 Ill. 481.

Most of the matters complained of as a nuisance are not subjects of judicial cognizance.

N. K. Fairbank Co. v. Nicolai, 167 Ill. 248, 47 N. E. 360.

The relief prayed and that granted do not correspond, and must do so to be valid.

Dorn v. Geuder, 171 Ill. 362, 49 N. E. 492.

Relief by injunction will be denied where it is doubtful if the injury complained of will be permanent.

Robb v. La Grange, 158 Ill. 21, 42 N. E. 77.

Special injury is the gist of an action concerning a nuisance, and it must be alleged and clearly proved.

McDonald v. English, 85 Ill. 236.

Special damages do not relate to degree, but to a different kind from those sustained by the public.

Chicago v. Union Bldg. Asso. 102 Ill. 380, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395.

Failing to speak when fairness and good conscience require it will estop, when to do so would operate unjustly.

Lloyd v. Lee, 45 Ill. 280; *Nichols v. Murphy*, 36 Ill. App. 205.

Mr. James A. Cameron for appellee.

Scott, J., delivered the opinion of the court:

The first assignment of error to which our attention is called is that the relief granted does not correspond with the relief prayed in the bill. The prayer is that the defendant be "restrained and enjoined from further operating and carrying on said home and hospital." By the decree it is permanently restrained from carrying on and operating a hospital in the building which it now occupies "during the continuance of the relative proximity of the complainant's said residence and the building of the defendant heretofore used . . . as a hospital, and of the present internal and

external construction of the defendant's said building." The relief granted is not as extensive as that prayed, but is not inconsistent therewith, and that granted is with in the prayer of the bill, and the decree is therefore sustained by the bill.

It is then urged that, as the hospital is not a nuisance *per se*, its operation cannot be enjoined until there has first been a determination by the verdict of a jury in an action at law that it is a nuisance. From the evidence in this case it is clear and certain that the hospital conducted by appellant is a private nuisance. It not only destroys the peace, quiet, and comfort of those living in the residence of appellee, but likewise seriously and injuriously affects their health, and occasions irreparable injury, within the meaning of the law. Under these circumstances equity will interfere by injunction, without waiting for a determination of the question of the existence of the nuisance in an action at law. *Wahle v. Reinbach*, 76 Ill. 322; *Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496. If there is such contrariety of evidence that there remains a substantial doubt whether a nuisance exists, the question should first be determined in a suit at law. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. In this case, however, there is no evidence which tends to show that a nuisance does not exist. The most that can be said for the evidence offered by appellant is that it indicates that the wrong is not of so serious a character as complainant charges, and that it may be lessened somewhat by certain precautions which appellant is willing to use hereafter. The proposed measures would not result in an entire removal of the nuisance. It is said that a screen may be erected between the two properties, and that the windows of the hospital may be kept closed and the curtains drawn on the side next the property of appellee. It is manifest that in the summer time the windows must be opened and the curtains drawn aside in both buildings for ventilation, and it is equally apparent that the screen would not prevent the cries of the suffering, the moans of the dying, and other offensive noises being heard in the home of the appellee; nor would such an obstruction entirely prevent the transmission of the smell of iodoform, ether, and other offensive substances; nor would the annoyance resulting from the frequent visits of the hearse and the ambulance to the hospital be materially lessened by the proposed precautions. The work in which appellant

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is engaged is philanthropy of the highest order, but the law will not permit it to be conducted in such a manner that it becomes an intolerable nuisance to those who are in no wise responsible for its location and operation.

The statement is made that appellee had the power in her own hands, by mere request to those who were operating the hospital, to prevent the injury complained of; and it is insisted that she failed to speak when fairness and good conscience required her to make her objections known to the hospital authorities, and that she is therefore estopped to now seek the aid of a court of equity. Without stopping to consider at all this proposition of law, it is sufficient to say that the argument is based upon a misapprehension of the evidence. Prior to the establishment of the hospital, appellee objected to its location in the building in question. She made these objections known to persons who were raising money by subscription to set the hospital on its feet, and offered a donation if it was located elsewhere. From the testimony of Mr. Walter Wyatt, secretary of the board of trustees of appellant, it appears that complaint was made to him by Cameron, the attorney for appellee, prior to the beginning of this suit, of the manner in which the institution was conducted. Wyatt, in substance, invited this litigation by stating to the attorney that he saw no way out of the matter except to bring suit. Wyatt, however, reported the complaint to the trustees who took no action except to direct the superintendent to conduct the hospital in such a manner that there would be no complaint from anyone. This direction bore no practical fruit. The trustees testified that they did not know that the hospital was being conducted in a manner so offensive to those in the home of appellee; that, had they known of the condition of affairs, they would have minimized the evil as far as possible. This is no answer to the complaint. They were responsible for the management of the institution, and it was their duty to see that it was conducted in such a manner that the lawful rights of others were not infringed. From the evidence before us, this difficulty seems to come about from the fact that the grounds occupied by appellant are wholly inadequate in extent for the operation of a hospital of the character there conducted.

The judgment of the Appellate Court will be affirmed.

KENTUCKY COURT OF APPEALS.

CINCINNATI TOBACCO WAREHOUSE
COMPANY, *Appl.*,

v.

J. T. WEBSTER, Trustee, etc., of Leslie &
Whitaker, *et al.*

(.....Ky.....)

The sale by a receiver of the assets of an insolvent commission company will pass a claim for repayment of advances made to a produce buyer to enable him to procure produce to be shipped to the company for sale, together with a lien which had been expressly given by contract upon the property shipped to secure the advances.

(January 29, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Harrison County in favor of plaintiffs in an action brought to recover the proceeds of certain tobacco which had been sold under an order of the assignee of a produce buyer, and which were claimed by the successor of a commission merchant who had made advances upon it. *Reversed.*

The facts are stated in the opinion.
Mr. J. J. Blanton for appellant.

Barker, J., delivered the opinion of the court:

Leslie & Whitaker resided in Harrison county, Kentucky, and were engaged in the business of buying and selling tobacco for speculation. The Cincinnati Leaf Tobacco Warehouse Company was a Kentucky corporation, doing business in Cincinnati, Ohio. During the years 1898, 1899, and 1900 these parties had a contract between them by which the corporation advanced money to the firm from time to time, as they required it, which was invested in the purchase of tobacco, and then consigned to the corporation at its business place in Cincinnati for sale, with the express agreement that the corporation was to have a lien upon the tobacco so purchased, and the debt for advances, commissions, insurance, etc., should be paid out of the proceeds of the sales when made. Under this agreement the corporation, from August 31, 1899, to September 12, 1900, advanced Leslie & Whitaker the sum of \$5,080.23, and during the same period of time they purchased and consigned, under the contract, 83 hogsheads of tobacco, all but 13 of which had been

sold, and the proceeds applied to the extinguishment of the consignee's debt for advancements, at the time this controversy arose. Before the sale of the 13 hogsheads of tobacco above mentioned, and which are in controversy here, the Cincinnati Leaf Tobacco Warehouse Company became seriously involved financially, if not insolvent, and proper proceedings were had in the circuit court of Kenton county, by which it was placed in the hands of a receiver, and afterwards the receiver was authorized to and did sell at public auction *in solido* all of its assets, whether real, personal, or mixed, for the sum of \$1,500,000, the Cincinnati Tobacco Warehouse Company becoming the purchaser at the sum named. This sale was confirmed by the court, and the Cincinnati Tobacco Warehouse Company, which seems to have been organized for this express purpose, stepped into the shoes of the Cincinnati Leaf Tobacco Warehouse Company, taking up the business of the latter, and carrying it forward without commercial jar or jostle, as if no change had occurred. About this time, or shortly thereafter, Leslie & Whitaker became involved, and made a general assignment of all their property to W. T. Lafferty, of Harrison county, Kentucky, for the benefit of their creditors. The assignee, ascertaining that there were 13 hogsheads of tobacco belonging to his assignors, unsold, in the warehouse of the Cincinnati Tobacco Warehouse Company, ordered it sold. In accordance with this direction, the tobacco was sold, realizing the sum of \$950. Afterwards certain creditors of Leslie & Whitaker set on foot such proceedings in bankruptcy that the firm were adjudged to be bankrupt under the United States bankruptcy act, and their assets passed into the hands of appellee J. T. Webster, as trustee, for the benefit of their creditors. After qualifying, the trustee instituted this action to recover of appellant the proceeds of the sale of the 13 hogsheads of tobacco which were sold under the order of the assignee, as above stated. This sum, amounting to \$950, is the matter in controversy here. The question is one of law, there being no disputed questions of fact.

There is no dispute or question as to the regularity of the legal proceedings by which the Cincinnati Tobacco Warehouse Company purchased all of the assets of whatever kind of the Cincinnati Leaf Tobacco Warehouse Company; as to the amount or time of the advancements made by the Cincinnati Leaf Tobacco Warehouse Company to Leslie & Whitaker; nor as to the fact

NOTE.—For a case in this series holding that a factor's lien for commissions and expenditures is personal to him, and not transferable, see *Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co.* 22 L. R. A. 850.
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that the tobacco shipped under the contract realized a sum insufficient to pay the amount of the advancement by \$350. But it is contended by appellee that the Cincinnati Tobacco Warehouse Company did not acquire, by its purchase, the benefit of the contract existing between the Cincinnati Leaf Tobacco Warehouse Company and Leslie & Whitaker, or the lien which the latter had, under the express contract, on all the tobacco shipped for the payment of all the advancements made; that the lien of the Cincinnati Leaf Tobacco Warehouse Company was a personal one, which did not pass by operation of law under the sale, and that, therefore, the 13 hogsheads of tobacco remaining unsold after the transfer by the court are to be considered as a matter separate and apart from the old contract, and that out of the proceeds appellant was entitled only to collect and receive its commission, drayage, insurance, etc., and had no right to apply it to the extinguishment of the unpaid balance originally due the Cincinnati Leaf Tobacco Warehouse Company. On the contrary, appellant contends that, having purchased at the sale by the receiver of the Cincinnati Leaf Tobacco Warehouse Company all its assets, including the chose in action due from Leslie & Whitaker, consisting of the unpaid balance for the advancements made to them, it also acquired the lien under the contract, and with it the right to apply the proceeds of the sale of all the tobacco, including the 13 hogsheads, to extinguish the debt. If this can be done, there will still be a balance due appellant of \$350. Upon trial of the case in the court below the learned chancellor entered the following judgment: "It appears further from this record that the whole of the tobacco bought by Leslie & Whitaker was delivered by them to the Cincinnati Leaf Tobacco Warehouse Company prior to the appointment of a receiver, and prior to the sale by decree of court of its effects. There can therefore be no question but that the factor's lien of the Cincinnati Leaf Tobacco Warehouse Company was a complete lien, perfected by reducing the tobacco to possession. The only question in this case, then, is, Does the Cincinnati Tobacco Warehouse Company, by reason of its purchase at decretal sale of the demand of the Cincinnati Leaf Tobacco Warehouse Company against Leslie & Whitaker (they being no parties to that suit, and not obtaining their consent), succeed to the rights of the Cincinnati Leaf Tobacco Warehouse Company as against them or their general creditors, they having become bankrupt before a sale of the tobacco by the defendant (appellant)? Or, stating it more succinctly, does the purchase by defendant defeat or discharge the

lien? It seems from the authorities that a lien of this character 'is a purely personal privilege, and can only be set up by the person to whom it accrued, and that he cannot assign his claim, so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner.' The court holds that these transactions by which defendant (appellant) obtained the debt and the property destroyed the lien, and it is not available to the defendant in this action." It will be observed that the trial judge placed some stress upon the fact that the Cincinnati Tobacco Warehouse Company obtained its legal position with reference to the assets of the Cincinnati Leaf Tobacco Warehouse Company without the knowledge or consent of Leslie & Whitaker. If this be important, we think the record shows conclusively that Leslie & Whitaker recognized the Cincinnati Tobacco Warehouse Company as the successor of the Cincinnati Leaf Tobacco Warehouse Company, and as lawfully assuming and carrying out the latter's contract with them. Five of the hogsheads of tobacco in question were shipped to and received by the Cincinnati Tobacco Warehouse Company after it became the successor of the Cincinnati Leaf Tobacco Warehouse Company; and Leslie & Whitaker received from it, upon request, the sum of \$269 with which either to purchase tobacco or to pay for tobacco already purchased under the original contract. It seems to us that these facts, under all the circumstances of this case, would go very far towards establishing a ratification by Leslie & Whitaker of the transfer by the receiver of the insolvent corporation to appellant, if it were required to take that view in order to uphold appellant's lien in question; but we do not think this is necessary. It is true that the authorities hold that a common-law lien is a personal privilege, and not transferable by the assignment of the debt which it secures; but we think the court below erred in assuming that the lien of appellant is a common-law lien. Common-law liens arise by implication of law, and not by express contract. The lien here is an equitable one, growing out of the express contract between Leslie & Whitaker on the one part and the Cincinnati Leaf Tobacco Warehouse Company on the other, by which it was agreed that the latter should have a lien on the tobacco for all the advances made by it to the former, and which appellant claims passed to it by the assignment. Jones, in his work on Liens, very elaborately describes the difference between common-law and equitable

liens, and in § 63, in describing equitable lien, says: "Where in terms the parties agree that one making advances for the purchase of merchandise to be shipped to him shall have a lien upon the same, the lien arises upon the purchase of the merchandise before it is consigned to the creditor. The lien in such case attaches to the merchandise purchased and in the hands of the debtor at the time of his bankruptcy, and may be asserted against the debtor's assignee in bankruptcy. Judge Story said that the possession of the property by the debtor was not a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of his general creditors; and therefore the agreement to give a lien or equitable charge was binding upon the property in the hands of the assignee." In § 982, *Id.*, it is said: "A common-law lien is not a proper subject of sale or assignment, for it is neither property nor is it a debt, but a right to retain property as security for a debt." And in § 983, still speaking of common-law liens: "A lien is a purely personal privilege, and can only be set up by the person to whom it accrued. He cannot assign his claim, so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner." In § 991, however, the author says: "An equitable lien reserved by express agreement passes by an assignment of the debt it was created to secure. Such a lien does not depend upon possession, as does a common-law lien." The case of *Hauselt v. Harrison*, 105 U. S. 401, 28 L. ed. 1075, was in all respects similar in principle to the case at bar. There a merchant advanced money to a tanner with which to purchase hides to be manufactured into leather, under this agreement: "And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced [him] by the party of the second part, and that all the skins shall be insured for their full value in good companies only." The tanner, after receiving large advances, became insolvent, and in the contest between his assignee and the merchant as to the lien of the latter on certain hides and leathers the Supreme Court said: "It was decided in *Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740, that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties without a change of possession, even though void as against subsequent purchasers in good faith without notice and creditors levying execu-

tions or attachments; and, if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely. Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer [the tanner] had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauselt [the merchant], and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee fraudulently dealing with and misappropriating trust property, and Hauselt would be protected in his rights as owner of a beneficial interest in the property entitled to the enjoyment of the specific fruits of the agreement." In *Brooks v. Staton*, 79 Ky. 174, it is said by this court: "Manifestly, there is an equity in one who advances money on the agreement and faith that certain property shall be intrusted to him as a security which does not pertain to a general creditor, or to one who extends credit without reference to any particular fund or property as security. From the moment the advances are made there is an inchoate right in or to the property on the faith of which the advance was made, and this right becomes complete if the creditor with reasonable diligence pursues his right by reducing the property to possession before any other equity has intervened. Such contracts, when the money has been advanced, and before delivery of possession, are partly executed and partly executory. The delivery of possession completes the contract; and if, at the time the contract was entered into and the advances made, the parties acted in good faith, and there was no insolvency, and no design to prefer one creditor to another, the act of possession, when there are no intervening equities, relates back, and the contract is a unit from the time it was entered into and the advances made." This case was approved in a later case of *Cook v. Brannin*, 87 Ky. 101, 7 S. W. 877. In the case of *Stahl v. Lowe*, 19 Ky. L. Rep. 210, 38 S. W. 862, it was held that a transaction similar to the one involved in the case at bar created an equitable lien; and in the case of *Atchison v. Jones*, 8 Ky. L. Rep. 259, 1 S. W. 403, it was held: "A firm to which tobacco had been consigned for the purpose of securing advances made by them thereon, having made an assignment for the benefit of creditors, their assignee had the right to hold the tobacco for the purpose of securing the advances against the assignee of the con-

signor, who, subsequent to the consignment, had also made an assignment for the benefit of creditors." The Cyclopædia of Law & Procedure, volume 4, p. 69, title, *Assignments*, states the rule thus: "In the absence of any stipulation . . . in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as an incident to the chose, all securities held by the assignor as collateral to the claim, and all rights incidental thereto, and vests in the assignee the equitable title to such collateral securities and incidental rights. . . . As the right to the chose and its incidents pass to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same." In the case of *Summers v. Kilgus*, 14 Bush, 449, it was said: "The assignment of a debt carries with it a vendor's or mortgage lien, by which the debt is secured. This has been so often decided by this court as to render the citation of authority unnecessary."

There is a vast difference between the narrow, rigid, personal right to merely retain possession of personal property until payment, which is known as a common-law lien, and an equitable lien arising by express contract between the parties, and which the needs of commerce render absolutely necessary in order to facilitate modern dealing

between man and man. It requires no profound examination of the subject to realize how hopelessly crippled would be the industries and resources of the whole state if the farmer, the manufacturer, and the dealer could not obtain the aid of the capitalist in the advancement of their business: or that this aid very largely, if not wholly, depends on the ability of the borrower to make the lender secure by a lien on the specific product of the industry involved in the enterprise. The lien involved in this action is not the common-law lien of the factor for advancements, but an equitable lien, created by express contract. Sometimes these liens resemble each other very closely, and sometimes both statutory and equitable liens coincide, and are identical with, or declaratory of, common-law liens. When this happens, the latter are superseded by the former, for, although their forms and terms may resemble, the consequences which flow from their existence, as in the case at bar, are often divergent. Appellant, as assignee of the chose in action purchased at the receiver's sale, became invested thereby with the right to enforce the equitable lien which secured its payment to the Cincinnati Leaf Tobacco Warehouse Company.

Wherefore the judgment is reversed, with directions to dismiss the petition.

LOUISIANA SUPREME COURT.

George MUNTZ, *Appt.*,

v.

ALGIERS & GREYNA RAILWAY COMPANY *et al.*

(.....La.....)

- *1. A railroad corporation, by its very incorporation under the laws of the state, assumes as one of its primary obligations that it shall operate the road under such conditions as to properly secure the safety of the general public.
2. It is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or by another corporation to which it had leased it.

(November 30, 1903.)

*Headnotes by NICHOLLS, Ch. J.

NOTE.—As to liability of lessor of railroad for injuries caused by negligence of lessee, see also, in this series, *Caruthers v. Kansas City, Ft. S. & M. R. Co.* 44 L. R. A. 737, and *note*, and *Harden v. North Carolina R. Co.* 55 L. R. A. 781.
64 L. R. A.

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division A, in favor of defendants in an action brought to recover damages for the alleged negligent killing of his minor child. *Reversed.*

The facts are stated in the opinion.

Messrs. P. F. Hennessey and W. J. Hennessey, for appellant:

A street railroad company cannot, unless authorized by the authority granting the franchise, lease or transfer its road and franchise with the right to exercise and operate the same, so as to escape liability for torts committed by the drivers or those in charge of the cars, even though the lessor has no control over the driver or employee by whose negligence the injury is inflicted. The lessee in that case will be regarded as the agent of the lessor, and the lessor will be responsible for all negligence of the lessee, including torts.

Middlesex R. Co. v. Boston & C. R. Co. 115 Mass. 347; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 30, 36 Am. Rep. 572;

Wyman v. Penobscot & K. R. Co. 46 Me. 162; *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 444, 10 N. W. 594; *Braslin v. Somerville Horse R. Co.* 145 Mass. 67, 13 N. E. 65; *Davis v. Old Colony R. Co.* 131 Mass. 259, 41 Am. Rep. 221.

Railroads or street railways have no authority, unless authorized by legislative authority or general laws, to lease their franchises to another corporation or person, and such lease is *ultra vires*.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 21 L. ed. 675; *York & M. Line R. Co. v. Winans*, 17 How. 30, 39, 15 L. ed. 27, 30; *Whitney v. Atlantic & St. L. R. Co.* 44 Me. 362, 69 Am. Dec. 102; *Taylor, Corp.* §§ 131, 132; *Com. v. Smith*, 10 Allen, 455, 87 Am. Dec. 672; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 106; *East Boston Freight R. Co. v. Eastern R. Co.* 13 Allen, 422; 5 Thomp. Corp. § 5884; *Macon & A. R. Co. v. Moyes*, 49 Ga. 355, 15 Am. Rep. 678; *State ex rel. Atty. Gen. v. Sherman*, 22 Ohio St. 411.

Mr. Frank E. Rainold, for appellees:

Actions *ex delicto* are purely statutory in this state.

A corporation is unquestionably liable for the acts of its servant, and it seems equally axiomatic that it is not liable for the carelessness or negligence of the servant of another corporation.

McConnell v. Lemley, 48 La. Ann. 1438, 34 L. R. A. 609, 55 Am. St. Rep. 319, 20 So. 887; *Hart v. New Orleans & O. R. Co.* 4 La. Ann. 262; *Thompson v. Dotterer*, 105 La. 37, 29 So. 483.

It is sufficient to find that the Algiers & Gretna Railway Company has nothing at all to do with the operation of the road, in order to exonerate it from liability.

McDonald v. Louisville & N. R. Co. 47 La. Ann. 1440, 17 So. 873; *Pierce, Railroads*, 283, 284; *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425; *Norton v. Wiswall*, 26 Barb. 618; *Virginia Midland R. Co. v. Washington*, 86 Va. 629, 7 L. R. A. 344, 10 S. E. 927; 23 Am. & Eng. Enc. Law, 2d ed. p. 785.

Nicholls, Ch. J., delivered the opinion of the court:

The plaintiff brought suit in the parish of Orleans against the Algiers & Gretna Street Railway Company (or the Algiers, 64 L. R. A.

McDonoughville, & Gretna Street Railway Company) and the Jefferson Street Railway Company, seeking to recover from them *in solido* the sum of \$15,000, with legal interest. The grounds upon which this demand was based are: That the defendants were corporations organized under the laws of Louisiana, and doing business as common carriers of passengers in the parish of Orleans, conjointly and separately operating horse cars between the parish of Jefferson and the fifth district of the parish of Orleans. That on or about the 27th of December, 1901, about 7 o'clock in the evening, in Goldsborough, parish of Jefferson, Idelia May Muntz, the minor child of the plaintiff, aged about twelve years, was knocked down and run over by a car owned and operated by the defendants, so that her neck and limbs were broken and skull fractured, besides suffering other severe injuries, from which, after the most intense agony, she died shortly thereafter. That her death was caused by the fault and gross negligence of defendants, and by the fault and negligence of the driver in charge of the car which ran over and killed her, because the defendants failed to provide their car with proper lights, and with proper appliances and means to give signals and warning of the approach of the car. That the track upon which defendants' car was operated was of a narrow gauge, and laid on the public road, and his child was lawfully thereon, and did not know and was not warned of the approach of the car by which she was knocked down and killed, and received no warning either by the car or the driver thereof, and after she was knocked down and run over by the car the driver never stopped it, but continued on his journey to the terminal of the road in Gretna; and the said driver, if he had been attending to his duties, could have seen the child and have prevented the act which caused her death, but neglected to do so; and the car was running at an unlawful rate of speed through the town when it ran down, mangled, and killed his child. That the space between the tracks of the railway was generally used by the public as a foot passage, and the child's injuries and her resulting death were not caused by any fault on her part, and her injuries and death were caused directly and solely by the fault and gross negligence of defendants and their employees and agents.

The Jefferson railway excepted that the court was without jurisdiction *ratione personæ*, as its domicile was in the parish of Jefferson, where the trespass complained of was alleged to have occurred. The exception was sustained, the suit as to that company was dismissed, and no appeal was taken.

from the judgment. The Algiers & Gretna Railway Company excepted to the petition: First. Because the court was without jurisdiction, and, should the exception be overruled, that the petition was contradictory, self-destructive, and the allegation in the petition that the Algiers railway company and the Jefferson Street Railway Company were "conjointly and separately operating horse cars" was without sense and meaning; that, as a matter of fact, plaintiff was in possession of full knowledge concerning its relation to the street railway in question; that it leased out said roadbed and tracks to Thomas Pickles on the 7th of March, 1903, and the cars of said road never belonged to it; that Thomas Pickles died, and his heirs sublet said road to Peter Meid on the 27th of August, 1897, by notarial act before Frank E. Rainold, notary; that on the 23d of January, 1899, he leased the same to Anthony Rubrich, and Anthony Rubrich, by notarial act of the 29th of April, 1899, sold his rights in and to the lease to the Jefferson railway company; that plaintiff knew that the Jefferson railway company was alone operating the road; that the petition disclosed no cause of action, because the driver through whose carelessness it was alleged the accident occurred was not and never had been in the employ of the Algiers & Gretna Railway Company.

It was subsequently agreed between plaintiff's attorneys and the attorney of the Algiers & Gretna Railway Company that "the exception to the jurisdiction and the formal exception of no cause of action were waived," and the attorney for the latter named company "agreed to try the issue whether that company was lessor, and whether, as lessor, it could be held in any manner for the accident, as raised by his second exception."

Evidence was accordingly heard on these issues. The district judge sustained the second ground of exception filed by defendant, and rendered judgment in its favor and against the plaintiff, dismissing his suit. Plaintiff appealed.

The act by which the Algiers & Gretna Railway Company was incorporated was not in the record. Mr. Rainold, as witness, states it was incorporated on the 11th of February, 1882, by act before Samuel Flower, notary public; that the original franchise to run a street railroad in Algiers was given, he thought, to a syndicate of about fifteen persons, whom he named; and that they transferred their right to the Algiers & Gretna Railway Company.

There is no direct evidence in the record showing how or from whom and when that company acquired, or claimed to have acquired, otherwise than through its act of 64 L. R. A.

incorporation, the right to operate a railway for transporting freight and passengers outside of the limits of the city of New Orleans beyond and into the parish of Jefferson and over its roads; but there is copied into the transcript an ordinance of the police jury of the parish of Jefferson (but with nothing showing the date of its passage) granting to the same parties, who were named by Mr. Rainold as composing the syndicate to whom the city of New Orleans had made its grant, and to their successors, transferees, and assigns, the right of building and operating from Algiers, in the parish of Orleans, to the parish line of Jefferson, a track of railroad for the transportation of passengers and freight from Harvey's canal, into the parish of Jefferson, to the lower line of that parish. However this may be, there is no doubt that the Algiers & Gretna Railway Company claimed to have in some way acquired such a right, inasmuch as on the 7th of March, 1893, by act before Frank E. Rainold, it leased for ten years to Thomas Pickles, who was one of the parties named as forming the syndicates referred to, "all the franchises of the Algiers & Gretna Railway Company, including its roadbed, and the right to operate a railway for transporting freight and passengers between the town of Gretna, in the parish of Jefferson, and the fifth district of the city of New Orleans, formerly known as Algiers, and the tracks as laid between said terminals."

On the 27th of August, 1896, by act before Rainold, Mrs. Henrietta Cook Pickles, wife of Alexander M. Halliday, and Mrs. Josephine E. Harvey, widow of Robert S. Harvey, the heirs of Thomas Pickles, leased the same property, under the same description, to Peter Meid, and, additionally, "the stables and real estate situated on Bouny street, in the fifth district of New Orleans," together with the cars then used in the operation of said Algiers & Gretna railway, which numbered five, and the entire equipment of the road, for the term of five years, to begin on the 10th day of September, 1897, and to end on the 9th day of September, 1902. The lessors simultaneously sold and transferred to the lessee the horses and mules—seventeen in number—they used in the operation of the Algiers & Gretna company.

On the 23d of January, 1899, by act before Rainold, notary, Peter Meid leased to Anthony Rubrich until the 9th day of September, 1902, the same property, under the same description, which was leased by the Algiers & Gretna Railway Company to Thomas Pickles; also the stables and real estate in McDonoughville, in the parish of Jefferson; also all the cars used, at the time of this lease to Rubrich, in the opera-

tion of the Algiers & Gretna Railway Company, and the entire equipment of the road.

On the 29th of April, 1899, by act before Rainold, notary, Anthony Rubrich sold and transferred to the Jefferson railway company "all the rights which he acquired by reason of the notarial contract executed before Rainold, notary, on the 23d of January, 1899, to which contract Peter Meid, Anthony Rubrich, Ella Mills, Mrs. Josephine E. Harvey, and Mrs. A. M. Halliday were parties."

The Jefferson railway company was incorporated by notarial act before Rainold, notary, on the 4th of April, 1899. The purposes for which it was incorporated were declared to be: "To acquire by lease the right to operate and maintain a railway system between Algiers, in the parish of Orleans, and Gretna, in the parish of Jefferson; to operate and maintain between said terminals for the transportation of passengers and freight; and more especially to acquire all the right of Anthony Rubrich under the contract made by him with Peter Meid and Mrs. A. M. Halliday and Mrs. Josephine E. Harvey, which contract was executed before Frank E. Rainold, notary public, on the 23d of January, 1899; and that this corporation shall have the right to acquire such franchises, privileges, and property, both movable and immovable, as shall be necessary for its business or incidental thereto."

Gretna and McDonoughville are unincorporated villages, situated in the parish of Jefferson, the latter between Gretna and the upper line of the city of New Orleans. The accident occurred in a street of McDonoughville. At the time of the accident the only property owned by the Algiers & Gretna Railway Company were its franchise and the road tracks of the road between Algiers and Gretna. The railroad between Algiers and Gretna was being operated at that time by the Jefferson railway over the roadbed and tracks of the Algiers & Gretna company under its lease, but the car which ran over the child belonged to it, and the driver in charge of the same was one of its employees.

The theory upon which the Algiers & Gretna company claims to have been released from responsibility in the premises is that, under the laws of Louisiana, the franchises and property of a railroad company can be mortgaged and sold, and that the rights granted by the city of New Orleans and by the police jury of the parish of Jefferson to the syndicates mentioned—and which rights that company acquired—were by their express terms assignable in character, and that, being such, the company had the right to make the lease it did; that

by so leasing it was released from all obligations resulting from the negligent operation of the road, the leasing company being alone responsible. They cite in support of their position articles 2317 and 2679 of the Civil Code; Pierce, Railroads, 283, 284; 23 Am. & Eng. Enc. Law, 2d ed. p. 785; *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425; *Norton v. Wiswall*, 26 Barb. 618; *Virginia Midland R. Co. v. Washington*, 86 Va. 629, 7 L. R. A. 344, 10 S. E. 927; *Hart v. New Orleans & O. R. Co.* 4 La. Ann. 262; *McDonald v. Louisville & N. R. Co.* 47 La. Ann. 1440, 17 So. 873; *McConnell v. Lemley*, 48 La. Ann. 1438, 34 L. R. A. 609, 55 Am. St. Rep. 319, 20 So. 887; *Thompson v. Dotterer*, 105 La. 37, 29 So. 483; *Farmer v. Myles*, 106 La. 333, 30 So. 858; *Goodwin v. Bodow Lumber Co.* 109 La. 1050, 34 So. 74. The plaintiff refers to *Morawetz*, Priv. Corp. 1120; *York & M. Line R. Co. v. Winans*, 17 How. 30, 15 L. ed. 27; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, 450, 21 L. ed. 675, 678; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1-39, 32 L. ed. 837-846, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Wyman v. Penobscot & K. R. Co.* 46 Me. 162; *Middlesex R. Co. v. Boston & O. R. Co.* 115 Mass. 347; *Braslin v. Somerville Horse R. Co.* 145 Mass. 64, 13 N. E. 65; *Davis v. Old Colony R. Co.* 131 Mass. 258, 276, 41 Am. Rep. 221; *Com. v. Smith*, 10 Allen, 455, 87 Am. Dec. 672; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572; *Freeman v. Minneapolis & St. L. R. Co.* 28 Minn. 444, 10 N. W. 594; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678.

Referring to the authorities cited by the parties in 23 Am. & Eng. Enc. Law, 2d ed. pp. 784, 785, under the title *Railroads*, we find that different rules have been adopted in different jurisdictions as to the effect upon the legal liability of a railroad company, which had made a lease of its road, for the negligent operation of the same by its lessee. The first rule and the line of decisions supporting it are found on page 784 of that work under the heading, *Negligent operation by lessee—(aa) Rule holding lessor liable.*

The second rule and decisions supporting it, on page 785, under the heading (*bb*) *Rule denying liability of lessor.*

Under the first of these headings it is said: "There is a sharp conflict of authority as to whether the lessor of a railroad is liable for injuries to persons or prop-

erty caused by the wrongful or negligent acts or omissions of the lessee in the operation of the road, as distinguished from the nonperformance of a duty which the lessor's charter or the general law imposes primarily on the lessor. There is one line of decisions holding that the proper operation of the road so as to avoid injury to third persons is one of the duties imposed by the charter of the proprietary company, and that it cannot escape such duty and the corresponding liability by leasing its road to another, but that the lessor is liable to any person who may be injured by the negligence or wrongful act of the lessee in operating the leased road, unless the charter or statute authorizing the lease exempts the lessor from such liability. The theory of these cases is not that the lessee is to be regarded as the agent or servant of the lessor, but that public policy forbids a railroad company thus to divest itself of its legal responsibility without legislative authority."

Under the second heading it is said: "Opposed to the rule just stated is a line of cases holding that legislative authority to lease a railroad implies an exemption of the lessor from liability for the acts of its lessee, and that when a company had leased its road, and the lessee is in exclusive possession and control under the lease, no liability attaches to the lessor for any negligent or wrongful conduct of the lessee or its servants whereby third persons are injured."

We have said that the act of incorporation is not in the record, but the whole course taken in the case justifies us in assuming that it is a street railroad company created legally by notarial act for the purpose of constructing and operating a railroad for the transportation of freight and passengers for the public benefit from Gretna, in the parish of Jefferson, to that portion of the city of New Orleans, parish of Orleans, lying on the right bank of the Mississippi river, known as "Algiers."

When the incorporators of that corporation availed themselves of the general law to create that corporation, they acquired for the corporation so created certain legal rights and privileges. They also bound the corporation to the performance of certain acts, and subjected it and its property to certain duties and obligations in behalf of the general public. The corporation so created became bound to an acquisition of a right of way, and the construction thereon over it of a roadbed and tracks, and the operation of cars upon the same, under such conditions as to properly secure the safety of the general public. It became subjected as a quasi public corporation to just and 64 L. R. A.

proper legal control and regulation. These were primary obligations on its part, resulting directly *ipso facto* from its incorporation; and from those obligations towards the public it could not free itself purely at its own will by contracts made with third parties. It might be true that, so long as the corporation remained entirely inactive, it could not be forced into the active performance of these duties by way of mandamus, and that the remedy for non-user would be by way of forfeiture through the state authorities; but when it took action under its act of incorporation—acquired a right of way, constructed a roadbed and track upon it, and placed the railroad into active operation—it placed itself in a position where it could no longer deal with matters as it might itself think proper, in disregard of the primary obligations which it had come under at and by its creation and in favor of the general public. The various acts of acquisition of property and secondary franchises by the corporation, in necessary aid of the purposes and objects of its creation, impressed upon the rights and property and secondary franchises so acquired, in favor of the general public, certain rights which it was not free to of itself set aside or disregard. The corporation, through these acquisitions, became owner of the property; but by the very tenure of the character of this ownership the public, as well as itself, acquired an interest therein. Its ownership was not in one sense an absolute ownership, giving the corporation an unrestricted power of use and disposition, but an imperfect ownership, where the power of use and disposition was held in check and controlled by the rights of the general public and the obligations of the corporation.

The right of a corporation to acquire property in aid of the objects of the incorporation is not a criterion of the right of the corporation to use and dispose of it. Where the rights of property are successively acquired in aid of the objects of the corporation, they become fused, consolidated, or merged into an entirety to carry out the public purposes for which they were acquired, and the corporation is not permitted thereafter, at its own mere volition, to separate them and to divert them from those purposes.

Defendant's argument that, because the law allows the property and franchises of a corporation to be mortgaged, and to be sold in foreclosure of the mortgage, it must be taken to have authorized the leasing of the same by the corporation, as the power to mortgage is much the broader and more extensive power of the two, and the maxim. that the less is included in the greater ap-

plies, is not well founded. The two powers are not in the same line, but are distinct from each other, and it is error to reason from that standpoint. Besides, the precise circumstances under which the property and franchises are authorized to be mortgaged are fixed, and there existed no such condition of things in this case as would have authorized a mortgage, still less a lease.

Defendant urges that the rights which it acquired by transfer from the syndicates were by their terms and on their face assignable, and in leasing the road they simply exercised a right granted in their act of purchase of the rights. It is true that, in so far as the city of New Orleans and the police jury of the parish of Jefferson were concerned, they each agreed that the rights and privileges which they consented to in favor of the original grantees could and should pass to their assigns and successors. Possibly the city of New Orleans and the parish of Jefferson might be held to that consent, but we are not dealing now with what both or either of those corporations would have the right to object to in the premises. Again, the consent of the city and the parish of Jefferson that the grant of a right of way for a railroad through the streets of Algiers should inure to the benefit of the assignees or successors of the original grantee contemplated that all of the rights and franchises of the road should pass as an entirety, and in the interests of the public, to those assigns or successors. They agreed to the transmissibility of their consent to them, but not to a divisibility of the franchises. The franchises, rights, and obligations of the Algiers & Gretna Railway Company as a quasi public railroad were not created by the action of the police jury of the parish of Jefferson. Neither the city of New Orleans nor the police jury of Jefferson could alter rights and obligations which sprang from and were fixed by the lawmakers. The effect of the doctrine contended for by the defendant would be to permit six persons, created a corporation with special rights and privileges, but subjected to special duties and obligations to the public, after acquiring property and placing itself in position to carry out its functions, itself to free the corporation and its property from all liability to the public, and abandon the performance of any of its duties, while owning its franchises and property, by the simple process of making a lease to third parties by a contract which would confer upon the corporation rights against its lessee which would prime any to be acquired by third parties for torts committed by the lessee through the faulty and negligent operation of the road. No such result could have been intended by the leg-

islature. Rights transmissible or assignable *quoad* one of the parties to a contract are not necessarily so as to the other.

It is a general rule that when a person, whether natural or artificial, has come under obligations to a third person, he cannot free himself from the same by contract by delegating to another the performance of these obligations, and changing debtors. The present action is not one by which a party holding contractual relations with a lessee seeks to extend the obligations of his contract beyond the person with whom he has contracted over to the lessor, but one *ex delicto* brought by a third party who, prior to the injuries received complained of, was a stranger to the lessee.

In the case of *McConnell v. Lemley*, 48 La. Ann. 1438, 34 L. R. A. 609, 55 Am. St. Rep. 319, 20 So. 887, cited by defendant, there was no corporation involved. The issue was whether a private individual, owning a building which he had leased, could be held responsible for damages caused by the acts of the lessee. The owner of the building is liable to the public under certain circumstances, and when so liable he is not released from liability by reason simply of the property being (at the time that damage complained of was received) under lease. In that case the court was of opinion that the damages received were not due to a violation of the lessor's primary obligation. Had they been, a different result would have been reached. A private individual's obligation to the public is much more restricted than is that of a public railroad corporation. *Goodwin v. Bodcaw Lumber Co.* presented questions different from those raised here. That company was not a public railroad corporation, but a lumber company owning a logging track road used only in connection with its own business. It did not lease, but sold outright, a part of its property which it did not care any longer to retain the ownership of. Some of the stockholders were inclined to convert the private railroad into a public one by the procuring of public railroad franchises; others were not inclined to do so. The result was that the road in question, being the private property of the corporation, was sold to certain of the stockholders as individuals, who thereupon organized as a public railroad corporation, and were operating it as such when the accident complained of occurred.

We are of the opinion that the judgment appealed from is erroneous, and for the reasons herein assigned it is *hereby ordered, adjudged, and decreed that said judgment be, and the same is, hereby annulled, avoided, and reversed*, and that the cause be reinstated on the docket of the Civil District

Court for the Parish of Orleans, and this cause be remanded to that court for further proceedings according to law.

Petition for rehearing denied January 18, 1904.

Dominick FROELICHER

v.

OSWALD IRON WORKS, Limited.

(.....La.....)

- *1. Acts which disturb physical comfort to an injurious extent may be restrained by the interposition of the courts.
- *2. An offensive occupation cannot be carried on to the very great annoyance of the one dwelling immediately near.
- *3. No one has the right to use his own land so as to render that about him in any degree useless. His enjoyments must have reference to the rights of others.
- *4. To the extent needful to prevent extreme annoyance, the decree as heretofore rendered by the district court is by the supreme court affirmed.

(November 30, 1903.)

CROSS-APPEALS from a decree of the Civil District Court for the Parish of Orleans, Division E, enjoining defendant from annoying plaintiff by the conduct of its business; plaintiff appealing from so much of the decree as failed entirely to enjoin the conducting of the business at its present location; and defendant appealing from so much as awarded damages against it. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry L. Lazarus, with Messrs. Herman Michel and David Sessler, for plaintiff:

The law applicable to the case at bar is admirably summed up in the maxim, *Sic utere tuo ut alienum non laedas*.

3 Sutherland, Damages, p. 394; *State ex rel. Denis v. King*, 105 La. 731, 30 So. 101; *State ex rel. Violet v. King*, 46 La. Ann. 79, 14 So. 423; *New Orleans v. Lambert*, 14 La. Ann. 244; *Blanc v. Murray*, 36 La. Ann. 162;

* Headnotes by BREAU, J.

NOTE.—For other cases in this series as to right to injunction or damages because of injury or discomfort caused by noise, smell, or smoke, see *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298; *Bohan v. Port Jervis Gaslight Co.* 9 L. R. A. 711, and cases in note thereto; *People v. Detroit White Lead Works*, 9 L. R. A. 722; *Wylie v. Elwood*, 9 L. R. A. 726; *Powell v. Bentley & G. Furniture Co.* 12 L. R. A. 53, and note; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758; *Sperb v. Metropolitan Elev. R. Co.* 20 L. R. A. 752; *Frost v. Berkeley Phosphate* 64 L. R. A.

Story, Eq. Jur. § 924; *Milhau v. Sharp*, 28 Barb. 228; *Doolittle v. Broome County*, 18 N. Y. 160; *Fuselier v. Spalding*, 2 La. Ann. 773; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; *Tilton v. New Orleans City R. Co.* 35 La. Ann. 1074; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Bradley v. Gill*, Lut. pt. 1, p. 29; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Scott v. Firth*, 10 L. T. N. S. 241; *Gullick v. Tremlett*, 20 Week. Rep. 358; *Robertson v. Campbell*, 13 F. C. (Sc.) 61; *Johnston v. Constable*, 3 Dunlop, B. & M. 1263; *Cooper v. North British R. Co.* 35 Jur. 295; 1 Macph. 499; *Kinloch v. Robertson*, Keane Sel. Dec. 175; *Eaden v. Firth*, 1 Macph. (Sc.) 573; *Roskell v. Whitworth*, 19 Week. Rep. 804; High, Inj. §§ 772, 773.

Messrs. Solomon Wolf and Robert O'Connor, for defendant:

Two things essential to general prosperity and happiness are, useful trades whereby people are supplied with things necessary in life, and healthful and peaceable dwellings; and the structures for habitation and trade cannot well be remote from one another. Here, therefore, are two interests traveling to the one ultimate goal, yet in constant conflict during the journey; and the courts, in administering justice between them, necessarily request each to lay aside something of what pertains to convenience and comfort; yet they permit each to stand so far on its own rights as not to be destroyed.

Bishop, Non-Contr. Law, § 418.

An act or use of property, to constitute a nuisance, must violate some legal right, either public or private, and must work some material annoyance, inconvenience, or injury, either actual or implied, from the invasion of the right. The mere fact that it is unpleasant, annoying, or unsightly will not be sufficient.

Wood, Nuisances, § 568; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 35 L. J. Q. B. N. S. 66, 11 Jur. N. S. 785, 12 L. T. N. S. 776, 13 Week. Rep. 1083; *Rockwood v. Wilson*, 11 Cush. 221.

A suit to enjoin the maintenance of a building or manufactory which it is claimed interferes with private rights must be

Co. 26 L. R. A. 693; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755; *Chicago, G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488; *Louisville R. Co. v. Foster*, 50 L. R. A. 813; *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 398; and *Louisville & N. Terminal Co. v. Jacobs*, 61 L. R. A. 188.

As to power of municipality to control smoke as nuisance, see *St. Louis v. Edward Heltzberg Packing & Provision Co.* 39 L. R. A. 551, and note.

brought with the utmost promptness and diligence.

Mondie v. Toledo Plow Co. 6 Ohio N. P. 294; *McCann v. Strang*, 97 Wis. 551, 72 N. W. 1117; *Roscoe Lumber Co. v. Standard Silica Cement Co.* 62 App. Div. 421, 70 N. Y. Supp. 1130; *Jones v. McCleary Mfg. Co.* Rap. Jud. Quebec, 18 C. S. 130; *Robins v. Dominion Coal Co.* Rap. Jud. Quebec, 16 C. S. 195; *Romer v. St. Paul City R. Co.* 75 Minn. 211, 74 Am. St. Rep. 455, 77 N. W. 825; *Farrell v. New York Steam Co.* 23 Misc. 726, 53 N. Y. Supp. 55; *Leonard v. Hotel Majestic Co.* 17 Misc. 229, 40 N. Y. 1044; *Culver v. Rogan*, 15 Ohio C. C. 228; *Hafer v. Guynan*, 7 Pa. Dist. R. 21; *Fisher v. Lakeside Park Hotel & Amusement Co.* 4 Ohio N. P. 329; *Harvey v. Consumers' Ice Co.* 104 Tenn. 583, 58 S. W. 316; *Dubos v. Dreyfous*, 52 La. Ann. 1117, 27 So. 663; *Fischer v. Sanford*, 12 Pa. Super. Ct. 435; *Ladd v. Granite State Brick Co.* 68 N. H. 185, 37 Atl. 1041; *Harper v. Standard Oil Co.* 78 Mo. App. 338; *Hughes v. General Electric Light & P. Co.* 107 Ky. 485, 54 S. W. 723; *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795; *Southard v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 518; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Sprague v. Steeres*, 1 R. I. 247; *Hieskell v. Gross*, 3 Brewst. (Pa.) 430; *Vick v. Rochester*, 46 Hun. 607; *Gaunt v. Fynney*, L. R. 8 Ch. 8, 42 L. J. Ch. N. S. 122, 27 L. T. N. S. 569, 21 Week. Rep. 129; *Doellner v. Tynan*, 38 How. Pr. 176; *Huckenstine's Appeal*, 70 Pa. 108, 10 Am. Rep. 669; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085; *Straus v. Barnett*, 140 Pa. 111, 21 Atl. 253; *Penrose v. Nixon*, 140 Pa. 45, 21 Atl. 364.

Breaux, J., delivered the opinion of the court:

Plaintiff brought this suit to enjoin the defendant company from continuing its works at the present place, because the noise made and the smoke and the odor are a nuisance to the neighborhood, and it prevents plaintiff and his family from enjoying their home, which is situated near defendant's plant. He also asks for damages because of the asserted noise in the sum of \$2,500.

Plaintiff's home is situated at the corner of Morgan and Seguin streets, in the Algiers portion of New Orleans, and here he has resided about twelve years in a large, two-story frame house, worth about (plaintiff avers) \$4,000. He occupies the lower portion of the building in connection with his saddlery business, and resides in the upper story.

Petitioner also avers, substantially, that property in the locality in which this prop-

erty is located has depreciated of late in value in consequence of the asserted nuisance, which will be specially referred to later in our opinion. He also avers that the use of his property for business or residence is injured and destroyed.

Plaintiff's complaint, further, is that defendant has erected, upon property adjacent to his own, machine shops and boiler works; that defendant's predecessor bought property adjacent to his own from Charles With-erup, who, under an ordinance of the city council, was permitted to carry on the work of blacksmith thereon, and that defendant, taking advantage of this permit, erected large machine shops, to the injury of plaintiff, and to his discomfort and that of his family; that defendant, the successor of those by whom these improvements were erected, sought from the city council the grant of a privilege to operate their shops; that this application met with the serious opposition from owners, residents, in the immediate vicinity, which resulted in their protesting by petition addressed to the council against that which they said "would prove an intolerable nuisance to the residents in the vicinity."

The application to the council was denied. Plaintiff avers this refusal among other things pertaining to the claim he sets up.

The allegations of plaintiff are complete enough, and contained all that was needful to admit testimony offered.

Defendant sought to meet plaintiff's suit by averring that its business is no more noisy or otherwise irksome than any other business conducted in the vicinity of plaintiff's residence that it avoids noises of all kinds as much as possible; that night work is rarely done at its shops. The premises are kept clean and in perfect order, and the sheet-iron work it does is the best answer to plaintiff's contention that there are offensive odors on the premises.

Defendant's works front on Patterson street. Its shops do not extend from that street to the rear of plaintiff's lot, although its lot does adjoin that of plaintiff both in the rear of plaintiff's lot and on the side. There is a vacant space between these (defendant's) shops and plaintiff's property. Occasionally, in putting up boilers and tanks, this open space has been used or occupied in working on iron. Defendant also owns the lot alongside of plaintiff's lot, and there, also, it was found more spacious and commodious for the work in the open air in putting boilers, tanks, and in hammering sheets of iron. The noises produced by hammering on the sheets of iron used in boilers, tanks, and other works are doubtless loud and harsh, particularly when the hammering is done outside of the shops. Defend-

ant has a boiler producing steam it uses in its shops. In addition, it uses a forge for heating heavy sheets of iron before they are put in the machine that curves them, and in the yard they use two portable forges to heat rivets.

Plaintiff has cause to complain. He was obliged to close his windows in summer when work was done in the lot adjacent to and alongside of his house, to keep out the vapor or steam from the outdoor furnace. It had been an obstacle to his opening his window. He had to endure the heat of summer without sufficient ventilation from his windows. There was complaint of vibration felt, and that at night he and his family did not enjoy desired rest and quiet. The noise and smoke were doubtless offensive, and there is no question but that too much noise and smoke are a nuisance. It is true that only an exceptional noise and disturbance are actionable. Still it is certain that acts which greatly disturb physical comfort may be enjoined, to the extent that they are injurious. An offensive and tortious occupation cannot be carried on to the great annoyance and grave discomfort of the one dwelling near. It must, however, be very serious. While it may, perhaps, not be necessary for it to greatly injure health, it is sufficient if it greatly lessen and impair the enjoyment and happiness of home.

There is a test in matter of nuisance which the following question suggests: Is the discomfort one of mere fastidiousness or extreme refinement, as is sometimes seen, or does the nuisance interrupt the average comfort to which the individual has the right? We do not refer to the very nice manner of living, but rather to a simple life, with the ordinary comforts. Considered in this light, plaintiff falls within the category of those who have a right to have an annoying noise abated, sufficient for peace and comfort to which the family ordinarily is entitled. The theory to which some of the evidence tends cannot have our support to the extent asked. It has the appearance of being slightly extreme. That plaintiff has become irritable, he says; that members of his family have become fretful, owing to the harsh noise; that there have been moments of slight infelicity in the family, as words are not heard or are misunderstood. Part of all this has the appearance of some exaggeration growing out, in all probability, of the noisome situation in which plaintiff was placed. Plaintiff and some of his witnesses affirmed that, owing to the vibration and the consequent jarring, the house is not entirely in plumb; the foundations are unsettled; the windows do not shut as formerly; even the china and crockery move when on the table; and other ailments and troubles men-

tioned by these witnesses cannot all be laid at the door of the defendant. There is evidence that the vibratory movements of the earth at the particular place are not as imagined, and the odors as noxious as plaintiff evidently thought. There is smoke, but not enough to constitute nuisance as injurious as claimed. It is conclusively shown, we think, that the noise is at times very great, and this presents the serious issue. The noise produced caused actual physical discomfort. The plaintiff is entitled to solid comfort, and, to that extent that this is interrupted, relief should be afforded; but the injury must be real, and not fanciful. To the degree that it is real, there is ground for complaint,—no further.

It is true, plaintiff's home is in the commercial and residential district. He is a harness maker, and must, in the nature of things, accommodate himself to his surroundings, provided, always, that the necessities of active industry do not become unbearable. No one has a right to use his own (not even those engaged in the most industrious and worthy enterprises) so as to injure others about him. The use and enjoyment must have reference to the rights of others. Whatever may be the condition in the neighborhood in which plaintiff lives, he should not be subjected to unendurable noise at his home, which he has occupied for years. A number of industrious mechanics at work in the open air, constructing boilers or tanks, or hammering sheet iron, may raise a noise, as in this case, that cannot be endured by those living immediately near. The evidence has at least served to prove, as relates to defendant, that its workmen are very industrious. The noise from their work has been in the nighttime, and sometimes even on Sundays, to an unendurable extent, the testimony shows.

We have noted that defendant has improved machinery; that he has sought to lessen the noise. Part of the up-to-date machines consists of a pneumatic calker for calking the boilers. The sounds from this machine are not in murmuring and suppressed tones. We gather from the testimony that it is very little less noisy than the hammering with hand on the boiler. Besides, there is considerable hammering done still, in putting up a boiler or tank. "Pandemonium at large" is the impression created after reading the testimony of some of the witnesses,—particularly that of plaintiff and the member of his family who also testified. We do not think it is as bad as they imagine, but there remains enough for complaint. We are not hasty in arriving at the conclusion that the noise should be, to some extent, abated. The noises of industrial enterprises are not frequently characterized

as nuisances. None the less, it must be held a nuisance when extreme and tortious.

Mr. Bishop, in his Non-Contract Law, § 418, has stated the idea with great force and clearness, looking to the interest of useful trade and occupation, on the one hand, and the convenience and comfort of the family, on the other. "Two things," says the author, "essential to general prosperity and happiness, are useful trades, whereby people are supplied with things necessary in life, and healthful and peaceful dwellings. . . . The courts, in administering justice between them, necessarily require each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights not to be destroyed." From this point of view, we think that the purposes the law intends will have been secured by affirming the judgment

of the district court. We are not willing to go further. At the same time, we do not think, after serious consideration, that the plaintiff is entitled to less.

The amount of damages allowed was \$500, in addition to restraining the defendant from carrying on noisy work on lots 15 and 16 of the plot in evidence. We think this judgment does justice between the parties. The demand of plaintiff for an amendment of the judgment on appeal is rejected. We are not of the opinion that the damages should be assessed at a higher amount, nor that the restraint should go further than before expressed.

For these reasons, *the judgment is affirmed.*

Petition for rehearing denied February 1, 1904.

CALIFORNIA SUPREME COURT.

UKIAH CITY, *Appt.*,

v.

UKIAH WATER & IMPROVEMENT COMPANY, *Respt.*

(.....Cal.....)

Here acceptance of and payment for the service of a water company in furnishing water for general fire purposes are not sufficient to establish a contract on the part of the water company to compensate the municipality for loss of property by fire for the extinguishment of which the company negligently failed to furnish water, although the service was undertaken in compliance with a demand therefor by the municipality.

(February 10, 1904.)

A PPEAL by plaintiff from an order of the Superior Court for Mendocino County granting a new trial after judgment in its favor in an action brought to recover the value of property destroyed by fire because of the alleged neglect of defendant to furnish water for its extinguishment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Seawell & Pemberton and J. C. Raddock, for appellant:

This action is maintained by the plaintiff town, and not by a taxpayer and private consumer of water.

The contract is directly between the town and the water company, and the town was

paying the water company the water rates established at the very time the property of plaintiff was consumed and destroyed through the carelessness and wilful neglect of defendant, and in violation of its contract with said town.

The destruction of property of a private consumer ought not to be without a remedy for the owner against the person or water company which has ruthlessly occasioned the loss. But if there was a contract between the town and the water company, then there was a privity of contract between them, though there be no privity between a consumer of water or taxpayer therein and the water company. To hold that a water company, under such circumstances, is not liable would confer upon it an immunity not enjoyed by any person or other corporation.

Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341; 5 Thomp. Corp. §§ 6357, 6358.

The spirit and letter of our Code and our reformed procedure should, on the propositions involved in this action, cause the law of this state to follow the law as established by the judicial tribunals of Kentucky, of North Carolina, and of Louisiana.

Paducah Lumber Co. v. Paducah Water Supply Co. 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249; *Duncan v. Owensboro Water Co.* 12

NOTE.—For other cases in this series as to liability of water company for loss by fire due to lack of adequate water supply, see *Howson v. Trenton Water Co.* 23 L. R. A. 146, and *note*; 64 L. R. A.

House v. Houston Waterworks Co. 28 L. R. A. 532; *Gorrell v. Greensboro Water Supply Co.* 46 L. R. A. 513; and *Middlesex Water Co. v. Knappman Whiting Co.* 49 L. R. A. 572.

Ky. L. Rep. 35, 12 S. W. 557; *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684; *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.* 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227.

A county or city may not be liable for failure to keep a highway in proper repair, but, when that duty is delegated to a corporation which is given a franchise to collect toll as recompense for so doing, that company has always been held responsible for breach of the duty.

Canton, C. & H. Turnp. Co. v. McIntire, 105 Ky. 185, 48 S. W. 980; *Henderson & C. Gravel-Road Co. v. Cosby*, 103 Ky. 182, 44 S. W. 639; *Lebanon & P. Turnp. Road Co. v. Purdy*, 18 Ky. L. Rep. 612, 37 S. W. 588; *Evans v. New Brunswick & C. Turnp. Co.* 69 N. J. L. 3, 34 Atl. 985; *Washington, C. & A. Turnp. Co. v. Case*, 80 Md. 86, 30 Atl. 571; *Kreider v. Lancaster, E. & M. Turnp. Co.* 162 Pa. 537, 29 Atl. 721; 27 Am. & Eng. Enc. Law, pp. 341, 342, and notes.

The measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused by the breach of contract, or which, in the ordinary course of things, would be likely to result therefrom, or the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not.

C. C. 3300, 3333; *Crow v. San Joaquin & K. River Canal & Irrig. Co.* 130 Cal. 309, 62 Pac. 562, 1058.

A private individual or corporation dealing with a municipality may be bound by an implied or oral contract, and is estopped from denying the validity of the contract, after accepting and while retaining the consideration and benefit thereof.

American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447, 50 Am. St. Rep. 610, 64 N. W. 711; *Crow v. San Joaquin & K. River Canal & Irrig. Co.* 130 Cal. 309, 62 Pac. 562, 1058.

On rehearing.

It could not be doubted that, if the city buildings were destroyed by fire through failure of defendant to furnish water for their protection, as provided by the contract, the city could recover.

Gorrell v. Greensboro Water Supply Co. 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.* 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227; *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 64 L. R. A.

249; *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35, 12 S. W. 557.

Mr. W. S. Goodfellow also for appellant.

Messrs. McGarvey & Bledsee, for respondent:

The damages alleged in the complaint are too remote to constitute any cause of action against this defendant.

Anderson v. Taylor, 56 Cal. 132, 38 Am. Rep. 52; *Friend & T. Lumber Co. v. Miller*, 67 Cal. 467, 8 Pac. 40.

It is not claimed by plaintiff that the fire originated by reason of the negligence of defendant. The whole claim for damages is based upon a surmise of what citizens, firemen, and officers of plaintiff could or would have done under certain conditions after the fire started.

Proximate cause is defined to be, "that which, in a natural and continuous sequence unbroken by any new cause, produces that event, and without which that event would not have occurred.

Shearm. & Rēdf. Neg. 4th ed. § 26; *Taylor v. Baldwin*, 78 Cal. 522, 21 Pac. 124; *Oakland Bank of Savings v. Murfey*, 68 Cal. 462, 9 Pac. 843; *West Mahanoy Twp. v. Watson*, 116 Pa. 344, 2 Am. St. Rep. 604, 9 Atl. 430; *Western R. Co. v. Mutch*, 97 Ala. 194, 21 L. R. A. 316, 38 Am. St. Rep. 180, 11 So. 894; *Pendleton v. Cline*, 85 Cal. 143, 24 Pac. 659; *Durgin v. Neal*, 82 Cal. 598, 23 Pac. 133, 375.

Remote results produced by intermediate sequence of causes are beyond the reach of any just and practicable rule of damages.

Martin v. Deetz, 102 Cal. 68, 41 Am. St. Rep. 151, 36 Pac. 368.

How can it be said, as matter of law or fact, that plaintiff's loss was the direct, natural, ordinary result of the negligence complained of?

James v. James, 58 Ark. 157, 41 Am. St. Rep. 95, 23 S. W. 1099; *Henry v. Southern P. R. Co.* 50 Cal. 182.

The measure of damages, if defendant were liable at all, would be the value of the water failed to be furnished under the alleged contract, and the complaint does not allege, and there was no proof of, the value of such water.

Britton v. Green Bay & Ft. H. Waterworks Co. 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 315, 9 S. E. 673; *Foster v. Lookout Waterworks Co.* 3 Lea, 42; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 8.

A contract can only be made, in California, by a municipal corporation, by ordinance or resolution in the manner required by law.

Zottman v. San Francisco, 20 Cal. 97, 81 Am. Dec. 107, note; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Wallace v. San José*, 29 Cal. 186; *McCoy v. Briant*, 53 Cal. 247; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; 17 Am. & Eng. Enc. Law, p. 235.

Henshaw, J., delivered the opinion of the court:

This action was instituted by the town of Ukiah City to recover damages against the defendant water company for the destruction of plaintiff's property by fire, the liability of defendant being predicated upon its negligence, and upon the breach of its contract with the plaintiff for supplying water in its supply pipes and fire hydrants under sufficient pressure for effective use. A general demurrer was interposed to the complaint and overruled. The defendant answered, and trial was had, resulting in a verdict of the jury, under the instructions of the court, in favor of the plaintiff. The defendant moved for a new trial, which motion was granted, and plaintiff appeals from this order.

The learned judge of the trial court expressed his views upon granting the motion for a new trial in the following language:

"The case presents the novel question as to the extent of liability on the part of one engaged in the business of furnishing water appropriated for sale, rental, and distribution, to a municipality, to which it has undertaken for a consideration to furnish water for the extinguishment of fires within the municipal limits, the property of which has been destroyed by fire by reason of the failure of such person to furnish water under a sufficient pressure at the time of the breaking out of the fire, such failure being due to negligence on the part of such person. It cannot be seriously disputed that the evidence adduced on the trial of this case warranted the jury in finding the facts to be as embodied in the above proposition,—at least as to a portion of the property destroyed by fire. It appeared that defendant corporation was at the time of the fire, July 16, 1899, and for more than six years immediately preceding that time, engaged in the town of Ukiah City in the carrying on of the business or employment for which it was incorporated, *viz.*, the maintenance and operating of waterworks in said town, and the furnishing to said town and its inhabitants of pure, fresh water for all purposes. It further appeared that, at the time the defendant commenced business, hydrants for fire purposes were connected with its mains and pipes at various places in the streets of said town, in such a manner that there was no way to shut water out of the hydrants except by shutting off

the mains. That these hydrants, which, according to the testimony of witness Smith, were owned by plaintiff, have ever since been maintained and used by the town almost solely for the extinguishment of fires, and that in each of the ordinances passed from year to year by the trustees of plaintiff, fixing the rates to be charged for water furnished the town and its inhabitants, a provision has been made for fire hydrants, the ordinance in force July, 1899, providing, among other charges against the town for water for municipal purposes: 'For fire hydrants each per month, \$1.00;*' that for the whole time defendant has at regular intervals presented its bills against plaintiff for water furnished, and has always included in said bills a charge for the hydrants connected with its pipes, at the rate fixed by the ordinance in force, the bill rendered for the period covering the fire charging for 36 hydrants from June 1st to September 1st, at \$1 per month; and that all of these bills have been paid by plaintiff. The foregoing is substantially the only evidence as to a contract.

"In ruling upon the demurrer to the complaint, I stated that I had not been referred to, nor did I know of, any statute or rule of law that would, independent of contract, make the defendant liable on the facts stated in the complaint; in other words, that the mere fact that a corporation was engaged in the business of furnishing water appropriated for sale, rental, and distribution would not place upon it the obligation of having constantly on hand a sufficient quantity of water available for use by the town for the extinguishment of fires, for the failure to observe which it would be liable to the municipality for the value of municipal property destroyed by reason of such failure. Further thought has satisfied me that there can be no question as to the correctness of these views, that something additional is essential to the creation of such a liability, and that, if there be any such liability here, it must arise from contract.

"A contract for furnishing water to the plaintiff town by defendant for the purpose of extinguishing fires in said town is, however, alleged in the complaint. I am unable to concur in the views of learned counsel for defendant,—that no contractual relation is shown by the evidence. It is true that no written contract covering the time of the fire is shown; but no particular form is prescribed by the statute for such contracts, and the evidence forces the conclusion that at the time of the fire the same relations existed between the town and the defendant as to the furnishing of water for general fire purposes as ordinarily exist between the

private consumer and the water company as to water for domestic purposes. Where a private property owner demands of a water company that it connect its system with his residence, and tenders the rate prescribed by the town ordinance for the water to be supplied, and the company complies with his demand, as it is required by law to do, it can hardly be denied that a contractual relation is established between the parties, the company, on its part, undertaking to furnish water to the consumer so long as he may desire it and pays the established rates therefor, or at least to use all reasonable efforts to furnish it, for I hardly think that the company would be held bound, in the absence of an express undertaking, to do more than to exercise ordinary care in the management of its business. Doubtless, too, a water company is required, upon proper demand by the municipality, to furnish water to the municipality for the extinguishment of fires that may arise therein, at the established rates, and when, in pursuance of such requirement, it undertakes the service, a contractual relation is established, and the company is bound to continue the service it has undertaken. No formal written contract seems to be required by our statute to establish this relationship between the municipality and the company. That the plaintiff town, through its board of trustees, required this service for general fire purposes on the part of defendant, and that defendant undertook the same, and was actually employed therein at the time of the fire, is, in my judgment, fully shown by the evidence. If this be so, it was incumbent on the defendant, in order to fully perform its undertaking, to use ordinary care to have a supply of water, adequate for the extinguishment of fires that might arise in the town, constantly available at the various hydrants.

"Whether or not such obligation on the part of the company would carry with it any liability for the value of municipal property destroyed by fire, by reason of its failure to perform the service required of it, is another question; and this precise question does not appear to have ever been decided. The evidence clearly shows that whatever the relationship between plaintiff and defendant was, so far as the furnishing of water for fire purposes is concerned, it was entered into by the town in the execution of the power conferred upon it to provide protection against fire for the benefit of all the inhabitants, and there is nothing to indicate that the protection of any specific property was contemplated. In providing for a water supply for general fire purposes, a municipality exercises the same character of functions that it does when it provides

fire engines and other apparatus for the extinguishment of fires, or when it employs policemen or watchmen for the protection of its inhabitants against crime. Where, in the exercise of this power, it establishes or acquires its own system of waterworks, and undertakes to itself provide an adequate supply, it is settled beyond controversy that the city is not liable to its citizens whose property is destroyed by fire, for failure to provide an adequate supply, the power vested in the city being in its nature legislative and governmental, requiring the exercise of judgment and discretion. *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186; *Vanhorne v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 30 L. R. A. 660, 51 Am. St. Rep. 667, 42 N. E. 405; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Foster v. Lookout Waterworks Co.* 3 Lea, 42. See also *Sievers v. San Francisco*, 115 Cal. 654, 56 Am. St. Rep. 153, 47 Pac. 687. Where, instead of acquiring its own system and attempting to itself provide the water for such purpose, it contracts with a water company to furnish such service, thus making such company practically the agent or employee of the city, the many decisions of the appellate courts of other states are practically unanimous in holding, upon apparently the soundest reasoning, that the water company is not liable at the suit of a third person whose property was destroyed by fire, by reason of its failure to supply sufficient water to the town for such purpose. *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Beck v. Kittanning Water Co. (Pa.)* 11 Atl. 300; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Fowler v. Athens City Waterworks Co.* 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; *Atkinson v. Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441; *Foster v. Lookout Waterworks Co.* 3 Lea, 42; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 21 L. R. A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; *Fitch v. Seymour Water Co.* 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 982; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L. R. A. 375, 30 Am. St. Rep. 267, 28 Pac. 989;

Housmon v. Trenton Water Co. 119 Mo. 304, 23 L. R. A. 146, 41 Am. St. Rep. 654, 24 S. W. 784.

"The rulings in these cases are generally to the effect that there is no privity of contract between the water company and a citizen which will support the action, and that the contracting company cannot be charged with a greater liability than the city itself. Only two appellate courts have held otherwise,—those of Kentucky and North Carolina. The North Carolina ruling (*Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720), was based on the opinion of the Kentucky court in *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, and, as there was in that case a private contract between the plaintiff and the water company, the opinion consists principally of *dicta*. It is true that the question does not appear to have been presented to our supreme court, but I can see no reason to doubt the correctness of the rule approved by the great weight of authority.

"If such be the true rule, and if the defendant be liable here, the only property in the town specifically protected by such a contract for water for general fire purposes, and the only property for loss of which a recovery could be had in an action for damages based on a breach of such contract, is the property of the municipality itself. Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire by reason of its failure to furnish him a sufficient supply of water. See *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.* 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227; *Knappman Whiting Co. v. Middlesex Water Co.* 64 N. J. L. 240, 49 L. R. A. 572, 45 Atl. 692; *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249. It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more. The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for private corporate purposes, is clearly marked by the decisions. See *Spring-* 64 L. R. A.

field F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660, 51 Am. St. Rep. 667, 42 N. E. 405. In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which the municipality, as a property owner, derives the same incidental benefit that every other property owner does, no more, no less. Yet in each there is a contractual relation. The bar to such a recovery in each case is that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection. I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction, that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town, and that the plaintiff, as a property owner, is without right of action."

These views and the conclusions expressed are hereby adopted as the views and conclusions of this court. A consideration of the cases presented by appellant to this court, which cases were not before the learned judge of the trial court, do not in any wise serve to shake the soundness of the conclusions which he there expressed. *Paducah Lumber Co. v. Paducah Water Supply Co.* charged upon an express contract, whereby, for the granting of a franchise for forty years, the water company agreed, with other things, for the benefit of the inhabitants of the town and their property, to maintain "two pumping engines each having capacity to force into the standpipe 2,000,000 gallons of water every twenty-four hours, and to keep a head of water sufficient to throw from any eight of the hydrants, simultaneously and for five consecutive hours at any one period of time, streams through 50 feet of hose 100 feet high." A recovery was sought for the breach of the express terms of this contract. *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L. R. A. 513, 70 Am. St. Rep. 598, 32 S. E. 720, was in principle identical with the *Paducah Case*, which it cites with approval. There, too, it was alleged that the defendant company contracted to furnish said city with pure and wholesome water for the use of its citizens and of force at all times sufficient to protect the inhabitants of the city against loss by fire, and, further, to erect and maintain reservoirs,

water towers, pump houses, and other appurtenances and attachments necessary or expedient for the proper conducting and carrying on said waterworks so as to supply at all times the greatest protection against fire, and to maintain "a pressure of water for fire purposes sufficient to throw six streams of water from six hydrants to a vertical height of 100 feet in still air, each stream being taken from one hydrant and with 100 feet of hose and a 1-inch ring nozzle; and the said companies shall constantly, day and night, except from unavoidable accidents, keep all the said hydrants supplied with water for fire service, and shall keep them in good order for said service." In *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1243, 27 So. 684, a franchise and grant for thirty years had been made by the city with the defendant company under this express contract: "To supply and have ready at all times for use in pipes and hydrants erected on the premises by plaintiff as a precaution against fire, water in sufficient quantity and with a specified force of pressure sufficient to serve the purpose of the extinguishment of fires." The supreme court, dealing with the facts of the case, declared that the municipality is not liable in damages where it has a contract with a private company which fails adequately to meet its obligations, but that it is not so clear that the private company making such contract and failing to meet its duties thereunder may not be held answerable to the citizen for loss he sustains in consequence of such failure. In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which, in the exercise of its governmental functions, the plaintiff had obtained for the whole town.

The only other cases cited by appellant are Kentucky cases following the decision in the *Paducah Lumber Co. Case*, 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, and the case of *Watson v. Needham*, 161 Mass. 404, 24 L. R. 64 L. R. A.

A. 287, 37 N. E. 204. In this last case an action by a citizen against the town, which itself was supplying the water, was upheld, but that was under a doctrine at variance with the established rule in this state, which denies a right of action against a municipality for damages occasioned by the negligence of its officials or employees. *Huffman v. San Joaquin County*, 21 Cal. 426; *Chope v. Eureka*, 78 Cal. 591, 4 L. R. A. 325, 12 Am. St. Rep. 113, 21 Pac. 364; *Sievers v. San Francisco*, 115 Cal. 655, 56 Am. St. Rep. 153, 47 Pac. 687.

The order appealed from is therefore affirmed.

We concur: **McFarland, J.; Lorigan, J.**

Petition for rehearing in banc denied. March 11, 1904.

Beatty, Ch. J., dissents.

Leah J. KATZ, Exrx., etc., of Marcus Katz,
Deceased, et al., Appts.,

v.

Margaret D. WALKINSHAW, Respnt. }

(.....Cal.....)

1. Water percolating from mountain slopes to the valley, where it reaches an impervious barrier, and is held under an impervious stratum of earth, so that, when the latter is perforated, the pressure from above causes artesian wells, cannot be regarded as a water course so as to confer riparian rights upon owners of the surface.
2. The owner of a portion of a tract of land which is saturated below the surface with an abundant supply of

NOTE.—Correlative rights in percolating waters.

When the question of the rights in subterranean waters first came before the courts they hesitated, apparently because of the seeming difficulty of formulating any rules which would be adequate to regulate rights in such waters, to attempt to lay down any rules whatever, and held generally that the water was a part of the land, and that each landowner could do with it what he chose. See note to *Southern P. R. Co. v. Dufour*, 19 L. R. A. 92. It will be at once perceived that this method of dealing with the question recognized only the doctrine that might, or in this instance opportunity, made right, and refused absolutely to recognize any correlative rights whatever in underground water. This method, however, was wholly inadequate to meet the necessities of the case, and almost from the beginning exceptions began to be made to the general rule as above stated. By referring to the note in 19 L. R. A. 92, it will be seen that an exception almost as old as the rule was that, if the water was flowing in a definite

percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment.

On Rehearing.

3. A nonsuit should not be granted if enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proved.

4. The fundamental principles of right and justice on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state, and the peculiarities of its climate, soil, and products, the application of a given common-law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right.

(November 7, 1902.)

APPEAL by plaintiffs from a judgment of the Superior Court for San Bernardino County in favor of defendant in an action to enjoin the diverting of water from an artesian belt to the injury of plaintiffs' property. *Reversed.*

The facts are stated in the opinions.

Messrs. C. C. Haskell, Rolfe & Rolfe, and H. C. Rolfe, for appellants:

The water need not flow on the surface in a visible stream, "nor need it flow in a defined channel underground as a solid body of moving water of any particular dimensions, in order to constitute a water course."

Los Angeles v. Pomeroy, 124 Cal. 622, 57 Pac. 585.

The evidence showing that plaintiffs' wells were deprived of water by the flow of defendant's wells was overwhelming. Being so deprived, the inference is irresistible that defendant's wells draw from the same

channel; the same rules applied to it as applied to surface streams, and not the rule giving the landowner a right to use or destroy the water at his pleasure. Moreover, it will be seen that there was no right to foul or pollute the underground water to the injury of a neighbor, and that some courts held that a landowner would not be permitted to interfere with his neighbor's use of the water merely out of malice. In addition to the cases there referred to upon the question of malice, attention is called to *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74, and *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511. So, in *Wyandot Club v. Sells*, 6 Ohio N. P. 64, it was held that the owner of lands, the waters of a spring on which are wrongfully diverted by one who does the act maliciously, is entitled to punitive damages; and in *Burke v. Smith*, 69 Mich. 380, 8 L. R. A. 184, 37 N. W. 838, Judge Morse, for the purpose of determining the effect of maliciously cutting off light and air, assumes that there would be a liability for maliciously interfering with a water supply. In jurisdictions where the absolute right to cut off percolating water prevails, however, the court holds that the motive with which it is done is immaterial. Thus, in *Bradford v. Pickles* [1895] A. C. 587, 64 L. J. Ch. N. S. 759, 11 Reports, 286, 73 L. T. N. S. 353, 44 Week. Rep. 100, 60 J. P. 3, Affirming [1895] 1 Ch. 145, [1894] 8 Ch. 54, it was held that the fact that one, in intercepting percolating water, acted without a bona fide attempt to improve his own land, but maliciously with intention to injure his neighbor and to induce him to compensate him for refraining from doing so, does not make the one committing the act liable.

Referring again to the note in 19 L. R. A. it is seen that the doctrine of absolute right was held not to extend to permitting the landowner to appropriate underground water if the effect was to draw it by percolation from a surface stream; and the New Hampshire court intimated that the rules governing the rights in underground waters should be made more definite and certain to the extent of holding that there was a correlative right in such waters, so that each landowner must make a rea-

sonable use of his right, and that his neighbor had a right to object to an unreasonable or excessive use of the water.

Within the past few years, and since the note above referred to was published, the courts have taken long strides toward bringing the question of percolating water within the domain of law and order. The New Hampshire doctrine is the only one which can be recognized by any courts purporting to be governed by principles of right and justice. The mere fact that the source and course of water which is found percolating beneath the surface of the ground are not known is no reason why the courts should refuse to apply to such water definite rules so far as it is possible to apply them, the same as to other species of property; and in actual practice the application of rules recognizing correlative rights and confining each landowner to a reasonable use of the water is not difficult.

Upon this question the courts are not embarrassed by any fixed common-law rule which was adopted by the statutes enacting the common law, so that they are at liberty to adopt the rule which is most in accord with principles of right and justice and with the general analogies of the law. The first case dealing with underground water as such was decided in 1840 (*Hammond v. Hall*, 10 Sim. 552, 4 Jur. 694), and the English court did not hold that the water might be exhausted for commercial purposes by one landowner to the injury of his neighbors until 1860, in *New River Co. v. Johnson*, 2 El. & El. 435, 29 L. J. Prob. N. S. 93, 6 Jur. N. S. 374, 1 L. T. N. S. 295, 8 Week. Rep. 179; so that the courts in this country are not bound by English precedents, and the general statements of courts and text writers that the landowner has absolute title to the water found beneath the soil are mere crude generalities which have not been generally followed in the settlement of rights between adjoining landowners.

KATZ V. WALKINSHAW and BARCLAY V. ABRAHAM are good illustrations of the tendency of the modern decisions, and are the outcome of the application to the subject of percolating waters of the rules applied in dispensing jus-

stream of water which is admitted by the answer to supply plaintiffs' wells.

Burroughs v. Saterlee, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727.

Where a surface stream of water sinks beneath the surface, and, passing through the soil, no matter for how long a distance, reappears again, thence flowing on the surface, such a stream is a continuous stream throughout its course.

Case v. Hoffman, 64 Wis. 438, 20 L. R. A. 40, 54 N. W. 796; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Herriman Irrig. Co. v. Butterfield Min. & Mill. Co.* 19 Utah, 453, 51 L. R. A. 930, 57 Pac. 537; *Vineland Irrig. Dist. v. Azusa Irrig. Co.* 126 Cal. 486, 46 L. R. A. 820, 58 Pac. 1059; *Bartlett v. O'Connor* (Cal.) 36 Pac. 513; *McClellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280; *Keeney v. Carillo*, 2 N. M. 480.

The growth of trees in this arid country is indicative of an underground supply of water.

Hale v. McLea, 53 Cal. 578.

Where there is a channel either below or above the surface of the ground, in which there is a well-defined flow of water, the owner of the land through which it passes can only make a reasonable use of the water.

tice between parties disputing as to other property rights.

Even in England, where the rule has seemed to be that each landowner may do what he will with percolating water, Lord Wensleydale, in *Chasemore v. Richards*, 7 H. L. Cas. 387, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685, says that, according to reason and law,—*Sic utere tuo ut alienum non laedas*,—it seems right to hold that a landowner ought to exercise his right to use percolating water in a reasonable manner, with as little injury to his neighbor's rights as may be; and he suggests that it is not a reasonable use to pump water from a well to supply a municipal corporation at a distance, which would have no right to the use of the water because of ownership of the soil in which it was found, in such a way as to cause a diminution of the flow of water in a neighboring river.

In accordance with that suggestion, the New York court has held that the draining of land of a private owner by a city pumping works, which exhausts from all the ground thereabout the natural supply of underground or subterranean water, and thus prevents the raising on it of crops to which it was and would be peculiarly adapted, or destroy such crops after they are grown or partly grown, renders the city liable to the landowner for the damages he sustains, and entitles him to an injunction against the continuance of the wrong. *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644. Affirming 47 App. Div. 371, 61 N. Y. Supp. 1005; *Westphal v. New York*, 34 Misc. 684, 70 N. Y. Supp. 1021.

64 L. R. A. /

Brown v. Kistler, 190 Pa. 499, 42 Atl. 885; *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442; *Case v. Hoffman*, 84 Wis. 438, 20 L. R. A. 40, 54 N. W. 795; *Gould, Waters*, 263.

One may drain his own land, or do anything that will benefit it; but he cannot do this in such a way as to injure his neighbor's land.

Suett v. Cutts, 50 N. H. 439, 9 Am. Rep. 281; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 184; *Bartlett v. O'Connor* (Cal.) 36 Pac. 513; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Greenleaf v. Francis*, 18 Pick. 117; *Herriman Irrig. Co. v. Butterfield Min. & Mill. Co.* 19 Utah, 453, 51 L. R. A. 930, 57 Pac. 537.

One may not pollute water flowing underground.

Good v. Altoona, 162 Pa. 493, 42 Am. St. Rep. 840, 29 Atl. 741.

There is consistently an inconsistency in the rule which gives to an owner of the land the usufruct of a stream which exists as a right *ex natura*, and yet vests in another, in his search after underground water, the right to destroy the stream absolutely.

Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 147; *Forbell v. New York*, 27 Misc. 12, 56 N. Y. Supp. 790.

On rehearing.

If there were any lack of sufficient de-

So, in *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727, it was held that a city is liable for diminishing the supply of water in a private well, so as to leave an insufficient quantity for domestic purposes, by sinking wells and pumping therefrom a municipal water supply.

So, a railroad company will not be permitted to sink a well upon land procured for that purpose, and then pump from it water for the use of its shops and engines to such an extent that the water stratum is exhausted, and the wells of surrounding proprietors dried up. *East v. Houston & T. C. R. Co.* (Tex. Civ. App.) 77 S. W. 646.

So, one owner will not be permitted to waste the water to the injury of his neighbor. *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 60 L. R. A. 875, 93 N. W. 907.

A use for natural purposes takes precedence over artificial ones. *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727.

But, as between artificial uses, neither landowner has a right to precedence. The right of the landowner is limited to use of the water for the benefit of his own property, and, in case he attempts to remove the water from the land for sale, he cannot complain if the supply is diminished by others who make a like use of it. *Merrick Water Co. v. Brooklyn*, 32 App. Div. 454, 53 N. Y. Supp. 10.

A few recent decisions by courts misled by the general statements that the water is a part of the soil and may be used by the landowner at his pleasure, have held that injury to a neighbor by any use which one might make of the percolating water found upon his own prop-

scription of the water, about the identity of which there is no dispute, flowing in plaintiffs' wells, such lack of description is amply supplied by the defendant, who alleges in her answer that the water taken is percolating water, and not water of a well-defined underground stream.

Hunt v. Davis, 135 Cal. 35, 66 Pac. 957; *Herd v. Tuohy*, 133 Cal. 61, 65 Pac. 139; *Johnson v. Polhemus*, 99 Cal. 246, 33 Pac. 908; *Sandford v. Flint*, 24 Mich. 26; *Dayton v. Dayton*, 68 Mich. 437, 36 N. W. 209; *Rankin v. Newman*, 107 Cal. 609, 40 Pac. 1024, 41 Pac. 304; *Hegard v. California Ins. Co. (Cal.)* 11 Pac. 594.

A defective description of property in a complaint may be cured by the answer.

Vantilburgh v. Hamilton, 2 Mont. 413; *Willis v. Lockett* (Tex. Civ. App.) 26 S. W. 419; *Hines v. Wilmington & W. R. Co.* 95 N. C. 437, 59 Am. Rep. 250; 4 Enc. Pl. & Pr. p. 608.

Even though this flow and stream of water be by percolation, defendant has no right to take it, thereby depriving plaintiffs of the natural flow of water in their wells, and convey it to, and use it upon, lands "through or to which said underground stream does not flow."

In adjudicating upon the rights of parties to percolating water the rule *Sic utere tuo ut alienum non laedas* has been almost uni-

versally applied by the courts of the United States where the party interfering with percolating water did not commit the act in the reasonable use of his own land.

Where knowledge of the underground stream is certain the same rules apply to it as to surface streams.

Collins v. Chartiers Valley Gas Co. 131 Pa. 146, 6 L. R. A. 280, 17 Am. St. Rep. 791, 18 Atl. 1012.

An adjoining proprietor has no right to add pressure to the natural percolations of the soil. He is charged with the natural and anticipated consequences of his own acts.

Murphy v. Gillum, 73 Mo. App. 490; *Everett v. Hydraulic Flume Tunnel Co.* 23 Cal. 225.

Harmful percolations cannot be forced into a neighbor's land.

Parker v. Larsen, 86 Cal. 236, 21 Am. St. Rep. 30, 24 Pac. 989.

One who drains his lands so as to injure another without benefit to himself will be restrained from so doing.

Bartlett v. O'Connor (Cal.) 36 Pac. 513; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 356; *Greenleaf v. Francis*, 18 Pick. 117; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 513; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276.

erty gives the latter no cause of action. Thus, in *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352, there is a *dictum* to the effect that one landowner may draw from his property water to supply a large community, although he thereby takes water which would naturally come to the property of his neighbor to its benefit.

So, in *Clarke County v. Mississippi Lumber Co.* 80 Miss. 535, 31 So. 905, it was held that a landowner had a right, in the prosecution of his business, to drive a well on his property, and by means of suction obtain therefrom water to supply ponds for mill logs, although he thereby exhausts and dries up the well belonging to the county.

And the Wisconsin court pushes the doctrine to the extent of holding that a landowner has a right to sink a well on his land and use the water therefrom as he chooses, or allow it to flow away, regardless of the effect of such use on his neighbor's wells; and such right is not affected by malicious intent. That decision is opposed to good morals, good sense, and all common-law principles which are applicable to analogous subjects. The principle governing modern affairs of life is that common property is to be conserved and preserved for the good of the greatest number, and that one man, merely because he has access to the common supply, will not be permitted wantonly to waste or destroy the common property to the injury of others desiring to make use of it.

Controversies are likely to arise with respect to the right to use water for commercial purposes, or to waste or destroy it, only in local-

ties where there is an unusual quantity because of the geological formation or peculiar local conditions. In such cases there is invariably found to be a basin or reservoir, like a vast underground lake, with impervious sides and bottom covered with a loose stratum of earth which the water saturates. There is no reason why the same rule should not be applied to such a lake as to one on the surface. Every landowner who has access to it has a right to make a reasonable use of the common supply to meet his own needs; and, so far as he does so, his neighbor must accommodate himself to the effect of such use. But the moment that he begins to make an excessive or artificial use of the water, or to waste it, the neighbor has a right to complain. See *Farnham, Waters*, § 938. That is the rule of *Katz v. Walkinshaw* and *Barclay v. Abraham*, and of the better considered cases above cited.

In application of the doctrine of *Katz v. Walkinshaw*, the California court has held that a riparian owner cannot intercept percolating water so as to diminish the flow of a surface stream, and put it to a use which the stream itself could not be applied to. *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 849. And that the owner of land has a right to make only a reasonable use of water percolating therein for the benefit and enjoyment of his land, and cannot make an excavation in his land so as to divert the flow of water from other land, where the diversion is not for the benefit of his own property. *Cohen v. La Canada Land & Water Co. (Cal.)* 76 Pac. 47.

H. P. F.

The rule of "so use your own as not to injure another" is extended and applied to all cases where the percolating water is taken for an unreasonable use, and what is reasonable depends upon the facts surrounding the case.

Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 147; *Forbell v. New York*, 47 App. Div. 371, 61 N. Y. Supp. 1006; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 281; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 184; *Herriman Irrig. Co. v. Butterfield Min. & Mill. Co.* 19 Utah, 453, 51 L. R. A. 930, 57 Pac. 537.

Mr. G. H. Gould as amicus curiae.

Mr. Byron Waters, for respondent:

The evidence not only fails to show that a water course exists, but affirmatively shows that the waters constituting the sources of all the wells are percolating waters, neither having nor flowing within any known, defined channel, bed, or banks.

Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 616, 19 L. R. A. 92, 30 Pac. 783; *Gould v. Eaton*, 111 Cal. 641, 52 Am. St. Rep. 201, 44 Pac. 319; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

Messrs. Houghton & Houghton, amici curiae, in support of petition for rehearing:

The cause of action stated in the plaintiffs' complaint purports to be a diversion by the defendant of waters from a natural underground or subsurface stream of water flowing in known and well-defined channels. This cannot be supported by evidence which would warrant a judgment in favor of the plaintiffs, based upon their rights to water which was percolating or seepage water as distinguished from a stream of water.

Wilson v. Ward, 26 Colo. 39, 56 Pac. 573.

A recovery cannot be had upon a cause of action not set out in the complaint, but developed by the proofs.

Mondran v. Gouz, 51 Cal. 151; *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299; *Rudel v. Los Angeles County*, 118 Cal. 281, 50 Pac. 400; *Nelson v. Lemmon*, 10 Cal. 50; *Wallace v. Farmers' Ditch Co.* 130 Cal. 578, 62 Pac. 1078; *Murdock v. Clarke*, 59 Cal. 683; *Davis v. Pacific Teleph. & Teleg. Co.* 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; *Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. 180.

In the absence of evidence as to the source of subterranean waters, they are presumed to be formed by the ordinary percolations of water in the soil.

Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 618, 19 L. R. A. 92, 30 Pac. 783; *Metcalfe v. Nelson*, 8 S. D. 89, 59 Am. St. Rep. 748, 65 N. W. 911; *Clarke County v. Mis-*

issippi Lumber Co. 80 Miss. 535, 31 So. 905; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376, 63 Am. St. Rep. 268, 20 So. 780; *Ocean Grove Camp Meeting Asso. v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168.

The burden of proving, in a given case, that subterranean waters flow in a known and well-defined channel, is cast upon him who claims rights in and to such waters as so flowing.

Gould v. Eaton, 111 Cal. 645, 52 Am. St. Rep. 201, 44 Pac. 319; *Herriman Irrig. Co. v. Keel*, 25 Utah, 96, 69 Pac. 724; *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. Rep. 670, 40 Atl. 41; *Elster v. Springfield*, 49 Ohio St. 99, 30 N. E. 274; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 81.

Percolating water cannot be regarded as a water course when it is percolating through sand or gravel within limits not at all defined by anything appearing upon the surface or made to appear by investigation beneath the surface.

Meyer v. Tacoma Light & Water Co. 8 Wash. 144, 35 Pac. 601; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585; *Clarke County v. Mississippi Lumber Co.* 80 Miss. 535, 31 So. 905; *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. Rep. 661, 40 Atl. 41; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Lyde's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 451, 70 Am. St. Rep. 810, 54 Pac. 244; *Frazier v. Brown*, 12 Ohio St. 294; *Deadwood C. R. Co. v. Barker*, 14 S. D. 558, 86 N. W. 619; *Gould, Waters, & 281*.

The fact that the flow of one well diminishes the flow of adjacent wells does not prove that their common source of supply is an underground stream.

Ocean Grove Camp Meeting Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; *Taylor v. Welch*, 6 Or. 199; *Cole v. Bacon*, 63 Cal. 571; *Clarke County v. Mississippi Lumber Co.* 80 Miss. 535, 31 So. 905.

It has become a rule of property in this state that there are no correlative rights as to underground percolating waters,—that a landowner has an absolute property in, and dominion over, all waters percolating in the soil owned by him *usque ad infernos*.

Vineland Irrig. Dist. v. Azusa Irrig. Co. 126 Cal. 486, 46 L. R. A. 820, 58 Pac. 1059; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; *Huston v. Leach*, 53 Cal. 262; *Painter v. Pasadena Land & W. Co.* 91 Cal. 74, 27 Pac. 539; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92,

30 Pac. 783; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319.

The doctrine of prescription is not applicable to percolating waters.

Hanson v. McCue, 42 Cal. 310, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 94, 30 Pac. 783; *Wheelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. Rep. 661, note, 40 Atl. 41; *Frazier v. Brown*, 12 Ohio St. 300; *Elster v. Springfield*, 49 Ohio St. 99, 30 N. E. 274; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 80; *Roath v. Driscoll*, 20 Conn. 541, 52 Am. Dec. 352; *Chasemore v. Richards*, 7 H. L. Cas. 370, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685.

The rule of *stare decisis* should be enforced.

Re Dorris, 93 Cal. 611, 29 Pac. 244; *Smith v. McDonald*, 42 Cal. 484; *Redmond v. Peterson*, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97; *Butes v. Relyea*, 23 Wend. 340; *Reed v. Owenby*, 44 Mo. 206.

Rights in and to oil and natural gas are determined by the same principles as define the rights in and to percolating waters.

People's Gas Co. v. Tyner, 131 Ind. 277, 16 L. R. A. 443, 31 Am. St. Rep. 433, 31 N. E. 59; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Kier v. Peterson*, 41 Pa. 357; *Funk v. Haldeman*, 53 Pa. 229; *Stoughton's Appeal*, 88 Pa. 198; *Hail v. Reed*, 15 B. Mon. 479; *Gould, Waters*, § 291, p. 549.

Percolating waters are not the subject of property, "except while in actual occupancy," they belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former is gone.

People's Gas Co. v. Tyner, 131 Ind. 277, 16 L. R. A. 443, 31 Am. St. Rep. 433, 31 N. E. 59; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Kinnaird v. Standard Oil Co.* 89 Ky. 473, 7 L. R. A. 451, 25 Am. St. Rep. 545, 12 S. W. 938.

As no correlative rights exist between proprietors of adjacent lands with respect to percolating waters, the doctrine of *sic utero tuo*, which presupposes the existence of a legal right which can be injuriously affected, has no application in the determination of the right to use such waters.

Acton v. Blundell, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Chatfield v. Wilson*, 28 Vt. 49, 31 Vt. 358; *Harwood v. Benton*, 32 Vt. 724; *Wheelock v. Jacobs*, 70 Vt. 164, 43 L. R. A. 105, 67 Am. St. Rep. 659, 64 L. R. A.

40 Atl. 41; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Walker v. Cronin*, 107 Mass. 555; *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Strait v. Brown*, 16 Nev. 321, 40 Am. Rep. 497; *Roath v. Driscoll*, 20 Conn. 541, 52 Am. Dec. 352.

Interference with percolating waters is *damnum absque injuria*.

Gould, Waters, §§ 282 *et seq.*; *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; *Alexander v. United States*, 25 Ct. Cl. 87; *United States v. Alexander*, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; *Copper King v. Wabash Min. Co.* 114 Fed. 992; *Bruening v. Dorr*, 23 Colo. 195, 35 L. R. A. 640, 47 Pac. 290; *Wilson v. Ward*, 26 Colo. 39, 56 Pac. 573; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 25 Conn. 593, 27 Conn. 84, 71 Am. Dec. 49; *Greenleaf v. Francis*, 18 Pick. 117; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262, 20 So. 780; *Warmack v. Brownlee*, 84 Ga. 196, 10 S. E. 738; *Davis v. Afong*, 5 Hawaiian Rep. 216; *Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 114, 71 Am. Dec. 60; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Hougan v. Milwaukee & St. P. R. Co.* 35 Iowa, 558; *Emporia v. Soden*, 25 Kan. 588; *Kinnaird v. Standard Oil Co.* 89 Ky. 473, 7 L. R. A. 451, 25 Am. St. Rep. 545, 12 S. W. 938; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Davis v. Spaulding*, 157 Mass. 431, 19 L. R. A. 102, 32 Atl. 650; *Upjohn v. Board of Health*, 46 Mich. 549, 9 N. W. 845; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74; *Mosier v. Caldwell*, 7 Nev. 363; *Ocean Grove Camp Meeting Asso. v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Keeney v. Carillo*, 2 N. M. 495; *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783; *Frazier v. Brown*, 12 Ohio St. 300; *Elster v. Springfield*, 49 Ohio St. 100, 30 N. E. 274; *Disette v. Lowrie*, 6 Ohio N. P. 392; *Wyandot Club v. Sells*, 6 Ohio N. P. 64; *Taylor v. Welch*, 6 Or. 199; *Brosnan v. Harris*, 39 Or. 148, 54 L. R. A. 628, 87 Am. St. Rep. 649, 65 Pac. 867; *Wheatley v. Baugh*,

25 Pa. 528, 64 Am. Dec. 721; *Kier v. Peterson*, 41 Pa. 357; *Stoughton's Appeal*, 88 Pa. 198; *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Williams v. Ladew*, 161 Pa. 283, 41 Am. St. Rep. 891, 29 Atl. 54; *Brown v. Kistler*, 190 Pa. 499, 42 Atl. 885; *Buffon v. Harris*, 5 R. I. 243; *Metcalf v. Nelson*, 8 S. D. 89, 59 Am. St. Rep. 746, 65 N. W. 911; *Sullivan v. Northern Spy Min. Co.* 11 Utah, 441, 30 L. R. A. 186, 40 Pac. 709; *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 451, 70 Am. St. Rep. 810, 54 Pac. 244; *Herriman Irrig. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719; *Chatfield v. Wilson*, 28 Vt. 49, 31 Vt. 357; *Harwood v. Benton*, 32 Vt. 724; *Miller v. Black Rock Springs Improv. Co.* 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27; *Meyer v. Tacoma Light & Water Co.* 8 Wash. 144, 35 Pac. 601; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354.

Messrs. M. B. Kellogg, Otis & Gregg, Howard Surr, Frank H. Short, Platt & Bayne, and Henley C. Booth also as *amici curiæ*.

Temple, J., delivered the opinion of the court:

This appeal is taken from a judgment of nonsuit entered against plaintiffs on motion of defendant. The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs, and which they ever had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes, and for irrigating the lands of plaintiffs, upon which there are growing trees, vines, shrubbery, and other plants, which are of great value to plaintiffs. All of said plants will perish, and plaintiffs will be greatly and irreparably injured, if the defendant is allowed to divert the water. These facts are admitted, and further that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived. The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case. The defendant denies that she is taking or diverting water from an under-

ground stream or water course, and alleges that all the water which rises in the artesian wells on her premises, and which she is selling, is percolating water, and is parcel of her premises, and her property. In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground water course, and asserts her right to dispose of the water in the manner alleged, because it is percolating water, not confined to a definite water course. The court sustained that proposition, and for that reason granted defendant's motion for nonsuit.

The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of *detritus* of varying quantity and material, with no regular stratification. Wells have been sunk at least to the depth of 750 feet, but no bed rock has been found. It has quite an incline from the mountain, and is from 700 to 1,500 feet above sea level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses and as an expert. He says the saturated land is fed: First, by the underflow from the numerous ravines, canyons, and streams which enter the valley from the mountains; and, secondly, by the rain and flood water upon, and absorbed upon, the slope, and between the artesian belt and the mountains. This water, percolating down into the soil, and constantly pressed forward by water accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed subsurface stream, the witness thought, were on the west "a cemented dyke, which runs through the valley, and the eastern boundary of it is the clay bank or dyke at the south side of the Santa Ana river." Within these limits, many ravines enter from the mountains, some of them carrying at times great quantities of water, much of which had been appropriated and carried off in pipes or cemented aqueducts. It is evident that, if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. "It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil." It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground water course to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and

the water flowing in streams with known or ascertainable banks, which confine the water to definite channels. All rain water which falls upon the hills and mountain sides which does not flow off at once, as surface water, is absorbed and percolates down in the same way to the valley below. No doubt, limits can be found to every such flow, as in this case. The distinction is well established and, in some respects, different rules of law applied to the two cases. The plaintiffs, therefore, cannot establish their claims upon the theory of an underground water course to which they are riparian.

But appellants contend that, though they are not riparian to an underground water course, and although the saturated belt carries only percolating water, still they are entitled to the injunction prayed for. The defense, conceding that the water held in the earth is percolating water, relies upon certain decisions which assert and apply literally the maxim, *Cujus est solum, ejus est usque ad inferos*, and that water percolating in the ground, or held there in saturation, belongs to the landowner as completely as do the rocks, ground, and other material of which the land is composed, and therefore he may remove it and sell it, or do what he pleases with it. He cites authority for the proposition: *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 616, 19 L. R. A. 92, 30 Pac. 783; *Gould v. Eaton*, 111 Cal. 641, 52 Am. St. Rep. 201, 44 Pac. 319, and *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

It is obvious at once that the analogy between the right to remove sand and gravel from the land for sale, and to remove and sell percolating water, is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land and also sells water which is the property of his neighbor. And the effect is similar in other respects. By pumping out the water from his lands, he can, perhaps, deprive his neighbors of water for domestic uses, and in fact render their land valueless. In short, the members of the community, in the case supposed, have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community, and render the neighborhood uninhabitable.

We have derived our law, in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first cases are quite modern.

Even yet the text-books on water rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence, as compared with a climate like southern California. The learned counsel for appellants state in their brief that water at San Bernardino is worth \$1,000 per inch of flow. Percolating water or water held in the earth is the main source of supply for domestic uses and for irrigation, without which most lands are unproductive. It is also stated that speculators are seeking to appropriate the percolating water by getting title to some part of a watershed or slope, and by running canals and tunnels, and by sinking to obtain water for sale. It is asserted that the lands naturally made moist by percolating water are very productive, and were first settled upon, and have been most highly improved; and he asks whether these lands are to be converted into deserts because speculators may pump and carry away to some distant locality the subsurface waters which rendered the land fertile. Certainly no such case as this has come before a court or could well exist in England or in the eastern states.

It is often asserted that *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, decided in exchequer chamber in 1843, was the first case in England in regard to percolating water. This shows how unimportant, relatively, the subject is in England. It was an action for damages occasioned by working a coal mine on adjoining land, which interfered with water which was flowing underground to plaintiff's spring. The court instructed the jury "that, if the defendants had proceeded and acted in the usual and proper manner in the land for the purpose of working and mining a coal mine therein, they might lawfully do so." This instruction was held to be correct, and that is the real force and effect of the decision. But the chief justice pointed out some respects in which the right to water flowing in an open visible stream differs from an underground flow by percolation. The main difference, so far as concerns the question under consideration, was that percolation was occult, the regulation of which was a difficult matter. One who disturbed the course of percolating water by digging upon his own land could not tell whether he would drain his neighbor's well, nor could the person injured demonstrate that such was the cause of the injury. So, too, when one diverts water from a visible stream, the fact and the effect are at once known, while as to percolating water its course may be obstructed or changed without the intent to

do so, and without knowing that such would be the effect of what was done. His lordship, the case being one of first impression, quotes a passage from a civil-law writer to the effect that, when one digging upon his own land drains his neighbor's well, such neighbor has no cause of action, *si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit*. His lordship, however, although the case did not require it, disregarded the qualifications found in the civil law, and held that the case was not governed by law which applies to flowing streams, "but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or pervious ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of this right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action." This statement has been frequently quoted, both in England and in this country, and has been generally adopted as a correct statement of the law upon the subject. In *Aceton v. Blundell*, as has been said, the working of a mine upon an adjoining estate drained certain springs on plaintiff's land. It would have been sufficient to defeat plaintiff's action to have said that the working of a coal mine in a proper manner is a reasonable use of land, and that it was without malice, or an intent to injure plaintiff. It is a general rule—in fact, a universal principle of law—that one may make reasonable use of his own property, although such use results in injury to another. But the maxim, *Cujus est solum, ejus est usque ad inferos*, furnishes a rule of easy application, and saves a world of judicial worry in many cases. And perhaps in England and in our Eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like southern California, where the relative importance of percolating water and water flowing in definite water courses is greatly changed. And it seems to me a great mistake is made in supposing that, if the plenary property of a landowner in percolating water is denied, the alternative is to apply to such water all the rules which apply to the use of water flowing in water courses having defined channels. The entire argument for what may be called the "*cujus est*

solum doctrine" consists in showing that some recognized regulation of riparian rights would be inapplicable. It is said, for instance, that the law of riparian rights requires each proprietor to permit the water to flow as it was accustomed to flow. Apply this rule to subsurface water, and no one could drain his land, for he thereby prevents the water from flowing as it was accustomed to flow by percolation to his neighbor. The common-law method in the supposed case would be to apply the principle to the new case, although some judge-made rule as to how it shall be applied might stand in the way. The principle is clearly applicable. A riparian owner may not divert the water, because he would thereby injure his neighbors who have equal rights in the stream. Still he may take a reasonable amount from the stream for domestic purposes, and that may equal the entire flow, although he thereby injures his neighbors. It is a question of reasonable use, and that applies both to the land of the person disturbing the percolation and to adjoining land. He may cultivate his land, and for that purpose ordinarily may drain it, and plow it or clear it from forests, although all these operations may affect the flow of water to the lower proprietor, both in the water course and by percolation. He was allowed to become the owner for those purposes, and with the understanding that all other proprietors have the same right to use their land. The maxim, *Sic utere*, etc., plainly applies as between such proprietors, very much as it does between different riparian proprietors upon the same stream. The title to all land is held subject to this maxim. Such ownership is "but as an aggregation of qualified principles, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations necessary for the highest use of land by the entire community of proprietors." *Thompson v. Androscoggin River Improv. Co.* 54 N. H. 545.

Proprietary rights are limited by the common interests of others,—that is, to a reasonable use; and such use one may make of his land, though it injures others. This proposition is generally recognized, but for some reason has not always been recognized by the courts when considering the subject of percolating water, although all rights in respect to water are peculiarly within its province. This rule of reasonable use answers most effectually the main argument against recognizing any modification of the *cujus est solum* doctrine as applied to percolating water, although in a majority of the cases which are claimed as authority against the rule of reasonable use the court takes pains to note that the act which disturbs the percolating water was in using the

land in the usual manner, and without the intent of injuring a neighbor. Among the English cases, *Chasemore v. Richards* was most carefully considered. The village of Croyden was situated upon an extensive plain near the head waters of the river Waundale, and a goodly portion of the permanent flow of the river came by percolation from this plain. The village had caused a large well to be dug about a quarter of a mile from the river, and was pumping from it 500,000 or 600,000 gallons of water daily for the use of the town. Plaintiff was a riparian proprietor upon the river below, and had a mill which was operated by the waters of the river. The pumping naturally diminished the flow, and prevented the use of the mill as efficiently as before. All the facts were admitted or found to exist. The case was first decided in exchequer chambers in favor of the defendant, Mr. Justice Coleridge dissenting. 2 Hurlst. & N. 168. The dissenting opinion presents the doctrine of reasonable use. The case was taken to the House of Lords. 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685. There the case was most elaborately and ably argued, and the view in regard to reasonable use was fully presented. A case was made, and the opinion of the judges was solicited. The judges held unanimously for the defendant, sustaining fully the *cujus est solum* doctrine, without qualification, and this was affirmed by the House. The matter mainly discussed, however, was the plaintiff's claim that he had a prescriptive right to the water. The court held that riparian rights are not derived by prescription, but the right to the water is *ex jure naturæ*. This settled the main contention, and little more was said, except to refer to the cases in which the rights to percolating waters are discussed. Lord Wensleydale, however, who had doubts, pronounced an opinion which seems to me in accord with the views I am trying to express.

The doctrine of reasonable use has been recognized in many cases in the United States,—impliedly in most, as I have stated, but expressly in some. *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, is one of these, and is remarkable in that the court states as strongly as possible, and with approbation, the *cujus est solum* doctrine. It is even said that the opposite doctrine (applying to such water the rule as to riparian rights) would amount to total abrogation of the rights of property. It is said one could not clear or cultivate his land or build a house without interfering with percolating water, and, even if rights were admitted to exist, the difficulty of enforcing them would be insurmountable. I think I have shown that the admitted right to a reasonable use

of the land and of the water answers all these objections. To my mind, this is so obvious that I can but wonder that such objections have ever troubled the judiciary. And yet, notwithstanding this insistence upon the rule which apparently ignores all equities of others than the owner of the soil in which the water is found, the court felt obliged to, and did, in unequivocal words, declare that the use of it must be reasonable. The proprietor may make a reasonable use of his own land, although in so doing he obstructs or changes the percolation of water to or from his neighbor's land. But by far the most satisfactory case upon the subject is *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179. That was a most elaborately considered case, and this precise question is discussed with a fullness and ability which I am not so vain as to think I could improve upon. I would like to transcribe the entire argument, but, as it is accessible to the profession, I need only say I adopt it in full. The decision was approved in *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276. *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, was in some ways a counterpart of *Chasemore v. Richards*. The city of Brooklyn constructed, in Queens county, culverts, aqueducts, reservoirs, and conduits, and dug deep trenches to intercept percolating waters, and further sunk, in the process, earth wells, and put in pumps to obtain the water with which the soil, which it owned, was saturated. It thus procured for the use of the city a large amount of water. Plaintiff owned a farm, distant from these waterworks about 2,400 feet. Upon the land was a small brook, in which he had placed a dam, which he used for purposes of boat-building and for cutting ice. The brook had carried water all the year round. The operations of the defendant rendered this brook entirely dry, and deprived the plaintiff of his income. Here is a case like that of the village of Croyden. Defendant intercepted percolating water upon its own land before it had reached a water course. It did not drain water from a defined stream, but the water was prevented from reaching the stream, which was thereby as effectually destroyed as it could have been by draining the water from it. Judge Hatch, who wrote the opinion in the appellate division of the supreme court, begins by quoting the prevailing doctrine in regard to percolating water, from *Pisley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72: "An owner of the soil may divert percolating water, consume, or cut it off with impunity. It is the same as land, and cannot be distinguished in law from land." He says this proposition must be admitted, but nevertheless a case cannot be found in this country "where the right has been up-

held in the owner of land to destroy, a stream, a spring, or a well upon his neighbor's land, by cutting off the source of its supply, *except it was done in the exercise of a legal right to improve the land, or make some use of the same in connection with the enjoyment of the land itself.*" I have italicized the last clause, as it contains the qualification found in the civil law, upon which the English rule is professedly based, and expresses the principle for which I contend. The learned judge admits that the English cases go further, but says that the American cases have not gone further. The learned court gives a concise statement of the reasons given by the English courts for not applying to percolating water the same principle which governs the right of riparian proprietors, and agrees with Justice Coleridge and Lord Wensleydale that they are insufficient. The court recognized the right of the landowner to percolating water, but says the right must be exercised with reference to the equal right of others in their land. He says one may as well claim the right to tunnel into his neighbor's land and take out valuable minerals, as to drain from it water which is also parcel of it, for sale. The peculiar nature of the property which enables one to take it by drainage does not justify the taking, save in the usual and reasonable use of his own land,—in other words, for the proper use and betterment of his own property. Allusion is made in the opinion to the rule, inconsistent with the *onus est solum* doctrine, that you cannot do anything on your land which will drain water from a visible stream or natural pond upon the land of another. In *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 493, Lord Hatherley said: "You have a right to all the water which you can draw from the different sources which may percolate underground, but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all." It is well said that this decision cannot stand with *Chasemore v. Richards*, 2 Hurlst. & N. 168, even though the court may say that it can. If a landowner owns the water percolating in his soil, as he does the rock, minerals, and earth, why may he not take it in such a case? And what difference is there in destroying a stream or natural pond by drawing water from it through percolation, or by preventing it from flowing into the stream? The effect is the same, and knowledge of the inevitable effect of the act is the same. And this rule would prevent a landowner from draining a marsh, or even from clearing or

cultivating his land, when these operations would tend to increase the percolation from a stream or natural pond upon a neighbor's land. This is one of the main arguments in support of the doctrine of *Adon v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289. It seems here strangely to lose its force, as does also another reason for that rule,—that when doing such acts the landowner could not reasonably anticipate the injury as probable. The court expressly applies the doctrine, *sic utere tuo*, to the case, and affirms the judgment against the city. In the appellate court this judgment was affirmed. 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787. It is there treated, however, as a draining of water from plaintiff's brook and pond. Judge Hatch, in the supreme court, expressly states that defendant simply prevented the water from reaching the brook on plaintiff's farm. Perhaps either view may be taken of the facts. There was an immense saturated plain, composed of porous earth. Defendant's wells extended lower down than the bottom of the pond. The stream and pond, and all the springs, wells, and streams in the neighborhood, have been dry ever since the operations of the defendant. Since the water was first drained out, surely there has been no percolation from the stream. This circumstance makes the case more like that in hand. Here was a vast quantity of water held in the soil, which constituted the common supply of many people. The defendant, pumping from wells on its own land, and taking only percolating water, exhausted this common supply. The court held that it could not be. The reasons would have been much more forceful had the case risen in an arid climate like San Bernardino. But this question was completely put at rest, so far as the state of New York is concerned, by the case of *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644. It was a suit by another plaintiff to restrain the same operations considered in *Smith v. Brooklyn*. Here there was no visible stream or pond on plaintiff's land. His injury was merely that the level of the water held in the soil was lowered, to his injury. In stating the case the court said: "The defendant [city] makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its 2 acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his land is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly

adapted, or destroys such crops after they are grown or partly grown." This statement shows a striking similarity of the issues made in that case to those involved here. The court proceeds to state the usual doctrine in regard to percolating water, and approves the doctrine for the cases in which it is properly applicable. No doubt, the land proprietor owns the water which is parcel of his land, and may use it as he pleases, regard being had to the rights of others. It is not unreasonable that he should dig wells in order to have the fullest enjoyment and usefulness of his estate, or for pleasure, trade, or whatever else the land as land may serve. "But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and, by merchandising it, prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others, whose lands are thus clandestinely sapped, and their value impaired." Counsel for the plaintiff in that case contended that, since plaintiff owned the percolating water in his own soil, the unlawful draining of it away by the defendant was a trespass committed on his land. This contention was sustained both in the supreme court and in the court of appeals. The court further indorsed the opinion of Judge Hatch in *Smith v. Brooklyn*, from which I have made quotations. If the principle announced in these cases prevails here, the order granting a nonsuit, and the judgment entered thereon, must be reversed. It does not require a reversal of the rule laid down in *Acton v. Blundell*, which has been so often cited and indorsed, but only a holding that in certain cases there should be added the element of reasonable use, having reference both to the land belonging to the party who has disturbed the movement of percolating water and to adjoining land, and to land sensibly affected by such acts. Whatever the English rule may be, the American cases either recognize the application of the rule of *sic utere tuo* to the subject, or they are cases in which it was wholly unnecessary to consider that subject. Such are the California cases. In the case of *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585, the question might have been raised, and in the trial court, it may be, was, and in some of the instructions the rule laid down in *Acton v. Blundell* is asserted without qualification. Still this court was not called upon to, and did not, consider any such question. I think it clear that the American cases do not require us to hold that the maxim, *Sic utere tuo*, does not limit the right of the landowner to the use of

subsurface water, but, on the contrary, all the cases in which the question has been discussed held or admit that such maxim should limit such right where justice requires it. Such, I think, is the proper rule.

It follows that the court erred in granting the nonsuit, and the judgment is therefore reversed, and a new trial ordered.

We concur: **Beatty**, Ch. J.; **McFarland**, J.; **Van Dyke**, J.; **Harrison**, J.; **Henshaw**, J.

After a rehearing **Shaw**, J., handed down the following additional opinion:

A rehearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel, and of the utmost importance to the application to useful purposes of the waters which may be found in the soil.

Petitions for rehearing were presented, not only on behalf of the defendant, but also on behalf of a number of corporations engaged in the business of obtaining water from wells and distributing the same for public and private use within this state, and particularly in the southern part thereof. Able and exhaustive briefs have been filed on the rehearing. The principle decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrived at the conclusion, have been attacked in these several briefs and petitions with much learning and acumen. It is proper that we should here notice some of the objections thus presented.

It is urged in the first place that the decision goes beyond the case that was before the court; that the pleadings stated a cause of action solely for the diversion of water from an alleged underground stream, and that, therefore, there was no occasion for a discussion of the principles governing the rights to waters of the class usually denominated "percolating waters." The proposition is not tenable. The complaint, in substance, states that the plaintiffs had wells upon their respective tracts of land, from which water flowed to the surface of the ground; that the water was necessary for domestic use and irrigation on the lands on which they were situate; that the defendant, by means of other wells and excavations upon another tract of land in the vicinity, prevented any water from flowing through the plaintiffs' wells to their premises; and that this was done by drawing off the water through the wells of the defendant, taking it to a distant tract, and

there using it. If the principle is correct that the defendant cannot thus, and for this purpose, take from the plaintiffs' wells the percolating waters from which they are supplied, then no further allegations were necessary, and the averment that the water constituted part of an underground stream may be regarded as surplusage. The complaint was thus treated in the opinion of Justice Temple, and he properly considered the question whether or not, eliminating the surplus allegation that there was an underground stream, the complaint stated a cause of action which was sustained by the evidence. The fact that the court below supposed that the existence of a stream of water was necessary to make the diversion of the water an actionable wrong does not limit this court to the same view, if it be erroneous. If enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, then the nonsuit should not have been granted, although other allegations are not proved.

Many arguments, objections, and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each landowner owns absolutely the percolating waters in his land, with the right to extract, sell, and dispose of them as he chooses, regardless of the results to his neighbor, is part of the common law, and as such has been adopted in this state as the law of the land by the statute of April 13, 1850 (Stat. 1850, p. 219, chap. 95), and by § 4468 of the Political Code, and that, consequently, it is beyond the power of this court to abrogate or change it; that the question comes clearly within the doctrine of *stare decisis*; that the rule above stated has become a rule of property in this state, upon the faith of which enormous investments have been made, and that it should not now be departed from, even if erroneous; that, even if the question were an open one, the adoption of the doctrine of correlative rights in percolating waters would hinder or prevent all further developments or use of underground waters, and endanger or destroy developments already made, thus largely restricting the productive capacity and growth of the state, and that, therefore, a sound public policy and regard for the general welfare demand the opposite rule; that the doctrine of reasonable use of percolating waters would require an equitable distribution thereof among the different landowners and claimants who might have rights therein; that this would throw upon the courts the duty and burden of regulating the use of such waters and the flow of the wells or

tunnels, and that this would prove a duty impossible of performance; and, finally, that, if this rule is the law as to percolating waters, it must for the same reason be the law with regard to the extraction of petroleum from the ground, and, if so, it would entirely destroy the oil development and production of this state, and for that reason also that it is against public policy, and injurious to the general welfare.

The idea that the doctrine contended for by the defendant is a part of the common law adopted by our statute, and beyond the power of the court to change or modify, is founded upon a misconception of the extent to which the common law is adopted by such statutory provisions, and a failure to observe some of the rules and principles of the common law itself. In *Crandall v. Woods*, 8 Cal. 143, the court approved the following rule, quoting from the dissenting opinion of Bronson, J., in *Starr v. Child*, 20 Wend. 159: "I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes, not only such laws as are inconsistent with the spirit of our institutions, but such as are framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails." This quotation was subsequently approved by the New York court of appeals. *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461. The same doctrine was followed in the case of *English v. Johnson*, 17 Cal. 116, 76 Am. Dec. 574. In Pennsylvania and West Virginia, under similar statutes, it was held that only such parts of the common law as were applicable to the local situation of the particular state were in force (*Carson v. Blazer*, 2 Binn. 484, 4 Am. Dec. 463; *Powell v. Sims*, 5 W. Va. 4, 13 Am. Rep. 629), and this is the rule in all the states upon the question, irrespective of statutory adoption. *Com. v. Knowlton*, 2 Mass. 534; *State v. Rollins*, 8 N. H. 560; *Pierce v. State*, 13 N. H. 542; *Currier v. Perley*, 24 N. H. 223; *Dennett v. Dennett*, 43 N. H. 499; *Van Ness v. Pacard*, 2 Pet. 144, 7 L. ed. 374; *Wheaton v. Peters*, 8 Pet. 659, 8 L. ed. 1080; *Bloom v. Richards*, 2 Ohio St. 391. The true doctrine is that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances,—a principle adopted into our Code by § 3510, Civ. Code: "When the reason of a rule ceases, so should the rule itself." This is well stated in *Morgan*

v. King, 30 Barb. 16: "We are not bound to follow the letter of the common law, forgetful of its spirit; its rule, instead of its principle. A rule of law applicable to the fresh-water streams of England may be wholly inapplicable to fresh-water streams in this country of the same nature and character, because of different capacity, or because the adjoining country may furnish a commerce for them unknown in England, and yet be subject to the same principle. If so, the common law modifies its rules upon its own principles, and conforms them to the wants of the community, the nature, character, and capacity of the subject to which they are to be applied." In *Beardsley v. Hartford*, 50 Conn. 542, 47 Am. Rep. 677, the court says: "It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, *Cessante ratione, cessat ipsa lex*. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply or to be a controlling principle to the new circumstances." Accordingly, in many instances in this country, in states where the common law is held to be in force, some of its rules are held to be not applicable to the conditions different from the place of its origin. *Connolly v. Goodwin*, 5 Cal. 221; *Rickett v. Johnson*, 8 Cal. 36; *United States v. McCarthy*, 21 Blatchf. 469, 18 Fed. 89; *Bovard v. Kettering*, 101 Pa. 185; *Heywood v. Shreve*, 44 N. J. L. 96; *Green v. Lister*, 8 Cranch, 249, 3 L. ed. 552; *Cole v. Lake Co.* 54 N. H. 286; *Pettingill v. Rideout*, 6 N. H. 454, 25 Am. Dec. 473; *Boston & W. R. Corp. v. Dana*, 1 Gray, 97; *Lindsley v. Coats*, 1 Ohio, 243; *Stoeber v. Whitman*, 6 Binn. 420; *Dawson v. Coffman*, 28 Ind. 223; *Wagner v. Bissell*, 3 Iowa, 496; *Reaume v. Chambers*, 22 Mo. 54; *Seeley v. Peters*, 10 Ill. 130; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 230, 17 Am. St. Rep. 791, 18 Atl. 1012 (in which case this same doctrine of the absolute ownership in percolating water was modified); *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325, and *Wiggins v. Muscupiabe Land & Water Co.* 113 Cal. 182, 32 L. R. A. 667, 54 Am. St. Rep. 337, 45 Pac. 160 (in which last-mentioned cases the common law respecting riparian rights was said to have been modified in this state to suit our peculiar conditions.) Whenever it is found that, owing to the physical features and character of

this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted,—one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this state depends on whether it is suitable to our conditions under the rule just stated.

It is necessary, therefore, to state the conditions existing in many parts of this state, which are different from those existing where the rule had its origin. In a large part of the state, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture except by means of artificial irrigation. In a few places favored by nature crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel; but these places are so few that they are of no consequence in any general view of the situation. Irrigation in these regions has always been customary, and under the Spanish and Mexican governments it was fostered and encouraged. Even in the earlier periods of the settlement of the country after its acquisition by the United States, and while the population was sparse and scattered compared to the present time, the natural supply of water from the surface streams, as diverted and applied by the crude and wasteful methods then used, was not considered more than was necessary. As the population increased, better methods of diversion, distribution, and application were adopted, and the streams were made to irrigate a very much larger area of land. While this process was going on, a series of wet years augmented the streams, and still more land was put under the irrigating systems. Recently there has followed another series of very dry years, which has correspondingly diminished the flow of the streams. After this period began it was soon found that the natural streams were insufficient. The situation became critical and heavy loss and destruction from drouth was imminent. Still the population continued to increase, and with it the demand for more water to irrigate more land. Recourse was then had to the underground wa-

ters. Tunnels were constructed, more artesian wells bored, and finally pumps driven by electric or steam power were put into general use to obtain sufficient water to keep alive and productive the valuable orchards planted at the time when water was supposed to be more abundant. The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and, occasionally, pieces of drift-wood have been found near the coast far below tide level, showing that these sunken-stream beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks, and slowly moves through the lands by the process usually termed "percolation," forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to eke out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these, there is no percolating water in sufficient quantity to be of much importance in the development of the country, or of sufficient value to cause serious litigation. It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proved by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs. Many water companies, anticipating such an attack on their water supply, have felt compelled to purchase, and have purchased, at great expense, the lands immediately surrounding the stream or source of supply, in order to be able to protect and secure the percolations from which the source was fed. Owing to the uncertainty in the law, and the absence of legal protection, there has been no security in titles to water rights. So great is the scarcity of water under the

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present demands, and conditions that one who is deprived of water which he has been using has usually no other source at hand from which he can obtain another supply.

The water thus obtained from all these sources is now used with the utmost economy, and is devoted to the production of citrus and other extremely valuable orchard and vineyard crops. The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of \$50,000 for a stream flowing at the rate of 1 cubic foot per second. Notwithstanding the great drain on the water supply, the economy in the distribution and application, and the much larger area of land thereby brought under irrigation, there still remain large areas of rich soil which are dry and waste for want of water. This abundance of land, with the scarcity and high price of water, furnish a constant stimulus to the further exhaustion of the limited amount of underground water, and a constant temptation to invade sources already appropriated. The charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the eastern states, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left undone, and that there must ensue in years to come a fierce strife first to acquire and then to hold every available supply of water.

It is scarcely necessary to state the conditions existing in other countries referred to to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instances is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs. If one is deprived of water in those regions there is usually little difficulty in obtaining a sufficient supply near by, and at small expense. The country is interlaced with streams of all sizes from the smallest brooklet up to large, navigable rivers, and the question of the water supply has but little to do with the progress or prosperity of the country.

It is clear, also, that the difficulties arise

ing from the scarcity of water in this country are by no means ended, but, on the contrary, are probably just beginning. The application of the rule contended for by the defendant will tend to aggravate these difficulties, rather than to solve them. Traced to its true foundation, the rule is simply this: That, owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and, failing in this, must suffer irretrievable loss; that might is the only protection.

"The good old rule
Sufficeth them, the simple plan,
That they should take who have the power,
And they should keep who can."

The field is open for exploitation to every man who covets the possessions of another, or the water which sustains and preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him, or preserve his victim from the attack. The difficulties to be encountered must be insurmountable to justify the adoption or continuance of a rule which brings about such consequences.

The claim that the doctrine stated by Mr. Justice Temple is contrary to all the decisions of this court is not sustained by an examination of the cases. The decisions have not been harmonious, and in many of them what is said on this subject is mere *dictum*. A brief review of the cases will demonstrate this to be true. In *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299,—the first case on the subject,—it was not necessary for the court to say anything at all with respect to the right of a landowner to complain of a diversion of percolating waters. McCue's predecessor had made a ditch leading from a spring on his land, across a tract of land belonging to Hanson's predecessor, and terminating upon another tract, also owned by McCue's predecessor, through which ditch he conducted water from the spring across the Hanson tract to his other land. This ditch, in its course over Hanson's land, leaked water in such quantities that it collected into a stream, which Hanson used for irrigation. This was the only foundation for the right which Hanson had or claimed to the water. The court properly held that he had no right to the waste water, and that McCue was not bound to

continue to maintain the artificial stream for Hanson's benefit, but could, by any means he chose, change the use of the spring and the course of the ditch. The fact that the change was made by intercepting the percolating water which fed the stream was not material to the case, and all that is said as to the right to do so is *dictum*. The opinion, however, does, though unnecessarily, announce and approve the doctrine contended for by the respondent here. *Huston v. Leach*, 53 Cal. 262, decides only that the phrase "waters of said springs" in the decree of the court meant defined streams running into or issuing from the springs, and did not include the percolations which fed the springs. *Hale v. McLea*, 53 Cal. 578, referred to a well-defined, though very small, underground stream, flowing through fissures in the rocks, and has no relation to ordinary percolating water. The court held that the defendant could not cut off the entire stream, and at most could only use a reasonable portion thereof as an upper riparian owner. In *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409, the court, in its opinion, again by way of *dictum*, announces the doctrine that the owner of the soil is the absolute owner of the percolating water therein; but the decision is against this doctrine. It is a case of the court announcing one doctrine and deciding the contrary. The plaintiff, through a grant from defendant's predecessor, owned a right to take water on defendant's mining claim by means of a tunnel which served to collect the percolating water into a small stream of two miner's inches, which flowed out of the tunnel, and was conducted by pipes to plaintiff's premises. This court decided that the defendant had no right to cut off the percolations which fed the stream issuing from the tunnel, although this was done in the legitimate work of mining his own land. The decision is in direct conflict with the *dictum* in *Hanson v. McCue*, and is in accord with the principles laid down by Justice Temple. It can only be distinguished upon the ground that the defendant was estopped by the grant of his predecessor to use the land so as to destroy the water right granted,—a distinction which is not mentioned or referred to in the opinion. The distinction made in the opinion, and upon which the decision in *Cross v. Kitts* is based, is that when percolating waters are gathered into a defined stream by means of a tunnel, the stream is property, and, as such, it is protected by law from injury or destruction by the diversion of such percolating water before it reaches the tunnel. There can be no distinction in law or reason between a stream consisting of percolating waters gathered together by means of a tun-

nel and one gathered by means of an artesian well. Therefore the case supports Justice Temple's conclusion. The only point bearing upon the case at bar that was decided in *Painter v. Pasadena Land & W. Co.* 91 Cal. 74, 27 Pac. 539, is that the right of the owner of land to the water percolating therein may be reserved in a grant of the land, and that this right to such reserved water may subsequently be transferred. It does not touch the question of the extent of the right of the landowner to such water, as against the adjoining proprietors or others claiming rights in it. In *Southern P. R. Co. v. Dufour*, 95 Cal. 616, 19 L. R. A. 92, 30 Pac. 783, the decision was put upon the ground that the excavation of defendant, which caused the diversion of percolating water of which plaintiff complained, was made upon defendant's own land for the purpose of obtaining the water for the better use of the land, which it was held he had a right to do, although it destroyed the spring or stream claimed by the plaintiff. The *dictum* of *Hanson v. McCue* was approved. The decision seems to be in conflict with *Cross v. Kitts*, although the latter case is not mentioned. In *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319, the court below found that the tunnel complained of gathered and discharged a stream of water of which all except 1.43 miner's inches was gathered from percolating waters in the sandstone, which did not come from the channel of the natural stream. It was this excess only which was in issue. The finding that it was percolating water was held to be conclusive upon the appellate court. It appeared that some of the percolating water thus developed would, if not interrupted, have reached the natural stream. The court adopts and approves the *dictum* of *Hanson v. McCue*, and holds that the plaintiff had no legal right to enjoin a diminution of the natural stream caused by a diversion of percolating water before it reached the channel. In *Los Angeles v. Pomeroy*, 124 Cal. 622, 57 Pac. 585, an instruction of the court below stating the *dictum* of *Hanson v. McCue* was criticised by the appellants, not for the reason that it restated that doctrine, but upon the ground that it did not class as percolating waters all such water as might be found in the sand or soil underneath the bed of a stream or adjacent thereto. So far as it restated the doctrine of *Hanson v. McCue*, it was favorable to the appellants, and therefore they did not object to that part of it. The court held that it was not subject to criticism on the ground that it did not properly define percolating waters. The decision, however, cannot be taken as an approval of the doctrine of *Hanson v. McCue*. In so far as

that doctrine was stated, it being favorable to appellants, it was not presented for consideration to the appellate court. The objection of the appellants and the point considered by the appellate court was that the instruction departed from the rule quoted in *Hanson v. McCue*. Inasmuch as the writer of this opinion was also the writer of the instruction under consideration, it may be proper to say that he did not give the instruction because he approved that part of it restating the doctrine of *Hanson v. McCue*. The instruction was given because an instruction embodying that doctrine had been requested by the appellants in the case, and the respondents, the plaintiffs, believing that it would not materially affect the verdict, consented that that part should be given in substance, rather than take the chances of a reversal of the case should the supreme court hold its refusal to be erroneous. The remarks of the court in *Vineland Irrig. Dist. v. Azusa Irrig. Co.* 126 Cal. 494, 46 L. R. A. 820, 58 Pac. 1057, giving the ordinary definition of percolating waters, and stating the rule contended for by the defendant as applying thereto, call for no discussion. The court was referring to this solely for the purpose of giving the proper meaning to the word "percolating" as used in the findings, and to show that the word was not there used to designate waters which were not a part of the subterranean stream under consideration. In *Bartlett v. O'Connor* (Cal.) 30 Pac. 513, the defendants, with the intent to injure the plaintiff, attempted to reclaim their lands by drawing off the percolating water through an artificial ditch away from the natural stream. It appeared that this could have been done as well by deepening the natural channel of the stream. It was held to be an unlawful diversion. This comprises all the cases on the subject.

Excluding the cases in which the statement of the doctrine of absolute ownership is *dictum*, and looking to what has been actually decided, we have remaining only *Cross v. Kitts*, holding that the owner of a mining claim, whose predecessor had granted a stream made up of percolating water collected by means of a tunnel, could not, even in the ordinary mining of his own land, interfere with the flow of the percolating water to the tunnel; *Southern P. R. Co. v. Dufour*, holding that a landowner can divert, for use on his own land, percolating water which feeds a spring rising on the land, and flowing to an adjoining owner, although the diversion destroys the spring; *Bartlett v. O'Connor*, holding that such a diversion cannot be made in the process of draining the land for reclamation, where the draining and reclamation can be accomplished by another mode without diminish-

ing the stream, and the mode used is adopted with the intention to injure the lower proprietor, and *Gould v. Eaton*, declaring, in effect, that percolation water may be prevented from reaching a natural stream to the injury of a riparian owner, although the percolations are neither taken for use on the land where the diversion is made, nor in the use or reclamation of the land, but for use on other land distant from both the stream and the percolations. In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state. It is proper to state that in all the opinions which have so readily quoted and approved the supposed common-law rule that injuries from interference with percolating waters were too obscure in origin and cause, too trifling in extent, and relatively of too little importance as compared to mining industries and the wants of large cities, to justify or require the recognition by the courts of any correlative rights in such waters, or the redress of such injuries, there has been no notice at all taken of the conditions existing here, so radically opposite to those prevailing where the doctrine arose. It is also to be observed that in some instances in the eastern states, mentioned in the former opinion in this case, the injustice from the diversion of percolating waters has been so glaring and so extensive that the court there was compelled to depart from its previously decided cases and recognize the rights of adjoining owners.

We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the landowner; that he has no right, either to have them continue to pass into his land as they would under natural conditions, or to prevent them from being drawn out of his land by an interference with natural conditions on neighboring land. Such right as he has is therefore one which he cannot protect or enforce by resort to legal means, and one which he cannot depend on to continue permanently or for any definite period.

It is apparent that the parties who have asked for a reconsideration of this case, and other persons of the same class, if the rule for which they contend is the law, or no law, of the land, will be constantly threatened with danger of utter destruction of the valuable enterprises and systems of waterworks which they control, and that all new enterprises of the same sort will be subject to the same peril. They will have absolutely no protection in law against others having

stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so much temptation to others to capture the water on which they depend, can tend to promote developments in the future, or preserve those already made; and, therefore, we do not believe that public policy or a regard for the general welfare demands the doctrine. An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative.

The doctrine of reasonable use, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands. So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less, and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from attacks on the title to waters appropriated for use on distant lands made by persons who claim the right to the reasonable use of such waters on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams, and must always be expected to attend claims to rights in a substance so movable as water. But the courts can protect this particular species of property in water as effectually as water rights of any other description.

It may, indeed, become necessary to make new applications of old principles to the new conditions; and, in view of the novelty of the doctrine and the scope of argument, it is not out of place to indicate to some extent how it should be done, although otherwise it would not be necessary to the decision of the case. The controversies arising will naturally divide into classes. There

will be disputes between persons or corporations claiming rights to take such waters from the same strata or source for use on distant lands. There is no statute on this subject, as there now is concerning appropriations of surface streams; but the case is not without precedent. When the pioneers of 1849 reached this state, they found no laws in force governing rights to take water from surface streams for use on nonriparian lands. Yet it was found that the principles of the common law, although not previously applied to such cases, could be adapted thereto, and were sufficient to define and protect such rights under the new conditions. The same condition existed with respect to rights to mine on public land, and a similar solution was found. *Kelly v. Natoma Water Co.* 6 Cal. 108; *Conger v. Weaver*, 6 Cal. 557, 65 Am. Dec. 528; *Eddy v. Simpson*, 3 Cal. 253, 68 Am. Dec. 408; *Hill v. Newman*, 5 Cal. 446, 63 Am. Dec. 140; *McDonald v. Bear River & A. Water & Min. Co.* 13 Cal. 233. The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams, will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right. And in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply. In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners,—those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land; but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule. Such rights are limited, at most, to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators. Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving

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to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

In addition there are some general rules to be applied. In cases involving any class of rights in such waters preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause. Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused, and the party left to his action for such damages as he can prove. *Fresno Street R. Co. v. Southern P. R. Co.* 135 Cal. 202, 67 Pac. 773; *Southern California R. Co. v. Slauson*, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. 352. If a party makes no use of the water on his own land or elsewhere, he should not be allowed to enjoin its use by another who draws it out, or intercepts it, or to whom it may go by percolation, although perhaps he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made.

The objection that this rule of correlative rights will throw upon the court a duty impossible of performance—that of apportioning an insufficient supply of water among a large number of users—is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but, if the rule is the only just one,—as we think has been shown,—the difficulty in its application in extreme cases is not a sufficient reason for abandoning it and leaving property without any protection from the law.

It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from which it is taken, but solely for sale as an article of merchandise, and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this state are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether, in a contest between two oil producers concern-

ing the drawing out by one of the oil from under the land of the other, we should follow the rule adopted by the courts of other oil-producing states, or apply a rule better calculated to protect oil not actually developed, is a question not before us, and which need not be considered.

With regard to the doctrine of reasonable use of percolating waters, we adhere to the views expressed in the former opinion.

The judgment of the court below is reversed and a new trial ordered.

We concur: **Beatty, Ch. J.; McFarland, J.; Van Dyke, J.; Henshaw, J.; Lorigan, J.**

Angellotti, J., concurring:

I concur in the judgment and in the views expressed in the opinion of Mr. Justice Tem-

ple on the former decision of this case as to the application of the doctrine of reasonable use to percolating waters. When properly applied, it appears clear to me that such doctrine will serve to protect the rights of the owner of realty, rather than impair them.

I also concur generally in the views expressed by Mr. Justice Shaw in the majority opinion as to the same subject-matter; but several important questions are discussed that are not necessary to a decision of this case, and as to which the opinion herein cannot hereafter be considered as authority. As to such matters I refrain from expressing any opinion.

Petition for second rehearing denied December 28, 1903.

IOWA SUPREME COURT.

James BARCLAY

v.

Wilson ABRAHAM, Impleaded, etc., Appt.

(.....Iowa.....)

1. The burden of showing the existence of an underground stream of water is upon the one asserting the right to its use.
2. The mere fact that the excessive flow of water from one well interrupts that of several others does not tend to point out the location, course, or even the existence, of a subterranean stream.
3. A landowner has a right to make such beneficial use of water from underground reservoirs in the improvement of his estate as he may choose.
4. There is no right to draw water from a common underground reservoir merely for the purpose of wasting it, to the injury of other landowners having equal rights to use and means of access to it, or of maliciously depriving them of its beneficial use.

(October 30, 1903.)

A PPEAL by defendant, Abraham, from a judgment of the District Court for Boone County enjoining him from wasting water from a flowing well. *Affirmed.*

Statement by **Ladd, J.:**

Plaintiff is owner of S. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 10, and N. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of section 15, township 82 N., of range 25 W. of the fifth P. M. The defendant owns the N. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 10. A run, known as "Big Creek,"

NOTE.—Upon the question of the correlative rights in percolating waters, see note to preceding case of *Katz v. Walkinshaw*.

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nearly north and south, passes through both farms to the south. Following the trend of this creek for 3 or 4 miles in a northwesterly and southeasterly direction, and about $\frac{1}{2}$ mile wide, flowing wells are obtained at a uniform depth, considering the elevation of the surface. The plaintiff has lived some time on his south 80 at about the center of this district, and several years ago sunk one of the first wells near his house, somewhat above the level of the creek. Later two other wells were sunk, one in the valley of the creek in the north 80, and the other about 30 rods from his barn, to which an underground pipe was extended to a tank at the barn. In July, 1901, the defendant Abraham put down a 3-inch well on his farm near the south line, close to the creek, to which he dug a ditch, and allowed the water to flow unrestrained through the creek to the land below. This resulted in stopping the flow of water from plaintiff's wells at his house and near the barn. In pursuance of a temporary writ of injunction, the flow of defendant's well was reduced to $\frac{1}{4}$ of an inch, whereupon water again flowed from plaintiff's well. Upon final hearing the injunction was made permanent, and defendant appeals.

Messrs. W. W. Goodykoontz and Crooks & Snell, for appellant:

Underground streams are divided into two distinct classes: Those whose channels are known and defined, and those unknown and undefined.

Kinney, Irrigation, §§ 48, 49; *Deadwood C. R. Co. v. Barker*, 14 S. D. 558, 86 N. W. 619.

Percolating waters are those that pass through the ground beneath the surface, without a definite channel. Percolating waters and those whose sources are unknown belong to the realty in which they are found. It is presumed that a well or spring is supplied by percolating waters, unless it appears that the same is supplied by a defined flowing stream.

Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; *Ocean Grove Camp Meeting Asso. v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Mosier v. Caldwell*, 7 Nev. 363; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721.

The presumption of law is that underground water is percolating water and the property of the man who finds it, unless it clearly and plainly appears that it is a defined, flowing stream, and has the characteristics of such a stream upon the surface of the ground.

Hougan v. Milwaukee & St. P. R. Co. 35 Iowa, 558, 14 Am. Rep. 502; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 393, 74 N. W. 220, 75 N. W. 945; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Acton v. Blundell*, 12 Mees. & W. 335.

Mr. Charles Whitaker for appellee.

Ladd, J., delivered the opinion of the court:

The particular district within which flowing wells may be obtained at a depth varying from 100 to 200 feet is 3 or 4 miles in length by about $\frac{1}{2}$ mile in width, following the direction of the creek. Within this area there are at least 11 wells which are now or have been flowing above the earth's surface. That of plaintiff, near his barn, is 152 feet deep. The well sunk by defendant is only 107 feet deep, but on ground about as much lower as the difference. Its casings are 3 inches in diameter, and the flow, when interrupted, has the effect of stopping the flow of plaintiff's well and of several others. It is located near the south line of defendant's land, from which the water runs in the creek, and, save that necessary for about 30 head of cattle, is without benefit to him or anyone else. The water in excess of a stream $\frac{1}{2}$ inch in diameter, to which extent the district court directed him to restrain the flow, is absolutely wasted, and so done without excuse. True, he pretended that the entire flow was essential to prevent clogging with sand or gravel, but the evidence shows conclusively that this was less likely with the smallest available exit. Again, he pretended to have in contemplation the elevation to his tenant's house, across the 80 acres, up some 40 feet, of water for domestic use by the operation of a hydraulic ram. But the extent of his 64 L. R. A.

preparation therefor was the reading of a circular from some manufacturing company. There was no proper showing that the flow permitted would be inadequate for this purpose, and it conclusively appears that it had nothing to do with his insistency upon utterly wasting the waters his neighbors so much needed. Indeed, the record indicates strongly his object was to maliciously cut off the water supply of a well owner rather than plaintiff. In the light of these facts, it is not very important that we determine whether the water was supplied by percolation through the soil or a well-defined subterranean stream. If the latter, of course the water might not thus be diverted. *Hougan v. Milwaukee & St. P. R. Co.* 35 Iowa, 558, 14 Am. Rep. 502; *Burroughs v. Saterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 727. But the presumption obtains that such waters are percolating waters, unless shown to be supplied by a stream of known and defined channel. Gould, Waters, §§ 280, 281; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262, 20 So. 780; *Metcalf v. Nelson*, 8 S. D. 87, 59 Am. St. Rep. 746, 65 N. W. 911; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354. And it follows that the burden of proof is upon those asserting right to waters below the surface, on the ground that they flow in a defined and known channel, to establish the existence of such channel. *Black v. Ballymena Twp.* Ir. L. R. 17 Eq. 459; *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354. It is to be observed that the mere existence of the channel is not enough; its location must be known or reasonably ascertainable. *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 17 Am. St. Rep. 791, 18 Atl. 1012, where the court concludes that it is clear, "from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below the ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course." And in *Black v. Ballymena Twp.* Ir. L. R. 17 Eq. 459: "So far the law on the subject is clear; but a difficulty appears still to exist as to the application of this rule by reason of the use of the word 'known' in connection with the word 'defined,' and it does not seem to have been sufficiently laid down as yet what the nature or extent of the knowledge is which must be proved to exist in or-

der to constitute the riparian relation. It cannot mean that a channel should be visible throughout its course, which would be an impossibility, from the very fact of its being subterranean. In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel, but must be a knowledge by reasonable inference from existing and observed facts in the natural, or, rather, the pre-existing, condition of the surface of the ground. The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that, without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream when it emerges into light comes from and has flowed through a defined subterranean channel." Surface indications of a stream are discussed in *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376, 53 Am. St. Rep. 262, 20 So. 780, where surface depressions extended on either side of a spring; in *Hale v. McLea*, 53 Cal. 578, where a line of bushes usually found nowhere except over water courses extended from a spring on adjoining land. See also *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; valuable note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 665. In the instant case surface indications do not aid in locating a stream below. The mere fact that the excessive flow from one well interrupted that of several others did not tend to point out the location, course, or even existence, of a subterranean river, or smaller water course. *Taylor v. Welch*, 6 Or. 199. A similar result would be as likely to occur when the supply is derived from water filtrating through the soil until caught in a stratum of sand and gravel lying between impervious layers of other material. See *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354. Indeed, the fact that large quantities of sand and gravel are drawn up when the level at which water is found is reached strongly sustains the latter view. But we need go no farther than to say there is nothing in the record to overcome the presumption that the supply of the entire district is percolating water. If a stream $\frac{1}{2}$ mile wide, it could scarcely be affected by the small outlets afforded by these wells. If a number of narrower streams flow beneath the surface, the location of none has been pointed out, nor appears to be ascertainable. *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Taylor v. Welch*, 6 Or. 199; *Greencastle v. Hasseltt*, 23 Ind. 189; 64 L. R. A.

Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. Rep. 201, 44 Pac. 319.

This being true, there is no doubt but defendant had the right to make such beneficial use of the water in the improvement of his land as he might choose. But it does not follow that he had the right to draw from this reservoir within the earth wherein nature had stored water in large quantities for beneficial purposes merely to waste or carry out a design to injure those having equal access to the same supply. Decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, or cut off with impunity, without liability for interfering or destroying the supply, are numerous in this country and England,—too numerous for citation; but see *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Bradford v. Pickles* [1895] A. C. 587, and *Frazier v. Brown*, 12 Ohio St. 294. In the last of these cases the principle underlying the right to such waters, and the reasons upon which it rests, were thus stated: "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible; (2) because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." An examination of the authorities, however, indicates that they proceed upon the theory that the right thereto relates to the beneficial use of the land, and is connected with its enjoyment for the purposes of agriculture, mining, trade, improvement, and the like. This thought is emphasized by the dicta in many decisions to the effect that percolating waters may not be extracted from the earth to the injury of others merely to gratify malice. Thus, in the leading case of *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721, the court declared that "neither the civil law nor the common law permits a man to be deprived of a well

or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent to the ocean it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor." See also *Greenleaf v. Francis*, 18 Pick. 119, where it was held that an owner may dig a well in any part of his land, even though the water in his neighbor's well be diminished, but with this limitation, that in doing so he is not actuated by a malicious intent to deprive his neighbor of water without benefit to himself. The right being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict. See *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354. The important intimation to which we wish to direct attention is that with respect to the beneficial use. Indeed, a decided tendency to depart from the strict rules of the common law with respect to percolating waters in the adjustment of modern conditions is manifest in recent decisions. In the well-considered case of *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 60 L. R. A. 875, 93 N. W. 907, the supreme court of Minnesota held that subsurface water might not be drained from his land by an owner merely to pour it into a sewer, when this resulted in depriving a company of the supply from which it furnished the people of a city. There the plaintiff supplied water for domestic purposes to the people of the city of Stillwater from a spring about which it had constructed a wall some 6 feet in diameter. This was within a few feet from the boundary line between the company's and Farmer's land. Near this line, and not more than 10 feet from the center of the spring, Farmer excavated a trench, and placed in it a 10-inch tile drain connected with the city sewer. As a result percolating waters were drawn away from the spring, where they would naturally have gone, materially affecting the supply of water in the spring. Thereupon the company made a change in the outlet and in the mains to guard against such loss; whereupon Farmer began to lay his tile at a lower level, commencing at the sewer. A temporary injunction was granted, and in a well-considered opinion the court held that defendant might not even collect percolating waters merely to squander them to the detriment of his neighbor. The theory of the decision is that, while ownership of

the soil extends to the center of the earth, it is somewhat restrained by the maxim, *Sic utere tuo ut alienum non laedas*. The court directs attention to the fact that in nearly every case where the right to collect or divert percolating waters has been upheld this has been for some beneficial purpose, and pertinently suggests that there is no good reason for not applying the doctrine of correlative rights in such a case, and that such application will not interfere with proper improvement of land, but tend to promote the general welfare of all citizens alike. The rule approved is thus stated: "Except for the benefit and improvement of his own property or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a landowner must not collect and wantonly waste percolating waters, which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people."

The doctrine of correlative rights between landowners respecting the appropriation and use of percolating waters has been broadly applied in New Hampshire (*Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Sweet v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276), where the court declared that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, though not real, hostility. The courts of New York seem to have held that the owner of land may not sink wells on his own land from which, by the use of pumps of potential force and reach, he may drain the percolating waters from the premises of his neighbors to their injury, merely for the purpose of merchandising the water to consumers distant from the land. *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644. In that case it was said: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs, in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever

else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The opinion seems to be grounded upon the notion that extracting the water by force constituted a trespass, and the court, apparently in recognizing a departure from previous decisions, added: "We more readily conclude to affirm because the immunity from liability which defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit." *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, is referred to approvingly. In that case, upon full consideration, the court declared that, while waters might be extracted from the depths for the reasonable use or improvement of the land, the law will not allow this to be done for some purpose unconnected with the use, improvement, or enjoyment of the land itself to the detriment of adjoining owners. See same case on appeal, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787. It is not necessary to go to this extent in order to sustain the decree in this case. The water from defendant's well, in excess of that allowed him by the court, fell to the earth, and immediately flowed from his land on that of a neighbor below. He proposed to draw the percolating waters, not to supply the people of a great city, but to waste without advantage to anyone. In principle the case is like that of *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 60 L. R. A. 875, 93 N. W. 907, and we are inclined to approve the doctrine therein announced. A contrary conclusion would permit defendant by allowing his well to flow at full capacity, not only to stop plaintiff's well, but every other well in the neighborhood, and this without the slightest benefit to himself. Indeed, this is precisely what he has threatened if interfered with. May one man thus waste the waters stored by nature for the community, and wantonly deprive it of their use? Are the courts powerless to remedy such a wrong? The supreme court of Wisconsin seems to have so held. *Huber v. Merkel*, 117 Wis. 355, 62 L. R. A. 589, 94 N. W. 354. A distinction between an injury to the quality of the neighbor's land, as in *Forbell v. New York*, 164 N. Y. 522, 51 64 L. R. A.

L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644, and to the enjoyment of its use, is suggested; but this is not substantial. See also *Hague v. Wheeler*, 157 Pa. 324, 22 L. R. A. 141, 37 Am. St. Rep. 736, 27 Atl. 714. Certainly no good reason can be found for allowing the owner of land to draw subsurface water therefrom merely to waste, when this results in draining like water from his neighbor's land, to his detriment in its use and enjoyment. Water moves so readily from one place to another that any definite portion of it cannot be said to be the property of the owner of the soil until in some way reduced to control. The water flowing in defendant's well may have been from plaintiff's land or that of some other well owner a moment previous. In this respect it differs from minerals beneath the surface, and is more like natural gas, which may not be allowed to escape by a landowner, when not made use of, to the detriment of his neighbors. *Ohio Oil Co. v. State*, 150 Ind. 698, 60 N. E. 1124, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576. Possibly he may waste that on his own land, if he can do so without draining water from his neighbor's. But the source of the supply of percolating waters can seldom be determined, and this is one of the main reasons for permitting its free appropriation by the owner of the soil. A different rule would undoubtedly restrict the use and improvement of land. But the prevention of carrying the water from the land of the owner for the purposes of commerce or waste cannot retard the improvement of the land itself, and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining landowners by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken, and presents a stronger case for the interference of a court of equity than *Forbell v. New York*. There the drainage rendered the adjoining land unfit for the growth of water cresses, which had formerly been raised upon it; here it destroyed the water supply essential for its customary use and enjoyment. There the drainage was to secure water to distribute to the inhabitants of a great city for profit; here the object was to turn it into a creek to flow unused in any way down to another's land below. The soundness of some of the reasoning of the *Forbell Case* may well be doubted. The exertion of the force there was in the removal of the subterranean waters in the city's land, and the only suction occasioned was by emptying a cavity into which the water naturally

drained from the surrounding country. It is at least exceedingly doubtful whether this constituted trespass. In a lesser degree this happens whenever the sinking of one well has the effect of drying up another. The doctrine of *Smith v. Brooklyn*, that the free use of such waters is limited to the improvement, use, and enjoyment of the land from which taken, and cannot be carried away for the purposes of commerce or waste, to the injury of the premises of an adjoining owner, has the better reason for its support. But we need not go this far, even to sustain the decree of the district court, as in the case at bar the owner derived no benefit from the sale or use of the water. As said, the case is in principle like *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 60 L. R. A. 875, 93 N. W. 907. The doctrine there announced is in harmony with good morals. It interferes with

no valuable right of the defendants. It shields from destruction property rights of great value belonging to the plaintiff and others. It goes no farther than to say that a landowner may not collect, drain, or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. It applies in principle the doctrine of correlative rights to the control of subsurface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken.

Affirmed.

Deemer, J., concurs in result.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Fred MARTELL

v.

James N. WHITE *et al.*

(.....Mass.....)

An action will lie on behalf of a quarry owner against members of a voluntary association of dealers in stone of which he is not a member who enforce a by-law of the association imposing a fine upon members who deal with those who are not members, so that members who desire to deal with nonmembers are coerced from doing so, to the ruin of the business of the quarry owner.

(March 1, 1904.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Norfolk County directing a verdict in favor of defendants in an action brought to recover damages for the alleged wrongful destruction of plaintiff's business. *Sustained.*

The facts are stated in the opinion.

Messrs. Charles W. Bartlett and Elbridge R. Anderson for plaintiff.

Messrs. James E. Cottoer and John W. McAnarney, for defendants:

A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby.

Vegetahn v. Guntner, 167 Mass. 92, 35 L. R. A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077.

It is not unlawful "for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for, or deal with, certain men or classes of men, or work under a certain price, or without certain conditions."

Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen, 499; *Snow v. Wheeler*, 113 Mass. 179; *Boston Glass Mfg. Co. v. Binney*, 4 Pick. 425.

The object and purposes of the defendants' association were lawful, and the defendants' conduct justifiable. There was no evidence of any threat or intimidation of

NOTE.—For boycott or combinations by dealers to injure rivals, see also, in this series, *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* 21 L. R. A. 837; *Jackson v. Stanfield*, 23 L. R. A. 588; *Graham v. St. Charles Street R. Co.* 27 L. R. A. 416; *Macauley v. Tierney*, 37 L. R. A. 455; *Brewster v. C. Miller's Sons Co.* 38 L. R. A. 505; *Hartnett v. Plumbers' Supply Assn.* 38 L. R. A. 194; *Doremus v. Hennessy*, 43 L. R. A. 797; *Boutwell v. Marr*, 48 L. R. A. 803; *Bailey v. Master Plumbers' Assn.* 46 L. R. A. 561; *Ertz v. Produce Exchange*, 48 L. R. A. 90; *Inter-Ocean Pub. Co. v. Associated* 64 L. R. A.

Press, 48 L. R. A. 568; *Gatzow v. Buening*, 49 L. R. A. 475; *Ertz v. Produce Exchange*, 51 L. R. A. 825; *Hawarden v. Youghogheny & L. Coal Co.* 53 L. R. A. 828; *West Virginia Transp. Co. v. Standard Oil Co.* 56 L. R. A. 804; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 547; and state *ex rel. Durner v. Huegin*, 62 L. R. A. 700.

As to validity of combinations to create monopoly or control prices, see *John D. Parks & Sons Co. v. National Wholesale Druggists' Assn.* 62 L. R. A. 632, and note thereto.

the plaintiff, or that the defendants influenced, or attempted to influence, the conduct of any person other than a member of the association, or did anything else than enforce, against members, the by-laws and regulations of the association. There was no coercion of its members. As was said in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119: "It was wholly a matter of their own free choice which they preferred,—to trade with the plaintiff, or to continue members of the association."

Bowen v. Matheson, 14 Allen, 499; *Vegetahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, sub nom. *Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Maconley Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686, 28 Atl. 190; *Allen v. Flood* [1898] A. C. 1; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666.

This association had a legal right to form, to adopt measures for the mutual protection and benefit of its members, and, for such purposes, to regulate the acts of its members within the scope and scheme of the association.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; *Snow v. Wheeler*, 113 Mass. 179.

Hammond, J., delivered the opinion of the court:

The evidence warranted the finding of the following facts, many of which were not in dispute: The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined, through the action of the defendants and their associates. The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Massachusetts, and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become, manufacturers, quarriers, or polishers of granite." There was no constitution, and, while there were by-laws, still, except as herein-after stated, there was in them no statement of the objects for which the association was formed. The by-laws provided,

among other things, for the admission, suspension, and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying, in part, the expense of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying, or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least \$1, and not more than \$500. The amount to be fixed by the association upon its determining the amount and nature of said transaction." Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and, under the section above quoted, it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from \$10 to \$100. Only the contribution of \$100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed, should they continue to trade with the plaintiff. The jury might properly have found, also, that the euphemistic expression, "shall contribute to the funds of the association," contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation practised upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff, except such as fairly resulted from action upon his

customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against his business alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts. Here, then, is a clear and deliberate interference with the business of a person, with the intention of causing damage to him, and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this, have they kept within lawful bounds? It is elemental that the unlawfulness of a conspiracy may be found either in the end sought, or the means to be used. If either is unlawful, within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world, and, indeed, those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things, at least, appear to have been settled; and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*, 107 Mass. 555, 564, in the following language: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." In a case like

this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. *Bowen, L. J., in Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. The justification must be as broad as the act, and must cover, not only the motive and the purpose, or, in other words, the object sought, but also the means used.

The defendants contend that, both as to object and means, they are justified by the law applicable to business competition. In considering this defense, it is to be remembered, as was said by Bowen, L. J., in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law, —the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound, and to be sustained within proper bounds, but each of which must finally yield, to some extent, to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which, at least, the line must run, and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure, upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine, from which it may be inferred that it is the idea of the members that, for the protection of their business, it would be well to confine it to transactions among themselves, and that one, at least, of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association

is to see that agreements made between its members and their employees, and between this association and similar associations in the same line of business, be kept and "lived up to." Whether this failure to set out fully in writing the object is due to any reluctance to have them clearly appear, or to some other cause, is, of course, not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but, in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with the others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff, except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then, so far as respects the end sought, the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used, as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that, in a more advanced stage of the discussion, the day may come when it will be more clearly seen, and will more distinctly appear in the adjudication of the courts, than as yet has been the case, that the proposition that, what one man lawfully can do, any number of men, acting together by combined agreement, lawfully may do, is to be received with newly disclosed qualifications, arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals, acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be simply one of degree, and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the *Mogul S. S. Case*, L. R. 23 Q. B. Div. 616: "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; 64 L. R. A.

and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See also opinion of Stirling, L. J., in *Giblan v. National Amalgamated Labourers' Union* [1903] 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the *Mogul S. S. Case*, L. R. 23 Q. B. Div. 616, and in *Bowen v. Matheson*, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished, is not enough, provided that the contest was carried on within the rules allowable in such warfare. It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or in the words of Bowen, L. J., in the *Mogul S. S. Case*, L. R. 23 Q. B. Div. 615, may adopt the "expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete. But from the very nature of the case, it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words they were coerced by actual or threatened injury to their property. It is true that one may leave the association if

he desires, but if he stays in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority.

This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. *Carew v. Rutherford*, 108 Mass. 1, 8 Am. Rep. 287.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of Munson, J., in *Boutwell v. Marr*, 71 Vt. 1, 9, 43 L. R. A. 803, 805, 76 Am. St. Rep. 746, 751, 42 Atl. 607, 609, are applicable here: "The law cannot be compelled, by any initial agreement of an associate member, to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victim of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful. We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal implement. In many cases it is so slight as not to be coercive in its nature; in many, it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation, and, in many, it serves as an extra incentive to the performance of some abso-

lute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature, but conditional, and is inconsistent with those conditions upon which the right rests, then the coercion becomes unjustifiable, and taints with illegality the act.

The defendants strongly rely upon *Bowen v. Matheson*, 14 Allen, 499; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; and *Cote v. Murphy*, 150 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686, 28 Atl. 190. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition,—for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay 10 per cent, but the propriety or the legality of that provision was not involved. In *Bowen v. Matheson*, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are lawful and proper, and, as no illegal methods are stated, the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendants, it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject, and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, *Slaughter-House Cases*, 16 Wall. 116, 21 L. ed. 394; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 48 L.

R. A. 568, 75 Am. St. Rep. 184, 56 N. E. 822; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Bailey v. Master Plumbers*, 103 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853; *Brown v.*

Jacobs' Pharmacy Co. 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Mogul S. S. Co. v. McGregor*, L. R. 15 Q. B. Div. 476, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598, [1892] A. C. 25.

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

Steven S. HULBERT, *Plff. in Err.*

(181 Mich. 156.)

1. The fact that a lower riparian proprietor upon a lake decides to use the water for drinking and cooking purposes does not render the reasonable use of the lake by upper proprietors for bathing purposes unlawful, although such use has a tendency to render the water less desirable for drinking and cooking purposes.
2. An upper riparian owner cannot, through the police power, be denied the right to bathe in a lake because a municipality takes its water supply therefrom.

(June 24, 1902.)

ERROR to the Circuit Court for Calhoun County to review a judgment convicting defendant of committing a nuisance by polluting the water of a lake from which was taken a water supply for a municipal corporation. *Reversed.*

The facts are stated in the opinion.

Mr. George W. Mechem, with Mr. Steven S. Hulbert, in propria persona:

Goguwac is an inland lake, and the shore ownership carries with it (unless expressly reserved) ownership to the center of the lake.

Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 236, 25 L. R. A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; *Butler v. Grand Rapids & I. R. Co.* 85 Mich. 246, 24 Am. St. Rep. 84, 48 N. W. 569.

A riparian proprietor on this lake has a right to the use of the water as it comes to

him, for domestic, agricultural, pleasure, and manufacturing purposes, with due regard to the improvements of the day in hydraulics, and due regard to the like use by other riparian owners above and below him.

Riparian rights depend upon the ownership of land which is contiguous to, and touches upon, the water; and it is upon that land, and within reasonable limits, that the water must be used.

Gould, Waters, pt. 2, chap. 6; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 11 Am. St. Rep. 72, 6 So. 78; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66.

A riparian owner has the right to use the water of a river for the purposes of his farm, and to carry on his business on his land, whatever it may be, to irrigate his land, to water his cattle, to wash his sheep, or for his aquatic fowls, to bathe in for health, or to sail upon for pleasure, etc.; in fine, to put the water which washes his bank to whatever use his pleasure or his business may prompt.

Gould v. Hudson River R. Co. 6 N. Y. 551; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; Lewis, Em. Dom. ed. 1888, § 79, p. 85.

Any injury to the property of an individual, which deprives the owner of the ordinary use of it, is equivalent to the taking, and entitles him to compensation.

Cooley, Const. Lim. p. 675; *Ronayne v. Loranger*, 66 Mich. 373, 33 N. W. 840; *Forster v. Scott*, 136 N. Y. 584, 18 L. R. A. 543, 32 N. E. 976; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308.

The city of Battle Creek obtains the right to take water from lake Goguwac by reason of the provisions of the charter given to it by the state.

Local Acts 1887, pp. 417, 418.

And this is the only way in which it has the right, *viz.*, by taking it as "a public use."

2 Dill. Mun. Corp. § 597.

A city is not a riparian proprietor in the

NOTE.—The above case is a unique application of the well-established rule that each riparian owner has a right to make such reasonable use of the water flowing past his property as he can without materially injuring the rights of his neighbor. See note to *Barnard v. Shirley*, 41 L. R. A. 737.

For the cases upon the question as to the right of the legislature to protect a municipal water supply, see note to *State v. Griffin*, 41 L. R. A. 177, and *Farnham, Waters*, § 137a. 64 L. R. A.

sense of being permitted, by the mere fact of shore ownership, to draw water and sell to its inhabitants miles away.

Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 11 Am. St. Rep. 72, 6 So. 78; *Dumont v. Kellogg*, 29 Mich. 421, 18 Am. Rep. 102; *Haupt's Appeal*, 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Hall v. Ionia*, 38 Mich. 493.

A city has no more right to invade, or cause the invasion of, private property than an individual.

Rice v. Flint, 67 Mich. 401, 34 N. W. 719; *Stock v. Jefferson Twp.* 114 Mich. 357, 38 L. R. A. 355, 72 N. W. 132; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

Respondent had the absolute right to control, on his 45 feet frontage out to the center of the lake, who shall sit in a boat on the water over that land and hunt or fish, or who shall navigate any kind of craft on, over, or across the water flowing over that land.

Hall v. Alford, 114 Mich. 165, 38 L. R. A. 205, 72 N. W. 137; *Sterling v. Jackson*, 69 Mich. 497, 13 Am. St. Rep. 405, 37 N. W. 845; *Marsh v. Colby*, 39 Mich. 626, 33 Am. Rep. 439; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103.

The injury complained of by the city must be to its rightful use.

Messersmidt v. People, 46 Mich. 437, 9 N. W. 485; *Gould, Waters, & 544*; *Grand Rapids, L. & D. R. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. 66; *Marquette, H. & O. R. Co. v. Probate Judge*, 53 Mich. 226, 18 N. W. 788; *Sheldon v. Kalamazoo*, 24 Mich. 385.

Police power is a regulation, not a taking, and not a confiscation; and the moment the act passes beyond mere regulation, and attempts to deprive the individual of his property under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.

Re Cheesebrough, 78 N. Y. 232; *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 498, 28 Am. St. Rep. 276, 50 N. W. 661; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Sanborn v. People's Ice Co.* 82 Minn. 43, 51 L. R. A. 829, 83 Am. St. Rep. 401, 84 N. W. 641; *Forbell v. New York*, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666, 58 N. E. 644.

Mr. O. S. Clark, for defendant in error:

Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others, 64 L. R. A.

nor injurious to the rights of the community.

Com. v. Alger, 7 Cush. 84; *People v. Smith*, 108 Mich. 527, 32 L. R. A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; *Champer v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783, 63 N. W. 424.

One who contributes to the contamination of the water in a stream is guilty of the nuisance caused thereby.

McClain, Crim. Law, ¶ 1175; *State v. Smith*, 82 Iowa, 423, 48 N. W. 727; *Douglas v. State*, 4 Wis. 387; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194.

It is a public nuisance to contaminate water in a well.

McClain, Crim. Law, ¶ 1170; *State v. Taylor*, 29 Ind. 517.

It is a nuisance to pollute the waters of a stream used to supply drinking water to a community.

Wharton, Crim. Law, 10th ed. 1477; *Com. v. Webb*, 6 Rand. (Va.) 726; *Stein v. State*, 37 Ala. 123; *State v. Wheeler*, 44 N. J. L. 88; *State v. Griffin*, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139, 39 Atl. 260.

The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society.

Meadowcroft v. People, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; *People v. Smith*, 108 Mich. 527, 32 L. R. A. 853, 62 Am. St. Rep. 715, 66 N. W. 382.

Nothing can be of greater concern to the community than a sufficient supply of wholesome water.

Elliott, Mun. Corp. ¶ 91; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *State v. Struper*, 5 N. J. L. J. 115.

The right of the public residing along a river to take water for domestic, sanitary, and fire purposes is paramount to those of the owners of water power.

Elgin v. Elgin Hydraulic Co. 85 Ill. App. 182.

The exercise of police power must become wider, more varied, and more frequent with the progress of society.

Boston & M. R. Co. v. York County, 79 Me. 386, 10 Atl. 113; *State v. Griffin*, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139, 39 Atl. 260; *State v. Noyes*, 30 N. H. 279; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *Bancroft v. Cambridge*, 126 Mass. 438; *Bartemeyer v. Iowa*, 18 Wall. 138, 21 L. ed. 932; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913.

The question of whether or not acts injurious to the public health shall be prohibited is wholly one for the legislature.

Tiedeman, Pol. Power, ¶ 426; *Sohier v. Trinity Church*, 109 Mass. 1; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *State v. Marshall*, 64 N. H. 549, 1 L. R. A. 51, 15 Atl. 210; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Although restriction and limitation upon the use of one's property, whereby he is deprived of any beneficial use of the same, may be, and often does become, oppressive, and in very many instances results in making valuable holdings, both real and personal, entirely valueless, it will not prevent the exercise of police power.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Ballentine v. Webb*, 84 Mich. 38, 13 L. R. A. 321, 47 N. W. 485; *People v. Detroit White Lead Works*, 82 Mich. 479, 9 L. R. A. 722, 46 N. W. 735; *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 205; *Robinson v. Baugh*, 31 Mich. 290.

The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure or tend to the comfort, prosperity, and protection of the community.

People v. Ewer, 141 N. Y. 129, 25 L. R. A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; *Crawfordville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. Rep. 214, 28 N. E. 849; *People v. McCune*, 14 Utah, 152, 35 L. R. A. 396, 46 Pac. 658; *State v. Freeman*, 38 N. H. 426.

One has no vested right in the general laws of his country which entitles him to insist that any one of them shall remain unchanged for his benefit.

Cooley, Const. Lim. 351; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87.

The police power extends to the protection of the lives, the health, and the property of the community, against the injurious exercise by any citizen of his own rights.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Russell, Pol. Power, 35; *Bancroft v. Cambridge*, 126 Mass. 441.

Messrs. **Horace M. Oren**, Attorney General, and **Jesse M. Hatch**, also for defendant in error:

The city is not a trespasser.

The owner of property must so use it as not to interfere with the rights of his neighbor.

Champer v. Greencastle, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390, 35 N. E. 14; 15 Am. & Eng. Enc. Law, p. 1166; *Com. v. Alger*, 7 Cush. 84; Cooley, Const. Lim. p. 714, 4th ed. 9, 570, 720; 4 Bl. Com. 162; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Munn v. Illinois*, 94 U. S. 113, 64 L. R. A.

24 L. ed. 77; *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213.

Unwholesome trades, slaughter houses, the burial of the dead, may all be interdicted by law in the midst of dense masses of population, on the general rational principle that every person ought so to use his property as not to injure his neighbor's, and private interests must be made subservient to the general interests of the community.

2 Kent, Com. 13th ed. 340.

The power to regulate all matters affecting health being most essential to the well-being of the community, the legislature cannot, by any contract, divest itself of the right to exercise it.

Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; 4 Am. & Eng. Enc. Law, p. 597; *State v. Ad-dington*, 77 Mo. 110; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.

When water is held by a dam, or, standing in a ditch, becomes stagnant, and so corrupts the atmosphere as to imperil the health of the neighborhood, it is a nuisance.

Gould, Waters, § 212; *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *State v. Wheeler*, 44 N. J. L. 88.

Of the right of the legislature to restrain the use of private property in order to secure the general comfort, health, and prosperity of the state, "no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned."

Com. v. Alger, 7 Cush. 53; *Com. v. Tewksbury*, 11 Met. 55; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *State ex rel. Sandfora v. Common Pleas Ct.* 36 N. J. L. 72, 13 Am. Rep. 422.

Moore, J., delivered the opinion of the court:

Goguac lake is a natural body of private water wholly within the township of Battle Creek, which township adjoins the city of Battle Creek. It has an area of about 360 acres, and varies in depth from nothing at the shore line, to 80 feet. The shore line of the lake is about 5 miles in all, and at the time of the alleged offense was owned as follows: About 200 feet by the city, upon which is its pumping station, and the rest of the 5 miles is owned and occupied

by farmers, pleasure resort proprietors, and summer cottagers, the latter holding some by fee and others by lease from the farmer owners. At the north end of the lake is a pleasure resort, and scattered around the lake shore are between 40 and 50 cottages, occupied during the summer season by the respective owners, or persons to whom they rent. The lake is accessible from the city by a good highway, a fine bicycle path, and an electric road. It is the only nearby pleasure resort for the citizens of Battle Creek. There are a large number of row-boats, sailboats, and several steamers upon the lake. The riparian uses to which the various owners have put the water are all the uses which farmers and summer cottagers would naturally exercise, *viz.*, fishing, wading, bathing, swimming, washing sheep, watering cattle, pigs, and horses, washing vehicles and clothing, cutting ice, boating, sailing, etc. In the summer of 1884 the respondent first occupied premises at the lake. In 1884, 1885, and 1886 he occupied tents within a few feet of where he erected a cottage in 1887, since which time he has continuously occupied said cottage. Beginning with 1884, he has occupied the premises for the camping season each year, continuously, except two, and every season has entered the water to swim. His investment in cottage and appurtenances is several hundred dollars. In 1886 the city proposed a system of water-works, and at some time thereafter determined to take the city water supply from Goguae lake. For that purpose the city bought a piece of land fronting on the lake at its northerly end, having a shore frontage of about 200 feet, and erected thereon a pumping station. The system is to take the water from the lake by means of an inlet pipe 16 inches in diameter, which runs into the lake. The water is pumped to a stand pipe, which is upon a rise of ground a short distance from the lake, and thence is distributed through pipes of 4 to 16 inches within the city limits, the piping now amounting to between 30 and 40 miles. The water is used by the city, and sold to the people, and is the only water system. The lake is about $1\frac{1}{2}$ miles long, and is fed by subterranean springs. There is no outlet except the intake pipe. From the cottage of the respondent, by water, to the intake pipe, is about $\frac{1}{4}$ of a mile. Quite early in the use of the lake for municipal purposes, the city pumped out so much water as to lower the lake. Litigation resulted, and the city then for certain months in the year turned into the lake the water from Minges brook, so that the water is not now lowered by the city, but the effect of turning in the water from the brook is to make the water harder

than it was before. The city, although given ample power by the charter to condemn lands and easements for a water supply upon paying due compensation for the rights taken, did not exercise that right, but, because it was a riparian proprietor, claimed the right to use the water of the lake, and that the other riparian proprietors must do nothing having a tendency to pollute the waters of the lake. The respondent, having first notified the board of public works of his intention to do so, made an entry into the waters of the lake on July 25, 1897, by wading on his own leased land under water, and swimming in the water flowing over said land. This he did without malice, and to afford a test case. He maintained that the difference between the exercise of the ancient common-law riparian right of bathing and swimming and those of washing sheep, watering cattle and horses, running a water wheel for a mill, etc., was a difference only in kind and degree, and that all were common-law rights incident and appurtenant to the ownership or lawful occupation of land upon an inland lake in this state. It was the claim of the people that this act of swimming polluted the sources of the water supply, and was criminal. The respondent was informed against, a trial was had, and the charge of the court was such that a conviction followed. The case is brought here by appeal.

Upon the trial several expert witnesses were sworn, who testified that germs might have been thrown off the body of the respondent while swimming, which would produce disease, and that some of those germs might reach the intake pipe, and through it the consumers of the water, and be a source of ill health. It is not shown any such germs ever did reach the intake pipe, or that any illness in Battle Creek could be traced to the use of the water taken from this lake. A great many interesting questions are raised by the record and presented in the briefs of counsel, but, in our view of the law, it will be unnecessary to discuss many of them. The first question calling for consideration is, Was the act of respondent unlawful? It is a matter of common knowledge that in this state the riparian owners whose lands border upon lakes, and through whose lands streams run, are in the habit of using the streams and lakes by allowing their domestic animals to drink therein, and by drawing therefrom what water may be needed for domestic purposes; and themselves and their families resort to the water of the streams and lakes for the purpose of bathing at suitable seasons of the year. It is also known that, as a rule, the supply of drinking and cooking water is obtained from springs or wells. Will the

fact that a lower riparian proprietor decides to use the water of the stream or lake for drinking and cooking purposes make a reasonable use of the water by the upper riparian owners for the purposes of watering cattle and bathing purposes unlawful because to do so has a tendency to make the water less desirable for drinking and cooking purposes? Can the upper riparian proprietors be deprived of such reasonable and ordinary use when the lower proprietor is a city having a large population, by invoking the police power, and without compensation? It will readily be seen these are very important questions. The diligence of able counsel has failed to call our attention to a case on all fours with the one at bar, but the principles involved are not new.

In *Wood v. Waud*, 3 Exch. 748, Pollock, C. B., speaking for the court, said: "We agree with the learned counsel for the plaintiffs in his exposition of the principles which regulate the law as to natural streams, which are fully considered, and placed on their right footing, in the case of *Mason v. Hill*, 3 Barn. & Ad. 306, 5 Barn. & Ad. 1, and the authorities there cited. Flowing water, as well as light and air, are in one sense *publici juris*. They are a boon from providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him. The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it. The law is laid down by Chancellor Kent, in 3 Com. 439, thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water. . . . He has no property in the water itself, but a simple usufruct as it passes along.' *Aqua currit et debet currere*, is the language of the law; and Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312, cited in *Gale & W. Easements*, p. 131, lays down the same law. In the judgment of Lord Chief Justice Tindal in the case of *Acton v. Blundell*, 12 Mees. & W. 324, he treats the right to waters flowing on the surface as arising from the acquiescence of neighboring owners, though he also quotes the judgment of Mr. Justice Story, above referred to, which treats the right as an incident to property; for Mr. Justice Story says: 'The natural stream, existing by the bounty of providence for the benefit of the land through which it flows, is an incident annexed by operation of the law to the land

itself.' Mr. Justice Whitelock, also, in *Sury v. Pigot*, Popham, 169, and *Crew*, Ch. J., Popham, 172, and *Lee*, Ch. J., in *Brown v. Best*, 1 Wils. 174, treat the right as arising *ex jure naturæ*; and consequently it is not extinguished, as an easement in *alieno solo* would be, by unity. . . . In considering this question, it is to be assumed that the plaintiffs' right is established to the use of the water. It is said that the true rule on this subject is laid down by Chancellor Kent (3 Com. 439, 440) that streams are meant for the use of men, and that it would be unreasonable, and contrary to the universal consent of mankind, to debar each riparian proprietor from the application of the water to domestic, agricultural, or manufacturing purposes, provided the use of it be made so as to work no material injury or annoyance to his neighbor, and though there will, no doubt, be, in the exercise of a proper use of water, some evaporation and decrease of it,—some variation in the weight and velocity of the current; but the maxim, *De minimis non curat lex*, applies, and a right of action by the proprietor below would not necessarily flow from such use; it would depend on the nature and extent of the injury and the manner of using the water."

In *Embrey v. Owen*, 6 Exch. 352, Baron Parke, speaking for the court, said: "The law as to flowing water is now put on its right footing by a series of cases beginning with that of *Wright v. Howard*, 1 Sim. & Stu. 190, Followed by *Mason v. Hill*, 8 Barn. & Ad. 304, 5 Barn. & Ad. 1, and ending with that of *Wood v. Waud*, 3 Exch. 748; and is fully settled in the American courts. See 3 Kent, Com. 6th ed. lecture 52, pp. 439, 445. The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*,—not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only,—that all may reasonably use it who have a right of access to it; that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. See *Mason v. Hill*, 5 Barn. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it. This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state. If it were, the argument of the learned counsel that every abstraction of it would give

a cause of action would be irrefragable. But it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of providence. . . . The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water. Nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect, the application of the water by the proprietors above or below on the stream. . . . On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult—indeed, impossible—to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it is said: "Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity, and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land

through which a water-course runs, and creates a nuisance for which those thereby injured are entitled to remedy. An injury to the purity or quality of the water to the detriment of other riparian owners constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes. *Mason v. Hill*, 2 Nev. & M. 747, 5 Barn. & Ad. 1; *Wood v. Waud*, 13 Jur. 472, 3 Exch. 748; 3 Kent, Com. 6th ed. 439; Angell, Water Courses, § 136."

In *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401, 27 Am. Rep. 711, it is said: "In an elaborate and carefully considered opinion in *Mason v. Hill*, 5 Barn. & Ad. 1, Denman, Ch. J., held that the possessor of land through which a natural stream runs has the right to the advantage of that stream flowing in its natural course, not inconsistent with a similar right in the proprietors of the land above and below; and that neither can any proprietor above diminish the quantity or injure the quality of the water, nor can any proprietor below throw back the water without his license or grant. It was one of the features of that case that the water which the defendant had the right to use, subject to the duty of returning it, was heated when it was returned to the stream, and the jury had assessed damages for that. The chief justice said, in entering judgment: 'As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question.' In *Wood v. Sutcliffe*, 16 Jur. 75, 8 Eng. L. & Eq. Rep. 217, an injunction was granted to restrain the defendant, against whom a recovery had been had at law, from pouring dye wares, dye liquors, madder, indigo, or potash into a channel that connected his dye works with a stream called the 'Bowling Beck,' on which, below the works, the cotton mill of the plaintiffs was situated, and in the use of the water of which they claimed prescriptive rights. 'I am satisfied from the evidence,' the vice chancellor remarked in the course of his opinion, 'that to some considerable extent the pollution of this stream is inevitable, and that no court of law, or court of equity, nor all the courts in the world, except there were a power of removing that mass of human beings which now congregate about its banks, ever could restore it to the state in which it once was. But still it does not follow, because there be a certain degree of pollution, which cannot be very accurately measured, and which is inevitable, that, therefore, everybody has

a right to pollute the stream by pouring in immense quantities of filth and pollution from his own works, to make it ten thousand times worse.' "

In *Greene v. Nunnenmacher*, 36 Wis. 50, the following language is used: "If the plaintiff is a riparian proprietor, he has the undoubted right to enjoy the use of the waters of the river for his cattle and for domestic purposes without having their purity affected or their quality destroyed by the upper proprietor. . . . And, if this is really the situation of his premises, it needs no argument to show that, so far as he is concerned, he has the right to insist that defendants shall not foul and corrupt the waters by discharges and slops from their distillery and hog and cattle yards, so as to render the waters unfit for agricultural and domestic purposes."

In *Dwight Printing Co. v. Boston*, 122 Mass. 583, it is said: "The riparian proprietors higher up still retain all their common-law rights in the river, so far as they are not inconsistent with the use defined in the statute. They certainly are not prohibited from drawing water from the river for domestic purposes, or from watering cattle in it, or from cutting ice."

In *Strobel v. Kerr Salt Co.* 164 N. Y. 303, 51 L. R. A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, it is said: "There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utero tuo observari* by all. The rule of the ancient common law is still in force, *Aqua currit et debet currere, ut currere solebat*. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation (when not out of proportion to the

size of the stream) and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use, in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration; so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material sometimes to ascertain which party first erected his works and began to appropriate the water. *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; *Smith v. Brooklyn*, 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 525, *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Beach v. Sterling Iron & Zinc Co.* 54 N. J. Eq. 65, 33 Atl. 286; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769; *Atty. Gen. v. Coloney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Hodgkinson v. Ennor*, 4 Best & S. 229; 3 Kent, Com. 6th ed. 439; Gould, Waters, § 219; Higgins, Water Courses, 132; Washb. Easements, 4th ed. 215; Wood, Nuisances, 3d ed. §§ 364, 427. The question of reasonable use is generally a question of fact; but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use, is a question of law. When the diversion or pollution (which is treated as a form of diversion) is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such use, as a matter of law, is unreasonable, and en-

titles the lower riparian owner to relief. Where the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by the convenience or necessity of the defendant's business. 'The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both.' *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657. While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to a neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use."

In *Trevett v. Prison Asso.* 98 Va. 332, 50 L. R. A. 564, 81 Am. St. Rep. 727, 36 S. E. 373, the following language is used: "In 1 Wood, Nuisances, 3d ed. § 427, it is said: 'The right of a riparian owner to have the water of a stream come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume. But in reference to this, as with the air, it is not every interference with the water that imparts impurities thereto that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes; or such as cause unwholesome or offensive vapors or odors to arise from the water, and thus impair the comfortable or beneficial enjoyment of property in its vicinity; or such as, while producing no actual sensible effect upon the water, are yet of a character calculated to disgust the senses, such as the deposit of the carcasses of dead animals

therein, or the erection of privies over a stream, or any other use calculated to produce nausea or disgust in those using the water for the ordinary purposes of life, or such as impair its value for manufacturing purposes.' The great principle upon which the law, as thus stated, rests, is that every man must use his own property so as not to injure that of another. It is true, as urged by counsel for defendant in error, that the operation of this principle is qualified by another maxim, founded in natural law, that he who exercises only his own legal rights injures no one. The motive, good or bad, which influenced the action complained of, is generally of no importance whatever, for it is well stated by an eminent writer upon this subject that 'whatever one has a right to do another can have no right to complain of.' Cooley, Torts, § 6, p. 630. If, therefore, a lawful act is done in a lawful manner, though another may be injured by it, the law affords no remedy. It is *damnum absque injuria*. It was said by the court in *Merrifield v. Worcester*, 110 Mass. 219, 14 Am. Rep. 592: 'Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farmhouses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but, so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action.' . . . Tracing the law from the time of Lord Coke to more recent times, the court, speaking through Judge Alvey, declares that 'all common-law authorities agree that a riparian owner has the right to the natural stream of water flowing by or through his land in its ordinary, natural state, both as to its quantity and quality, as incident to the right to the land on or through which the water course runs.' . . . 'If, therefore,' said the court, 'the defendants, being upper riparian proprietors, and as such en-

titled to the ordinary use of the water, including the right to apply it in a reasonable way to purposes of trade and manufacture, are using the water of the stream in an unreasonable manner, and have defiled the same in such manner and to such an extent as to operate an actual invasion of the rights of the complainants, the latter are entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction. What nature and extent of pollution of the stream will call for the active interference of the court is not in all cases easy to define. It is not every impurity imparted to the water, however small in degree, that will be the subject of an injunction. All running streams are, to a certain extent, polluted; and especially are they so when they flow through populous regions of country, and the waters are utilized for mechanical and manufacturing purposes. The washing of the manured and cultivated fields and the natural drainage of the country of necessity bring many impurities to the stream; but these and the like sources of pollution cannot ordinarily be restrained by the court. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense, as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose."

In *Gehlen Bros. v. Knorr*, 101 Iowa, 700, 36 L. R. A. 697, 63 Am. St. Rep. 416, 70 N. W. 75, it is said: "We need only consider, then, what the law is as to the rights of riparian owners to the use of the waters of a non-navigable stream for artificial purposes. Some general propositions may well be stated. The law is that as to such use, and in the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal. *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 729. It tol-

lows, therefore, that the defendants had the right to use the water reasonably, having reference to plaintiffs' rights therein. Washb. Easements, p. 379. Broadly stated, the general rule is that the owner of the land through which a stream of water runs has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water. *Willis v. Perry*, 92 Iowa, 297, 26 L. R. A. 124, 60 N. W. 729; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 578, 14 Am. St. Rep. 319, 42 N. W. 448; *Spence v. McDonough*, 77 Iowa, 462, 42 N. W. 371; 28 Am. & Eng. Enc. Law, p. 948; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85, notes; *Moulton v. Newburyport Water Co.* 137 Mass. 163; *Garwood v. New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 138, 46 Am. Rep. 580; *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426, 7 Am. St. Rep. 183, 17 Pac. 535; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 530; *Palmer v. Mulligan*, 3 Caines, 307, 2 Am. Dec. 270; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, note; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Haskins v. Haskins*, 9 Gray, 390; *Snow v. Parsons*, 28 Vt. 459, 67 Am. Dec. 723; *Springfield v. Harris*, 4 Allen, 494, 81 Am. Dec. 715; *Red River Roller Mills v. Wright*, 20 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167. No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167, and cases cited; Washb. Easements, p. 379. Now, while one riparian proprietor may not divert the water of a stream so as to deprive a lower proprietor on the same stream of the benefit thereof, such upper proprietor may reasonably detain the water for proper purposes. Washb. Easements, p. 380; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 138, 46 Am. Rep. 580; 28 Am. & Eng. Enc. Law, p. 955; Gould, Waters, § 213; Angell, Water Courses, §§ 90-96; *Gillett v. John-*

son, 30 Conn. 180. The doctrine that such use by the upper proprietor may result in diminishing the quantity of water which will go down the stream, and may affect the current by retarding the flow to a reasonable extent, and still be consistent with the existence of a common right, was early held in this country, and has been constantly adhered to. *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Bullard v. Saratoga Victory Mfg. Co.* 77 N. Y. 530; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; Gould, Waters, § 191; *Palmer v. Mulligan*. 3 Caines, 307, 2 Am. Dec. 270; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, note; *Van Hoesen v. Coventry*, 10 Barb. 518; *Oregon Iron Co. v. Trullenger*, 3 Or. 1; 3 Kent, Com. 6th ed. p. 439; *Keency & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 577; *Timm v. Bear*, 29 Wis. 254; *Whaler v. Ahl*, 29 Pa. 98; *Gould v. Boston Duck Co.* 13 Gray, 442. If the general rule that each riparian proprietor is entitled to the flow of the stream according to its natural course, without interruption or diminution, should be strictly adhered to, it would result in a virtual abrogation of the well-settled doctrine that the rights of all proprietors of the stream are equal, and would 'preclude the use of flowing waters in most cases; as, where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practical under the circumstances.' Cooley, Torts, 1st ed. p. 584; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312. In *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102, it was held, in an action by a mill proprietor against one having a mill and dam above him on the same stream, for damages caused by detention of the water, that it could not be said that such upper proprietor had no right to use the water to the prejudice of such lower proprietor; nor could it be held that such upper proprietor could not lawfully divert any of the water which would otherwise flow down the stream. The court said the real question was 'whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other.'

In *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102, Justice Cooley, speaking for the court, said: "But as between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one 'has no right to use the water to

the prejudice of the proprietor below him,' or that he cannot lawfully 'diminish the quantity which would descend to the proprietor below,' or that 'he must so use the water as not materially to affect the application of the water below, or materially diminish its quantity.' Such a rule would be, in effect, this: That the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state, as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream. Cases may unquestionably be found in which the rule of law is laid down as broadly as it was given by the circuit judge in this case, but an examination of them will show, either that the facts were essentially different, or that the general language was qualified by the context. Thus the language employed in the first instruction as above given seems to have been quoted from Lord Tenterden to *Mason v. Hill*, 3 Barn. & Ad. 312. But there it had reference to a case of diversion of water, and was strictly accurate and appropriate. The same language, substantially, is made use of in *Twiss v. Baldwin*, 9 Conn. 291; *Wadsworth v. Tillotson*, 15 Conn. 373, 39 Am. Dec. 391; *Arnold v. Foot*, 12 Wend. 331, and probably in many other cases, and is adopted by Chancellor Kent in his Commentaries, vol. 3, 6th ed. p. 439. See also *Bealey v. Shaw*, 6 East, 208; *Agawam Canal Co. v. Edwards*, 36 Conn. 497; *Williams v. Morland*, 2 Barn. & C. 913; *Mason v. Hill*, 5 Barn. & Ad. 1; *Tillotson v. Smith*, 32 N. H. 95, 64 Am. Dec. 355. But, as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether, under all the circumstances of the case, the use of the water by one is reasonable, and consistent with a correspondent enjoyment of right by the other. 'Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below.' Shaw, Ch. J., in *Cary v. Daniels*,

8 Met. 477, 41 Am. Dec. 532. 'The common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it, in order to work his mills to the best advantage, subject, however, to this limitation: That if, in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law in that case will interpose and limit this common right so that the owners of the lower mills shall enjoy a fair participation.' Woodworth, J., in *Merritt v. Brinkerhoff*, 17 Johns. 321, 8 Am. Dec. 404. It is a fair participation and a reasonable use by each that the law seeks to protect. Such interruption in the flow 'as is necessary and unavoidable by the reasonable and proper use of the mill privilege above,' cannot be the subject of an action. *Chandler v. Howland*, 7 Gray, 350, 66 Am. Dec. 487. And see *Embrey v. Owen*, 6 Exch. 353; *Hetrich v. Deachler*, 6 Pa. 32; *Hartzell v. Sill*, 12 Pa. 248; *Pitts v. Lancaster Mills*, 13 Met. 156; *Bliss v. Kennedy*, 43 Ill. 68."

It is very clear from these cases that the lower proprietor has no superior right to the upper one, and may not say to him that, because the lower proprietor wants to use the water for drinking purposes only, the upper proprietor may not use the water for any other purpose. Each proprietor has an equal right to the use of the stream for the ordinary purposes of the house and farm, even though such use may in some degree lessen the volume of the stream, or affect the purity of the water. *Hazeltine v. Case*, 46 Wis. 391, 32 Am. Rep. 715, 1 N.

W. 66; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 11 Am. St. Rep. 72, 6 So. 78; *Lewis*, Em. Dom. § 65. This right is not affected by the fact that the lower proprietor is a municipality instead of an individual. *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Haupt's Appeal*, 125 Pa. 211, 3 L. R. A. 536, 17 Atl. 436. It is not believed a case can be found where, out of deference to the rights of the lower riparian proprietor, it is made unlawful for the upper proprietor to make such reasonable and ordinary use of the water passing over his land as was made by the respondent in this case.

It is insisted by the people that under police power, it was competent to forbid any act on the part of the upper proprietor that would tend to impair the public health. It may be conceded that the police power of the state is very broad, but our attention has not been called to any principle of law, or to any case, the practical application of which will enable a village, city, or other municipality, for the purpose of obtaining a water supply, to prevent the ordinary and reasonable use of the waters of an inland lake or stream by an upper riparian proprietor, without the exercise of the right of eminent domain or without compensation.

In what we have said we do not mean to intimate that an upper proprietor may convert his property into a summer resort, and invite large numbers of people to his premises for purposes of bathing, and give them the right possessed only by the riparian owner and his family. We are undertaking to decide only the case which is presented here. Upon the record as made, we think the court should have directed a verdict in favor of respondent.

The conviction is reversed, and a new trial ordered.

Hooker, Ch. J., Grant and Montgomery, JJ., concur. Long, J., did not sit.

NEW YORK COURT OF APPEALS.

**Alexander M. WHITE, Respt.,
v.**

**NASSAU TRUST COMPANY, Exr., etc., of
William M. Tebo, Deceased, Appt.**

(168 N. Y. 149.)

1. The state alone can take advantage

NOTE.—Right to remove lateral support by dredging water bed.

From the shifting and unstable character of the deposits forming the beds of many of the navigable bodies of water, and the fact that a removal of a portion of such deposits may at any time become necessary for the improvement
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of a failure, by its grantee of lands under tide water, to fill them in as required by the terms of the grant.

2. The owners of a pier, having obtained from the state a grant of the adjacent land under water, may dredge it away to any proper depth to make it commercially useful, without liability to the owner of a neighboring pier which subsides be-

of navigation, or the construction of docks, the question, What rule with respect to lateral support governs? is an important one, although it is one which has not as yet received much consideration by the courts. *WHITE v. NASSAU TRUST CO.*, in applying to the water bed the same rule as is applicable to the upland, appears to have adopted the only rule which is

cause of the slipping of the intervening state lands towards the excavation.

3. No duty of lateral support which the owner of land under tide water owes to adjoining land extends to piers which may have been placed on such land.
4. The doctrine of lateral support has no application to lands under tide waters which have been granted by the state for the advancement of commerce.

(*Height and Werner, JJ., dissent.*)

(October 1, 1901.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's wharf by excavation in near-by waters. *Reversed.*

Statement by Gray, J.:

This action was brought to recover damages for injuries to plaintiff's wharf al-

leged to have been caused by the wrongful and unlawful acts of the defendant's testator in dredging beneath the waters adjacent to said wharf. The plaintiff is the owner of lands fronting on New York bay, in the borough of Brooklyn, at the intersection of the southerly line of Twenty-Fourth street with the waters of the bay. He is also the owner of a pier extending from high-water mark at Twenty-Fourth street into the bay for a distance of over 1,500 feet. This pier is constructed of timber cribs sunken in the mud, and filled with stones and earth. Defendant's testator was also the owner of lands fronting on said bay, between Twenty-Third and Twenty-Fourth streets, upon a portion of which there was a pier similar to that of the plaintiff, and extending into the bay about the same distance. These two piers were separated by a slip or channel 123 feet in width. By a grant from the state, defendant's testator became the owner of 93 feet in width of the land adjacent to this pier in this channel, which left a strip of 30 feet in width next to plaintiff's pier. The southerly line of the lands owned by the de-

practicable. Under this rule, one who is acting within the limits of his rights is not liable for injuries to improvements by dredging away a portion of the water bed so that the adjoining land shifts, carrying improvements with it. But it is to be observed that the one causing the injury must act within the limits of his rights. Thus, it has been held that, if a municipal corporation, not for the purpose of improving navigation, nor for any other proper purpose, but to construct a settling basin for use in connection with its sewer system, dredges the bottom of the river to such an extent that the adjoining land shifts, carrying with it the foundations of a building belonging to a private owner, it will be liable for the injuries thereby caused to him. *Pomroy v. Granger*, 18 R. I. 624, 29 Atl. 690.

A difference in opinion as to whether defendant in the case of *WHITS V. NASSAU TRUST CO.* was acting within the limits of his rights accounts for the difference of opinion between the appellate division of the supreme court and the court of appeals. The lower court decided against the one making the excavation on the ground that he had extended his excavation to land of the state, and therefore was a wrongdoer acting without authority, and was liable for all the consequences of his wrongful act. The court of appeals disposes of this theory by the statement that negligence would not be presumed, and "our assumption must be that the excavation beyond Tebo's boundary line was accidental, or without any intention to prejudice the plaintiff in any of his rights." And the court then proceeds to decide the case by the application of the rule of lateral support. The two courts are, therefore, not necessarily in conflict as to the law, but merely as to the facts. If defendant was a wrongdoer a different rule would, of course, be applicable than in case he was acting within his rights, and the injury was the result of accident.

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The rule exempting the one making the excavation from liability applies only so far as the injury is done to structures on the bed, or on the adjoining land, so that the injury may have been increased by the weight of the improvement. If because of excavations the land itself is made to shift when in an unimproved state, the one doing the work is liable for the injury done. Therefore, if one excavates sand on the seashore in front of his property to such an extent that by the law of gravitation or of wave motion it results in the removal of adjoining soil, and the removal of this soil exposes the property of a third person to the action of the ocean, the excavator is liable for the results of his excavating, if they are the reasonable and proximate consequences of his act; and an injunction will issue restraining him from making further excavations. *Murray v. Pannach*, 64 N. J. Eq. 147, 53 Atl. 595.

While there is no easement of lateral support for buildings, the maxim, *Sic utere tuo ut alienum non laedas*, applies in such cases; so that one who undertakes to excavate a dock on his own property adjoining piers belonging to a third person on which buildings are erected is bound to exercise ordinary care and skill in doing the work; and, if he negligently and improperly performs the work, and, through such negligence and want of caution, the buildings on the adjoining pier are injured, he will be liable to make compensation therefor. *Austin v. Hudson River R. Co.* 25 N. Y. 334.

And if the adjoining owner excavates the soil in such a way as to undermine a pier, he will be liable for the injury; and the remainderman, on succeeding to the estate in fee in the wharf, may, on the falling in of one of the walls of the wharf, maintain an action against an adjoining owner for so digging in his soil as to undermine it, although the undermining occurred before he succeeded to the estate in fee. *Gillon v. Boddington*, 1 Car. & P. 541, Ryan & M. 161.

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defendant's testator was the center line of Twenty-Fourth street extended. The plaintiff's northerly boundary was the southerly line of Twenty-Fourth street extended. The strip of land 30 feet in width between said two lines remained in the ownership of the state. The natural depth of the water in the slip between the two piers varied from 3 to 10 feet. In 1888 the defendant's testator dredged the part of the slip owned by him to a depth of about 13 feet, without causing any injury to plaintiff's pier. In 1893, for the purpose of constructing a dry dock, he dredged his portion of the slip, for a distance of several hundred feet from high-water mark, to a depth of 26 feet. During a part of the time while the work was in progress the dredge used in excavating was so placed that the lateral sweep of the "scoop" removed a considerable portion of the mud of the bed of the land owned by the state. As a result of this part of the dredging, the soil between the excavation and the plaintiff's pier fell or slid into the hole which had been made, and this caused a part of the latter's pier to sink away for some distance of its length. These facts were, in substance, found by the trial court, and are not in dispute. The plaintiff recovered a judgment for the cost of restoration of his pier, and that judgment has been unanimously affirmed by the appellate division, in the second department.

Messrs. Bergen & Dykman, for appellant:

At common law, and as riparian owner, and without any grant of lands under water, Mr. Tebo could project from his upland a pier for the purposes of commerce.

Buffalo v. Delaware, L. & W. R. Co. 39 N. Y. Supp. 4; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, 28 Am. St. Rep. 600, 30 N. E. 654; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096.

The right to dredge alongside a wharf projected from the upland is necessary to the full enjoyment of the right to build the wharf.

The judgment should not be affirmed because of defendant's failure to prop up the plaintiff's pier.

Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524.

The plaintiff had no right to have the structure he had erected on the confines of his land receive lateral support from the adjoining lands under water parcel of the bed of the sea.

Hendricks v. Spring Valley Min. & Irrig. Co. 58 Cal. 190, 41 Am. Rep. 257. 64 L. R. A.

The upland rule as to lateral support forbids this recovery.

If the damage to the lands is not appreciable there can be no recovery for the damage done to the buildings.

Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 312; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Thurston v. Hancock*, 12 Mass. 223, 7 Am. Dec. 57; *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Farrand v. Marshall*, 19 Barb. 380; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357.

Messrs. Moore, Wallace, & Dudley, for respondent:

Mr. Tebo dug beyond the boundaries of his own premises.

This fact was alleged and proved; it was found by the trial justice, and the finding was unanimously approved by the appellate division. It is therefore not open to question in this court.

Harroun v. Brush Electric Light Co. 152 N. Y. 212, 38 L. R. A. 615, 46 N. E. 291; *Consolidated Ice Co. v. New York*, 166 N. Y. 97, 59 N. E. 713.

The privilege of the owner of land to excavate upon it, even though in doing so he may injure his neighbor's building upon adjoining land, is based upon the right of a man to do what he wishes with his own property, though even this right is limited and not absolute. Beyond the limits of the land owned by him, there is no reason for such a privilege, and the right to excavate does not exist except it be given by legislative or other proper authority.

Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 275, 24 L. R. A. 105, 37 Am. St. Rep. 555, 35 N. E. 592; *Farrand v. Marshall*, 19 Barb. 380, 21 Barb. 409; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *Sullivan v. Dunham*, 161 N. Y. 290, 47 L. R. A. 715, 76 Am. St. Rep. 274, 55 N. E. 923; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Darley Main Colliery Co. v. Mitchell*, 55 L. J. Q. B. N. S. 529; *Cabot v. Kingman*, 166 Mass. 403, 33 L. R. A. 45, 44 N. E. 344.

Mr. Tebo disturbed the natural boundary of the sea, admitted it upon his land, allowed it to escape from his land and to enter upon adjacent land, and subjected the plaintiff's land to the action of the sea and its tides. He was liable for damage caused thereby, upon a principle analogous to that applied in cases of interference with running water.

Pisley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; *Hartshorn v. Chaddock*, 135 N. Y. 116, 17 L. R. A. 426, 31 N. E. 997; *Covert v.*

Cranford, 141 N. Y. 521, 38 Am. St. Rep. 826, 36 N. E. 597; *Mears v. Dole*, 135 Mass. 508.

Gray, J., delivered the opinion of the court:

I think this judgment should not stand. The question in the case is whether Tebo, the defendant's testator, in dredging out the slip by his pier, could become liable to the plaintiff for any damage occasioned by the latter's neighboring pier by reason of the soil upon which it stood subsiding or falling away into the excavation made by the dredging. There is no finding that the dredging was negligently performed, although it is found that the dredge, in its operation, excavated a portion of the state land intervening between Tebo's slip and the plaintiff's pier. Negligence will not be presumed, and our assumption must be that the excavation beyond Tebo's boundary line was accidental, or without any intention to prejudice the plaintiff in any of his rights. The theory upon which the plaintiff's right to recover has been upheld is that the plaintiff had an easement of lateral support in the adjacent land, and that it was the defendant's duty to protect the plaintiff's pier by preserving to it what lateral support there had been. I entertain the gravest doubt that the common-law rule thus invoked has its proper application to the case of land under the waters of the sea. The differing circumstances and the interests of the state incline me to the view that it should not be applied. But, if we should assume that it might apply, still, in my opinion, the plaintiff made out no right to recover damages. Tebo's wrongdoing, if any there was, consisted in the fact that he excavated the sea bottom by his dredge to a depth which, by force of natural laws, drew into it the soft and plastic mud upon the adjacent and intervening land of the state, with the consequence that the plaintiff's pier, losing some of its previous support, yielded and sank. Tebo, as riparian owner, had the common-law right, as against all but the state, to have his access to the navigable part of the waters in front of his upland, and, by grant from the state, the lands under water, between high and low water mark, became his for their appropriation to the purposes of commerce, by the erection of a dock or docks thereon. He constructed a pier out from high-water mark, and a slip, by which it could be availed of for commercial uses. By the legislation of 1873 and 1884 (chapters 702 and 491), the owners of real estate in that locality, fronting on the water, were authorized to fill in the lands under water to exterior bulkhead and pier lines. That, however, 64 L. R. A.

did not affect the right of Tebo to maintain the pier. It was a permission from the state, and not a command. He was under no obligation to destroy the pier property. There is no question here upon his grant, or of his compliance with its conditions. If the grant to Tebo is to be construed as requiring the grantee to fill in the lands under water, and a failure to do so has entailed a forfeiture of the grant, that is a question which the state alone can raise, in a proper action. Having, then, an apparent right to maintain his pier it would seem to follow that he had a clear right to dredge out the slip alongside the pier to any proper depth to make it commercially useful, and of the purposes of commerce the maintenance of a dry dock is certainly no inconsiderable one. A slip with water of sufficient depth to float vessels was a necessary incident to the pier. Not only had Tebo the general right to dredge his slip to the extent necessary to make it commercially useful, but the duty rested upon him by statute, as a pier owner, to properly dredge the adjoining slip. *Laws 1860, chap. 254, § 4*. If it is an admissible legal proposition that he owed a duty to the plaintiff to protect him in the enjoyment of an easement of lateral support to his pier in the adjacent land, it was, at most, one which regarded the land itself, and not the structure upon it. Tebo had a right to excavate upon his lands, and the limitation upon that right, if we are to apply the common-law rule referred to, was that it should be without injury to the adjacent land in its natural state. If that land had been burdened by the owner with some improvement, that fact gave to him no right to claim any greater easement of lateral support. This rule should be regarded as settled by the decisions of the courts of this state. *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Farrand v. Marshall*, 19 Barb. 380, Affirmed in 21 Barb. 409; *Dorrity v. Rapp*, 72 N. Y. 307; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552, 35 N. E. 592. And see Washb. Easements, 4th ed. pp. 585, 586. The courts in Massachusetts at an earlier day had declared this rule in *Thurston v. Hancock*, 12 Mass. 223, 7 Am. Dec. 57; and in *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Dec. 312, it was mentioned as a rule which had the weight of American authority, a number of cases being cited. The situation here was that all these lands under water, in question, being part of the bed of the Bay of New York, consisted of mud, which, having no consistency, would subside or fall away, with any change effected in the level of the adjacent sea bottom, and to that result the weight of the pier would naturally contribute. There is

no finding that the pier did not increase the lateral pressure upon the adjacent land, and therefore the natural presumption may be indulged, under the circumstances, that it did. It is plain that no appreciable damage could have been done to the plaintiff's land. In its natural state, it was soft mud. Its withdrawal or subsidence would ordinarily be of advantage in the deepening of the water. Its subsidence, in the nature of things, must have happened, and it is only by considering the effect upon the superstructure of the pier that we get at the damage to the plaintiff. But, within the rule of law as it has been declared in England and in this state, that could not give rise to a cause of action. *Smith v. Thackerah*, L. R. 1 C. P. 564; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524; *Booth v. Rome*, W. & O. Terminal R. Co. 140 N. Y. 275, 24 L. R. A. 108, 37 Am. St. Rep. 556, 35 N. E. 594. As it was observed by Judge Andrews in the *Booth Case*, in speaking of the rule as applying only to lands in their natural condition, and as not extending so as to give to the owner of a building the right to a lateral support, there was in this case "damage, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property." In dredging out his slip, Tebo was in the lawful exercise of his property rights, and, as that which resulted to the plaintiff's lands was not a damage of any appreciable nature, he cannot be rendered liable because the plaintiff's pier sank with the subsidence of its plastic bed. This is the result which I reach upon the theory that the common-law rule of lateral support is applicable. But, as I have suggested, it cannot reasonably be applicable to such conditions. Applied to the land, as it is usually owned, it can be seen to have its reasonable operation upon the relative obligations of adjacent landowners; but I am quite unable to see how it had any relevancy to the case of lands under water, where the tide ebbs and flows, whose ownership is in the state, in trust for the benefit of the people, and which are granted by the state for the advancement of its commerce.

Then, in my opinion, there is a further view to be taken of this question from the standpoint of the state. While the grant was obtained by Tebo for his private advantage, nevertheless it was made by the state, primarily, in pursuance of a policy to benefit the municipality by the improvement of its harbor, and therefore to advantage, to that extent, the commonwealth. *Langdon v. New York*, 93 N. Y. 129. It contemplated a development of the subject of the grant by the grantee, in a direction that would promote the purposes of com-

merce. As I have before observed, the question is not here as to whether Tebo has complied with the conditions of the grant. If he has not, that is for the state to assert. If it shall be held in this case that the owner of lands lying under the waters of the sea cannot deepen or improve them for commercial purposes without incurring a possible liability to an adjacent owner by reason of the effect upon his structures of the shifting of the loose soil or mud upon which they were insufficiently rested, or if he is legally bound to anticipate such a result and to make exertions to protect all such adjacent structures, the precedent must militate against the free and effective operation of the policy of the state, as it would tend to impose a more or less onerous burden upon the riparian proprietor in the exercise of his right to develop his water properties. The deepening by Tebo of his slip was to make it available to vessels entering from the public highway of the sea. As long as he elected not to avail himself of the permission to fill in his lands under water, they remained a part of the Bay of New York; and that was, too, the case with those intervening between his property and the plaintiff's, and which still remained in the ownership of the state. It was Tebo's right, and it was the interest of the state, that he should make use of his water properties for purposes of commerce; and no restrictions upon that right should be countenanced by the courts, which interfere with its lawful exercise, unless they can be seen to be based upon some rule of property of clear and obvious application in such cases.

For these reasons, I think *the judgment should be reversed*, and a new trial ordered; costs to abide event.

Parker, Ch. J., and Bartlett, Martin, and Vann, JJ., concur.

Haight and Werner, JJ., dissent.

Motion for reargument denied November 26, 1901.

Re Transfer Tax upon Property Transferred by Laura Astor DELANO, Deceased.

(176 N. Y. 486.)

The power to tax the exercise of a power of appointment by will is not destroyed by the fact that the power of appointment was created by deed prior to the passage of the statute providing for the tax.

(*O'Brien and Werner, JJ., dissent.*)

(November 24, 1903.)

NOTE.—For other cases in this series as to taxation of a transfer under a power of appointment, see *Re Stewart*, 14 L. R. A. 836, and *Re Dowd*, 52 L. R. A. 433.

A PPEAL by the State Comptroller from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of the Surrogate for New York County denying the application of Arthur Astor Carey to have proceedings to assess a transfer tax dismissed as to him. *Reversed.*

The facts are stated in the opinion.

Mr. George M. Judd with **Mr. Edward H. Fallows**, for appellant:

The taxation of a transfer of property passing under and by virtue of the exercise of a power of appointment has been sustained by this court.

Re Vanderbilt, 163 N. Y. 597, 57 N. E. 1127, Affirming 50 App. Div. 246, 63 N. Y. Supp. 1079; *Re Dows*, 167 N. Y. 227, 52 L. R. A. 433, 88 Am. St. Rep. 509, 60 N. E. 439; *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685.

The property over which Laura Astor Delano by her last will and testament exercised the power of appointment granted her under certain deeds of 1848 and 1849 is subject to the provisions contained in said subdivision 5 of § 220 of the tax law.

Re Seaver, 63 App. Div. 283, 71 N. Y. Supp. 544; *Re Walkorth*, 66 App. Div. 171, 72 N. Y. Supp. 984; *Re Potter*, 51 App. Div. 212, 64 N. Y. Supp. 1013.

Mr. Lucius H. Beers, with **Messrs. Roosevelt & Kobbe**, for respondent:

Where a doubt arises as to the construction of the transfer tax act, that doubt "should be resolved in favor of the taxpayer, and against the taxing power."

Re Enston, 113 N. Y. 174, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096.

The transfer tax is a tax upon succession; that is, upon only such a class of transfers as are caused by the death of the person who has been the owner of the property.

Re Swift, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Vanderbilt*, 172 N. Y. 69, 64 N. E. 782.

The legislature either did not intend to make the transfer-tax law retroactive, or, where that intention has been apparent, provisions to that effect are unconstitutional.

Re Pell, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789.

The amendment of 1897 does not apply to powers created by instruments which went into effect prior to the passage of the act. That amendment does not apply to cases 64 L. R. A.

where the power to appoint was created by a deed, unless the deed was one made in contemplation of the death of the grantor.

People ex rel. Mason v. McClave, 99 N. Y. 83, 1 N. E. 235.

The surrogate's court has no jurisdiction to assess a tax upon the property originally transferred by the deeds of 1848 and 1849.

Re Enston, 113 N. Y. 174, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *Re Smith*, 40 App. Div. 481, 58 N. Y. Supp. 128; *Re Cramer*, 56 App. Div. 479, 67 N. Y. Supp. 795; *Re Fitch*, 160 N. Y. 87, 54 N. E. 701; *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, Affirmed in 154 N. Y. 746, 49 N. E. 1096.

The amendment of 1897 did not impose a succession tax.

Re Swift, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Sherman*, 153 N. Y. 1, 46 N. E. 1032; *Knowlton v. Moore*, 178 U. S. 41-56, 44 L. ed. 969-976, 20 Sup. Ct. Rep. 747; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283-289, 42 L. ed. 1037-1041, 18 Sup. Ct. Rep. 594; *United States v. Perkins*, 163 U. S. 625-628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073.

If the amendment of 1897 imposed a tax on the respondent's property, it impaired the obligation of a contract made before the tax law was adopted, and is therefore unconstitutional.

Root v. Stuyvesant, 18 Wend. 257; *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *Re Vanderbilt*, 172 N. Y. 69, 64 N. E. 782.

The remaindermen under the deeds of 1848 and 1849 held under contracts which were made when those deeds were delivered, and their rights under those contracts could not be impaired or abridged by subsequent statute.

3 Parsons, Contr. 7th ed. p. 481; *Varick v. Briggs*, 22 Wend. 543; *Van Rensselaer v. Bull*, 19 N. Y. 100; *People ex rel. Reynolds v. Buffalo*, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; *Fletcher v. Peck*, 6 Cranch, 87-136, 3 L. ed. 162-177; *Murray v. Charleston*, 96 U. S. 432, 445, 24 L. ed. 760, 763; *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976.

Vann, J., delivered the opinion of the court:

This appeal presents the question whether the legislature is prohibited by the Constitution, state or Federal, from passing an act to impose a transfer tax upon the exercise by a last will and testament of a power of

appointment derived from a deed executed before the passage of any statute imposing a tax upon the right of succession to the property of a decedent. The facts out of which this question arose are as follows: On the 30th of September, 1848, William B. Astor owned a house and lot on Lafayette place, in the city of New York, and on that day he conveyed the same to his daughter Mrs. Laura Delano for life, and upon her death without issue to her brothers and her sister Alida, or their issue, as they might then survive, *per stirpes*. By the same deed he conferred upon Mrs. Delano a power of appointment, to be exercised, in her discretion, by an instrument "in its nature testamentary," in such a manner as "to give the said land and premises, or any share or part thereof, to and amongst her said . . . brothers and sister Alida, or their issue, in such manner and proportions as she may appoint." On the 6th of September, 1894, said William B. Astor transferred certificates of the public debt of the state of Ohio, amounting to \$50,000, to James Gallatin and another, in trust to receive the income and apply it to the use of his daughter Laura during her life, and upon her death without issue to transfer "the capital of the said stock . . . to her surviving brothers and sister Alida," or their issue then surviving. This gift was also subject to a power of appointment created by the trust deed, whereby the said Laura was authorized "by any instrument duly executed as a will of personal estate to dispose of said capital into and amongst her . . . brothers, sister, and their issue in such shares and proportions as she may think fit and upon such limitations, by way of trust or otherwise, as in her discretion may be lawfully devised." William B. Astor died on the 24th of November, 1875, about twenty-six years after the date of the last deed, and neither of said instruments was made by him in contemplation of death. Mrs. Delano, his daughter, died June 15, 1902, without issue, leaving a last will and testament, which has been duly admitted to probate, whereby she exercised the power of appointment contained in said deeds in favor of Arthur Astor Carey, her nephew. A proceeding was commenced before the proper surrogate to make the usual appraisal for the purpose of assessing a transfer tax upon the property transferred and appointed by the last will and testament of Mrs. Delano, and Mr. Carey was notified to appear. He appeared only for the purpose of objecting to the jurisdiction of the surrogate, from whom he procured an order requiring the executors of Mrs. Delano and the comptroller of the state to show cause why the proceeding should not be dismissed as to him for the want of jurisdiction. The surrogate denied the motion, but upon appeal to the appellate division his order was reversed, and the proceeding was dismissed as to Mr. Carey. The comptroller appealed to this court.

Article 10 of the tax law relates to taxable transfers, and embraces §§ 220 to 242, inclusive (Laws 1896, pp. 868-881, chap. 908). Section 220, as amended in 1897, imposes a tax upon the transfer of any property, real or personal, not only by will or intestate law, but also "whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." Laws 1897, p. 150, chap. 284, § 220, subd. 5. The learned appellate division held that the statute, as amended, applied to the property in question, but that the appointee took under the deeds, and not under the will, and the attempt of the act to impose a tax upon the property under the guise of a tax upon succession was retroactive and unconstitutional.

The statute, as we read it, does not attempt to impose a tax upon property, but upon the exercise of a power of appointment. The power in this case was exercised by will in such a way that the appointee became entitled to all the property, instead of an aliquot part. While the property came to him by deed from his grandfather, only a part of it could have reached him but for the will of his aunt. His title to the most of it depended on the will, as well as upon the deed. He is compelled to resort to the will in order to establish his right, for the deed alone will not suffice. The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others. The legislature could provide that no power of appointment should be exercised by will, or that it should be exercised only upon the payment of a gross or ratable sum for the privilege. It could exact this condition independent of the date or origin of the power. All this necessarily flows from the absolute control by the legislature of the right to make a will. *Re Sherman*, 153

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N. Y. 1, 4, 46 N. E. 1032; *Re Dows*, 167 N. Y. 227, 231, 52 L. R. A. 433, 88 Am. St. Rep. 508, 60 N. E. 439; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *United States v. Perkins*, 163 U. S. 625, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; *Mager v. Grima*, 8 How. 490, 493, 12 L. ed. 1168, 1170.

We do not regard the question presented as open in this court, for we have recently passed upon it in two cases, each of which arose under the statute as amended in 1897. In the earlier case a testator who died in 1885 created a trust fund, and gave the income thereof to his son during life, but directed that upon his death the principal should be paid to his issue in such shares or proportions as he should by will appoint, with a gift directly to such issue if the power of appointment was not exercised. The son died in 1899, leaving a will by which he exercised the power. We held, adopting the opinion of the court below, that, although the ultimate right of succession to the fund was not taxable under the statute in force when the father died, still the shares of the appointees under the son's will were subject to a transfer tax under the act of 1897. *Re Vanderbilt*, 50 App. Div. 246, 63 N. Y. Supp. 1079, 163 N. Y. 597, 57 N. E. 1127. In the second case the testator died in 1880, after devising certain real property in trust to pay the income to his son during life, and upon his death said realty was to vest absolutely and at once in such of his children and the issue of his deceased children as he should by will appoint. If, however, the son should die intestate, the realty was to vest absolutely and at once in his children then living and the issue of his deceased children. The son exercised the power by his last will, and died in 1890. We held that the property was subject to the tax imposed by the act of 1897; that such tax was on the right of succession, and not on the property; that, whatever may be the technical source of title of a grantee under a power of appointment, in reality and substance it is the execution of the power that gives to the grantee the property passing under it; and that, when the father devised the property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the privilege accorded to the son of making a will. *Re Dows*, 167 N. Y. 227, 52 L. R. A. 433, 88 Am. St. Rep. 508, 60 N. E. 439, Affirmed *sub nom. Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213. The Supreme Court of the United States reviewed our decision, and, after due consideration of the statute in question, was unable to see that, as construed by us, it infringed any provision of the Federal Constitution. 64 L. R. A.

The learned judges below did not consider the *Dows Case* in their opinion, but they attempted to distinguish the *Vanderbilt Case* from the one in hand upon the ground that the power of appointment was created by will, and that the will was made after the enactment of the collateral inheritance tax law. The latter distinction did not exist in the *Dows Case*, where the power was created before any act was passed in this state providing for the imposition of a succession or transfer tax. We think neither distinction is well founded. As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed, its efficiency is the same as if it had been created in the same form by will. No more and no less could be done by virtue of it in the one case than in the other. Its effective agency to produce the result intended is neither strengthened nor weakened by the nature of the instrument used by the donor of the power to create it. The power, however or whenever created, authorized the donee, by her will, to divest certain defeasible estates, and to vest them absolutely in one person. If this authority had been conferred by will, instead of by deed, the right to act would have been precisely the same, and the power would have neither gained nor lost in force. The statute applies to all powers alike, without distinction on account of the method of creation or the date of creation, and provides that the exercise of the power shall be deemed a taxable transfer of the property affected, the same as if it had belonged absolutely to the donee of the power, and had been bequeathed or devised by such donee. As we said through Judge Cullen in the *Dows Case*: "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." This accords with the statutory definition of a power as applied to real estate, for it includes authority to create or revoke an estate therein. Real Property Law, § 111 (Laws 1896, p. 577, chap. 547). Such was the effect of the exercise of the power under consideration, for it both revoked and created estates in the real property and interests in the personal property. No tax is laid on the power, or on the property, or on the original disposition by deed, but simply upon the exercise of the power by will, as an effective transfer for the purposes of the act. If the power had been exercised by deed, a different question would have arisen, but it was exercised

by will, and, owing to the full and complete control by the legislature of the making, the form, and the substance of wills, it can impose a charge or tax for doing anything by will.

It is quite immaterial that there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed, and nothing else. The right of the legislature to impose a tax on the privilege of exercising a power by will is not affected by the fact that no such tax was imposed when the power was created. When the creator of the power granted the property to the appointees of his daughter, as Judge Cullen said in the *Dours Case*, "he necessarily subjected it to the charge that the state might impose on the privilege accorded to the" daughter "of making a will. That charge is the same in character as if it had been laid on the inheritance of the estate of the" daughter herself; "that is, for the privilege of succeeding to property under a will." If the

power had not been exercised, the question would have resembled that presented by the *Pell Case*, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and nondefeasible, as should result in an absolute title after the passage of the act. *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 780. In that case the transfer was completed without the aid of a will, and the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will.

We think that the surrogate had jurisdiction, and that his order denying the motion to dismiss the proceedings as to the respondent was proper. It follows that *the order of the Appellate Division should be reversed*, and that of the surrogate affirmed, with costs.

Parker, Ch. J., and Bartlett, Haight, and Cullen, JJ., concur. O'Brien and Werner, JJ., dissent.

Reargument denied.

MISSISSIPPI SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,
v.

Mrs. W. G. HARPER.

(.....Miss.....)

1. Evidence of declarations of the ticket agents and conductor of the train first boarded by the passenger is admissible upon the question of the carriage contract, where one desiring transportation between two points connected by different routes asks for a ticket by the longer route, over which runs the more desirable train, and receives one which does not specify the route; and it is immaterial that the regulations of the carrier, of which the traveler has no knowledge, require the use of the more direct route.
2. A conductor of a train running between two points connected by different routes is bound to listen to the ex-

planation of a passenger holding a ticket which does not specify the route she is to take, that the agent selling the ticket had directed her to take the route on which the conductor finds her; and he cannot eject her from the train because of regulations of the carrier, unknown to her, requiring her to take the other route.

3. Insulting or ungentlemanly conduct is not necessary to render the ejection of a woman from a train wrongful, if, under the terms of her carriage contract she has a right there.
4. Exemplary damages may be recovered for the ejection, in the night and at a strange place, of a lady from a train where she has a right to be under the carriage contract made with the agent selling her ticket, of which the conductor is fully informed, although the terms of the contract are not embodied in the ticket, and the regulations of the carrier require passengers between the terminal named in the ticket to travel by another route.

NOTE.—For other cases in this series as to liability for ejecting passenger who, through fault of carrier or its agents, presents a defective ticket, see *MacKay v. Ohio River R. Co.* 9 L. R. A. 132; *Peabody v. Oregon R. & Nav. Co.* 12 L. R. A. 823; *Kansas City, M. & B. R. Co. v. Riley*, 13 L. R. A. 38; *Poulin v. Canadian P. R. Co.* 17 L. R. A. 800; *Ellsworth v. Chicago B. & Q. R. Co.* 29 L. R. A. 173; *Northern P. R. Co. v. Pauson*, 30 L. R. A. 730; and *Southern R. Co. v. Wood*, 55 L. R. A. 530.

As to liability for expelling passenger from

train on the ground that it does not stop at the station for which ticket was bought, where the agent assured the passenger that the train would stop at such station, see, in this series, *Atkinson v. Southern R. Co.* 55 L. R. A. 223, and *Kansas City, Ft. S. & M. R. Co. v. Little*, 61 L. R. A. 122.

As to expulsion of passenger whose ticket has been wrongfully taken by other conductor, see *Sloane v. Southern California R. Co.* 32 L. R. A. 193.

5. A decision awarding punitive damages must be reversed where, although they were allowable under the facts set out in the first count of the declaration, they were not asked for by it, but were asked for in another count under which no damages were allowable, where, from the instructions and the award, it is evident that they were allowed under the wrong count.
6. The conductor of a passenger train is under no obligation to place upon the right car a passenger who has entered the wrong one by mistake.

(January 25, 1904.)

APPPEAL by defendant from a judgment of the Circuit Court for Zallabusha County in plaintiff's favor in an action brought to recover damages for alleged wrongful ejection from defendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. Mayes & Longstreet and J. M. Dickinson for appellant.

Messrs. Brewer & Creekmore for appellee.

Whitfield, Ch. J., delivered the opinion of the court:

Mrs. Harper lived at Henderson, Kentucky; had been living there about eighteen months. Prior to that time she had lived at Water Valley, Mississippi. On the 24th of July, 1901, desiring to make a visit to Water Valley, she bought a ticket from Henderson, Kentucky, to Water Valley, Mississippi, from the ticket agent at Henderson. She had lived at Grenada, Mississippi, before she lived at Water Valley, and her husband and herself desired that she should go by way of Grenada, because she had acquaintances there. She says that she preferred that route, because she did not know where she would be delayed on the direct route by way of Jackson, Tennessee, in the nighttime, and her husband and herself desired that she should go by way of Memphis, and stop over at Grenada. The agent told her that there was no difference in the price of tickets, and she took the Memphis route. The defendant company had two routes: One from Henderson, *via* Jackson, Tennessee, to Water Valley, called the direct route; but the local train ran over this route. The other route was from Henderson, Kentucky, *via* Princeton, Kentucky, to Memphis, Tennessee, and Grenada, Mississippi. Over this the fast train ran. When Mrs. Harper got to Princeton, Kentucky, she interviewed the ticket agent of the defendant company there, and he told her to take the Memphis train,—positively told her not to take the other train. She accordingly took the Memphis train at Princeton. When the conductor of the train came around for

tickets, she asked him if she was all right, if she could go by way of Memphis. He told her that certainly she could go that way, and honored her ticket, and carried her to Brighton, Tennessee, within one half hour's run of Memphis. She was much nearer Water Valley at Brighton, going *via* Memphis, than she would have been returning from Brighton to Fulton, Kentucky, and thence going to Water Valley. But at Brighton another conductor refused to pass her any further on that ticket; saying that the ticket was for the other route, and not good on that route, and that she would have to get off. It was then about half past 8 at night. Mrs. Harper fully explained to him all that had passed between her and the two ticket agents and the conductor. On this point she says: "I told him the man had sold me a ticket for that route, and all the other railroad officials had instructed me to go on that way, and that I could not see why I could not; that I would get to Water Valley at 6:30 in the morning, and the other way would put me at Water Valley the day after; and that I had bought the ticket for that route. He put me off against my will; just wilfully put me off. Of course, he did not take me bodily and put me off, but he told me I had to do it, and, of course, I did it. I went back to Fulton and spent the night." She further testifies that he positively refused to accept any explanation from her. She got to Fulton on the back train about 10 o'clock that night. She would have been in Memphis in another hour on the route she was on. She stayed in the hotel in Fulton until 5 o'clock the next morning. She knew no person at Brighton, Tennessee, and stayed at the depot there about twenty minutes, until the train going to Fulton came along. This was an accommodation passenger train. At Fulton, Kentucky, the ticket agent, according to her testimony, which the jury believed, pointed out to her the train which he said was going to Water Valley, and also the very coach on the train which she should take to go to Water Valley. After the train had started, the conductor of this train which she was on told her that she was on the wrong train, but that he would put her on the right train directly. She says that by this time she was almost desperate, that she was really sick from anxiety and worry, and that she notified the conductor that she was thus sick from anxiety and worry. She had really gotten on the car that went to Nashville, Tennessee, from Martin, Tennessee. The conductor failed to keep his promise to put her in the right coach, and she was about to be carried to Nashville, Tennessee, from Martin; but she pulled the bell rope and stopped that train, and got off at Martin,

and found herself about 50 yards from the train going to Water Valley, but it was just pulling out, and thus she got left, so far as that train was concerned. She went to a hotel so sick that she could not go to the dinner table, and dinner was served in her room. She stayed at Martin all day, sick, and had to go to bed. She then took, at last, the right train, and reached her destination, after all this worry, vexation, and delay,—quite enough to make any woman traveling by herself thoroughly sick from anxiety and worry. She stated that the agent at Henderson told her expressly to go by Memphis, because she would make better connection that way, and that she went through Memphis, because she passed through Memphis in the night. She says that she had gone from Water Valley to Henderson by way of Memphis, buying her ticket at Water Valley via Grenada; that she had gone that way twice. She says that the conductor at Brighton was not insolent, but he was positive, and compelled her to get off. She further testifies that the circuitous route from Henderson to Water Valley was nevertheless the quickest route, by five hours, because over that route the fast train ran. She further says that the conductor on the train from Princeton told her that the Memphis route was the best route, and that she remained on the train on his advice until they got to Brighton,—nearly to Memphis. She says that both the conductor and the ticket agent at Brighton told her to take that route. The proof of actual damages in a small amount—some \$17—was made. The jury returned a verdict for the plaintiff for \$817.

The chief contention on the part of the appellant is that it was incompetent to admit the declarations of the two ticket agents at Henderson and Princeton, and of the conductor on the train from Princeton, Kentucky, to Brighton, Tennessee. This contention is unsound. The ticket, on its face, contained no information as to which route should be taken, nor did it advise appellee of the rule of the company relied on here,—that passengers on their trains must go by the direct route. Mr. Justice Lamar, speaking for the United States Supreme Court, in *New York, L. E. & W. R. Co. v. Winter*, 143 U. S., at pages 69, 70, 36 L. ed., at pages 78, 79, 12 Sup. Ct. Rep., at page 359, says: "The grounds upon which it is insisted that the evidence referred to was inadmissible are that the ticket itself, and the rules and regulations of the road with respect to stop-over checks, constitute the contract between the passenger and the road, and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of 64 L. R. A.

such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage, and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of conductors and other employees of railroad companies as to the internal affairs of the company, nor are they required to know them. *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544. In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket, or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca after stopping off at the former place. It is shown by the evidence that Olean was a station at which stop-over privileges were allowed. Under such circumstances, it was entirely proper for the passenger to make inquiries of the ticket agent, and to rely upon what the latter told him with respect to his stopping over at Olean. *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; *Palmer v. Charlotte, C. & A. R. Co.* 3 S. C. N. S. 580, 16 Am. Rep. 750; *Burnham v. Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Murdock v. Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Arnold v. Pennsylvania R. Co.* 115 Pa. 135, 2 Am. St. Rep. 542, 8 Atl. 213."

This is decisive of two propositions: First, that these declarations were competent; and, second, that this appellee was not bound by this alleged rule, of which she had no knowledge. It will be noted that this holding of the United States Supreme Court is squarely to the effect that the appellee would not have been bound by the rule unless information of it had been communicated to her, in any event. It is not necessary, however, in this case, on its facts, to hold that the appellee should rely on this statement of the principle in its strictness, though we think the principle is just as stated by the United States Supreme Court. For here it is

manifest that she did make inquiry of the ticket agent and of the conductor as to what route she should take, and the authorities cited by learned counsel for the appellant go no farther than to hold that, where there is a rule such as here involved, it is the duty of the intending passenger to find out what route he should take, by inquiry, and that it is not the duty of the railroad company to bring home notice of this rule to such intending passenger, otherwise than in answer to inquiry. In the case of *Church v. Chicago, M. & St. P. R. Co.* 26 L. R. A. 616, which, it should be noted, was decided without any counsel appearing for the appellee, the passenger,—the court reviews several authorities upon this particular question, as to which the editor, in the footnote, says: Very few precedents exist. One of these authorities, relied on by appellant (*Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60), distinctly says: "The requisite information can always be had from the agent when the ticket is procured, and it is but reasonable to require passengers to obtain the information, and to act upon it." In *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190, speaking upon this point, the court says: "The plaintiff might have inquired and informed himself of that." This is precisely what this plaintiff did, and "the direful spring of the woes unnumbered" which this plaintiff suffered was precisely the misinformation given her by the ticket agent. If it were a sound legal proposition that the company is not bound unless the plaintiff informs himself of the rule, still that condition was fully complied with in this case. Before passing from the *Church Case*, 6 S. D. 235, 26 L. R. A. 616, 60 N. W. 854, we desire to say that the only erroneous information given in that case was given by a mere gate keeper at the Milwaukee depot, whose sole duty, as pointed out at page 243, 6 S. D., page 619, 26 L. R. A. and page 857, 60 N. W., was "to assist passengers to take the right train." As stated: "He did not give her any misinformation. He simply did not advise her as to changes to be made at a junction 500 miles distant." Mrs. Harper was not dealing with a gate-keeper. She dealt with the ticket agent, who was authorized to give the very information she sought. Other authorities showing the competency of the declarations of the ticket agent and conductor, if any are needed, may be found in the learned note to *Robinson v. Southern P. Co.* 28 L. R. A. 755. It is also relied on and insisted by counsel for appellant that, as between the conductor and the passenger, it was not the duty of the conductor to listen to the explanation made by Mrs. Harper. *Kansas City, M. & B. R. Co. v. Riley*, 68 Miss. 765, 13 L. 64 L. R. A.

R. A. 38, 24 Am. St. Rep. 309, 9 So. 443: and *Alabama & V. R. Co. v. Drummond*, 73 Miss. 813, 20 So. 7, are decisive of the unsoundness of this view. In the *Drummond Case* the passenger simply protested; he did not make any explanation; and it was on this ground that the decision proceeded. It was not only the duty of the conductor to listen to this most reasonable explanation, but, having heard it, as he did, it was wrong—a wilful wrong warranting the imposition of exemplary damages—to put this lady off the train under the circumstances. It is none the less a wilful wrong because he acted in a gentlemanly manner, and was guilty of no insolent conduct. She was subjected to this most grievous wrong, and she was intentionally subjected to it, after full disclosure of what had occurred between her and the ticket agent of the company. Plaintiff was clearly entitled to recover, under the first count in the declaration, not only the actual damages she had sustained, but exemplary damages, and a verdict for a larger sum than here recovered would not have been disturbed by us. It is idle to argue that the conductor, flatly refusing to listen to the perfectly reasonable explanation made by this woman, and putting her off, under the circumstances detailed in the evidence, at night, was not guilty of such intentional and oppressive wrongdoing as to warrant the imposition of punitive damages. It may as well be understood, once for all, that this court proposes to stand by the doctrine announced in the *Drummond* and *Riley Cases*, as the just and true doctrine. But the difficulty in this case is that the plaintiff only asked for actual damages under the first count, when she was entitled to punitive damages, and yet asked and obtained an instruction for punitive damages under the second count, under which it is clear she was entitled to no damages at all. Under the well-settled decisions of this court, it was not the duty of the conductor to place Mrs. Harper in the right car, and the mistake of the ticket agent at Fulton was corrected by the proper information given by the conductor. Mrs. Harper had nothing to do except to get up from her seat and walk forward through the vestibule train to the Water Valley car. She was not sick to such a degree as to require the assistance of the conductor. It follows that the fifth and seventh instructions for the plaintiff, to the effect that she was entitled to exemplary damages, are erroneous. In this curious attitude of the case, reversal must necessarily follow, for we must indulge the presumption that the jury did their duty, and obeyed the instructions of the court, which did not allow them to find anything but actual damages under the first count, but which did al-

low them to find exemplary damages under the second count. The verdict cannot, under the instructions, be referred to the first count, since the actual damages were only about \$17. It is obvious that it must be referred to the second count, under which no recovery at all could have been allowed.

What we have said indicates the proper disposition of the case on a second trial, it being only necessary to add that the modification of the second instruction given for the defendant was necessary to a correct statement of the law.

Reversed and remanded.

MISSOURI SUPREME COURT.

Mary STONE, *Appt.*,

v.

E. C. COOK *et al.*, *Respts.*

(.....Mo.....)

1. A residuary legatee who receives, although under protest, the amount due him under the will cannot, upon a mere offer to bring the amount so received into court, contest the validity of the will, where, upon the faith of his acceptance, the special legacies provided for have been distributed.

2. Where the facts constituting an estoppel to the maintenance of the action affirmatively appear on the face of the petition the defense may be interposed by demurrer without the necessity of a plea or answer.

(February 10, 1904.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Audrain County in favor of defendants in a proceeding to contest the validity of the will of William T. Cook, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. George Robertson, for appellant:

The plaintiff is not barred from contesting the will after the lapse of a period of five years, by the fact that she is a married woman.

Rev. Stat. 1899, § 4624; *Linville v. Greer*, 165 Mo. 380, 65 S. W. 579; *Rosenberger v. Mallerson*, 92 Mo. App. 27; *Hughes v. Burriess*, 85 Mo. 660.

Estoppel is an affirmative defense, and must be specially pleaded, and cannot be made by demurrer.

McClanahan v. Payne, 86 Mo. App. 284; *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95; *Chance v. Jennings*, 159 Mo. 544, 61 S. W. 177; *Casler v. Gray*, 159 Mo. 588, 60 S. W. 1032; *Kansas Moline Plow Co. v. Wayland*, 81 Mo. App. 305; *Cadematori v.*

NOTE.—As to estoppel of devisee claiming under will to contest truth of recital therein, see, in this series, *Hunt ex rel. Streater v. Evans*, 11 L. R. A. 185.

As to estoppel of legatees by receiving proceeds of executor's sale, though protesting that this is not all that is due, to deny executor's power to make sale, see *Philbrook v. Newman*, 34 L. R. A. 265.
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Gauger, 160 Mo. 352, 61 S. W. 195; *Hammerslough v. Cheatham*, 84 Mo. 13; *Bray v. Marshall*, 75 Mo. 327; *State ex rel. Hospes v. Branch*, 161 Mo. 622, 52 S. W. 390.

The amount of the estate involved in the will was \$12,000. Plaintiff's share under the law would have been \$4,000. She accepted under the will \$1,100, slightly more than one fourth of her share under the law. Her conduct does not constitute estoppel.

To accept her share under the will, being a lesser amount than she was entitled to under the law were the will broken, does not mislead or induce another into any action to his prejudice.

11 Am. & Eng. Enc. Law, 2d ed. pp. 387, 388; *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 126 Mo. 353, 26 L. R. A. 840, 47 Am. St. Rep. 675, 28 S. W. 870.

There can be no estoppel as against plaintiff, unless it be shown that defendants have incurred some liability, or have been induced to do something to their prejudice, in consequence of the plaintiff's conduct.

Jones v. McPhillips, 82 Ala. 116, 2 So. 468; *Stevens v. Dennett*, 51 N. H. 333; *Brown v. Bowen*, 30 N. Y. 541, 86 Am. Dec. 406; *DeBerry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 338; *Smith v. Roach*, 59 Mo. App. 115; *Bales v. Perry*, 51 Mo. 449; *Noble v. Blount*, 77 Mo. 235; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307, 11 S. W. 891; *State ex rel. Hospes v. Branch*, 161 Mo. 622, 52 S. W. 390.

Where a widow has accepted all the provisions of a will her right of renunciation remains for the period of twelve months.

Bretz v. Matney, 60 Mo. 444; *Burgess v. Bowles*, 99 Mo. 543, 12 S. W. 341, 13 S. W. 99; *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642.

The will was made, not only with reference to the law of wills, but with reference to the law of administration.

Lilly v. Menke, 126 Mo. 190, 28 S. W. 643, 994, 143 Mo. 137, 44 S. W. 730.

Election is the choice between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both.

11 Am. & Eng. Enc. Law, 2d ed. p. 59.

The plaintiff tenders into court what she has received. This is all that can be required of her.

1 Woerner, Am. Law of Administration, 2d ed. *500; *Syme v. Badger*, 92 N. C. 706; *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138; *Watson v. Alderson*, 146 Mo. 333, 69 Am. St. Rep. 615, 48 S. W. 478.

MCCARRS. Fry & Rodgers and E. C. Kennen, for respondents:

Plaintiff's cause of action is, and rightfully should be, barred by the special five years' limitation statute.

United States v. Wiley, 11 Wall. 508, 20 L. ed. 211.

The married women's acts enabling married women to sue as to their separate property repeal in so far the statutory disability, and the general married women's acts, by implication, repeal altogether the disabling clause of the statute, and cause it to run against married women as it would if they were single.

13 Am. & Eng. Enc. Law, p. 739 (d); *Geisen v. Heidrich*, 104 Ill. 537; *Brown v. Cousens*, 51 Me. 301; *Dunham v. Sage*, 52 N. Y. 230.

As the demurrer was the only pleading filed by the defendants in the court below, the defense of election or estoppel is sufficiently pleaded therein.

Barton Bros. v. Martin, 54 Mo. App. 134.

The plaintiff had her choice to accept the provisions of the will or institute a proceeding to contest it, and, if successful, then to take under the law; and, as the petition shows on its face that she accepted all the beneficial provisions made for her in the will, she is bound by her acceptance.

2 Herman, Estoppel & Res Adjudicata, § 1028, p. 1156; *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 325; 1 Herman, Estoppel & Res Adjudicata, p. 11.

The plaintiff's interest in the estate of her father concerns her separate property, and she can be estopped, as much as any other property owner, although a married woman.

Blair v. Chicago & A. R. Co. 89 Mo. 383, 1 S. W. 350; *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398; *Gilliland v. Gilliland*, 96 Mo. 522, 10 S. W. 139; *Henry v. Sned*, 99 Mo. 425, 17 Am. St. Rep. 580, 12 S. W. 663; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Stone v. Gilliam Exch. Bank*, 81 Mo. App. 9.

She cannot avoid the force of the law of estoppel by claiming that she received her share under the will under "protest."

Broune v. Appleman, 83 Mo. App. 79.

He who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities.

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McLachlin v. Barker, 64 Mo. App. 511; *Sirofford Bros. Dry Goods Co. v. Bank of Blue Mound*, 81 Mo. App. 46; *Pemberton v. Pemberton*, 29 Mo. 409; *O'Reilly v. Nicholson*, 45 Mo. 160; *Cadematori v. Gauger*, 160 Mo. 352, 61 S. W. 195; *Casler v. Gray*, 159 Mo. 588, 60 S. W. 1032; *Austin's Estate*, 73 Mo. App. 61.

Marshall, J., delivered the opinion of the court:

This is an action under the statute to contest the will of William T. Cook. The plaintiff is a daughter of the testator, and the defendants are the other children, grandchildren, daughter-in-law, and executors of the deceased. The will was executed on December 17, 1895. Shortly thereafter the testator died, and the will was probated in March, 1896. By the first item of the will, the testator bequeathed to his grandson E. C. Cook 160 acres of land to enable him to support and care for his invalid mother. By the second item of the will, the testator bequeathed to his daughter, Martha Corner, 80 acres of land. By the third item of the will, the testator bequeathed to his daughter Mary Stone, the plaintiff, a legacy of \$500, provided that sum could be realized from the sale of his interest in certain land, which was subject to a mortgage for \$1,750 and interest, and, at all events, he directed that, if \$500 could not be so realized, she should have the excess over the amount necessary to pay the mortgage. By the fourth item of the will, the testator directed that his storehouse and lot in Laddonia be sold, and out of the proceeds the sum of \$50 a year, for six years, be paid to the trustees of the Methodist Church, to be used by them to pay the pastor's salary. By the fifth item of the will, the testator bequeathed to two granddaughters the sum of \$35 each, to buy a watch, as a token of affection of their departed grandmother. By the sixth item, the testator set apart the sum of \$100, the interest on which he directed to be used to keep in repair the graves of the testator and his family. By the seventh item, the testator bequeathed the residue of his estate to his daughter Mary Stone, the plaintiff, Martha Corner, the defendant, and his daughter-in-law, the widow of his deceased son, William R. Cook. After reciting the relationship of the parties litigant, and after setting out the will in full, wherein the testator declares himself to be ninety-one years old and of sound mind, the petition charges that at the time the will was made the testator was old, feeble of body, and was of unsound mind and incapable of making a will, and then charges that the will was procured by the undue influence of the grandson E. C. Cook, and of

the daughter-in-law, and of a witness to the will. The petition then states that the will was admitted to probate in Audrain county at the March term, 1896, of the probate court. The petition then alleges that the plaintiff received from the executors the special legacy of \$500 bequeathed to her by the third item of the will, and also received \$600 under the seventh item of the will, being one third of the residuum of the estate, but said she received said amounts under protest, insisting that she received said sums only because, under the law, she was entitled to one third of the estate, which she says would amount to \$4,000; and she avers that she is ready and willing (she omits to say able) to pay the said sums so received into court, or to have them deducted from her share of the estate, if the will is set aside. The prayer of the petition is that issue be joined as to whether or not the will is the will of William T. Cook. The suit was made returnable to the September term, 1901, of the Audrain circuit court. The defendants demurred to the petition on the ground that it does not state facts sufficient to constitute a cause of action, in this: First, because it shows on its face that it was not instituted within five years after the will was probated in common form, and hence is barred by limitations; and, second, because the petition shows on its face that the plaintiff accepted the benefits accruing to her under the will, and is therefore estopped to deny or contest the validity of the will. The circuit court sustained the demurrer, the plaintiff refused to plead further, judgment was entered for the defendants, and the plaintiff appealed.

The pivotal question here involved is whether the plaintiff, having received the legacies bequeathed to her by the will, can be heard to contest the validity of the will, upon bringing into court the sums she has received under the will. The fact that she received the legacies under protest, or under a claim that they constituted only a part of what she was entitled to by law, outside of the will, is wholly immaterial, and avails nothing. *Pollman & Bros. Coal & Sprinkling Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563; *McCormick v. Interstate Consol. Rapid Transit R. Co.* 154 Mo. 191, 55 S. W. 252; *McCormick v. St. Louis*, 166 Mo. loc. cit. 345, 346, 65 S. W. 1038. 1 Woerner, Am. Law of Administration, 2d ed. *500, says: "But since a person cannot hold under a will, and also against it, one who accepts a beneficial interest under a will thereby bars himself from setting up a claim which will prevent its full operation at law or in equity; and such a person will not, therefore, be allowed to contest a will unless he return the legacy received." The general

rule laid down in the text is supported by the following cases cited in the notes to the text: *Smart v. Easley*, 5 J. J. Marsh. 215; *Herbert v. Wren*, 7 Cranch, 370, 3 L. ed. 374; *Preston v. Jones*, 9 Pa. 456; *Smith v. Guild*, 34 Me. 443; *Hyde v. Baldwin*, 17 Pick. 303; *Benedict v. Montgomery*, 7 Watts & S. 238, 42 Am. Dec. 230; *Smith v. Smith*, 14 Gray, 532; *Van Duyn v. Van Duyn*, 14 N. J. Eq. 49; and *Fulton v. Moore*, 25 Pa. 468. To the same effect is *Syme v. Badger*, 92 N. C. 706. In all these cases it is held, without qualification, that one who accepts a benefit under a will or deed thereby elects to take under the instrument, and is estopped thereafter from contesting the validity of the instrument. Nothing is said in any of these cases about the right of such person to bring into court the benefits so received, and thereupon to contest the instrument. However, in *Holt v. Rice*, 54 N. H. loc. cit. 402, 20 Am. Rep. 138, while the general rule is announced and affirmed, it is held that one who has received a benefit under a will may pay the amount so received into court, and thereafter contest the will, though it is said: "Under circumstances of delay, connected with other circumstances, it has been held to preclude the party from contesting the will afterwards;" and it was allowed in that case because there had been no great delay. In *Miller's Appeal*, 159 Pa. loc. cit. 575, 28 Atl. 441, the contesting legatee was required to pay the money received into court before he was permitted to proceed; and it was held that "where the acts set up are equivocal, or were done in ignorance of the rights of the doer, or where they consist merely of the receipt of a pecuniary legacy, and the money is returned before the appellant proceeds beyond the entry of his appeal [which is like our proceedings to contest the will], they will not amount to an estoppel." In *Re Soule*, 1 Connolly, 54, 3 N. Y. Supp. 250, the sufficiency of a mere offer to refund, contained in a petition to contest a will, is discussed, and held to be insufficient, and that nothing short of an actual payment into court of the benefits received before the filing of the petition will entitle a beneficiary under a will, who has received benefits thereunder, to repudiate and contest the will.

In *Re Peaslee*, 73 Hun, loc. cit. 114, 25 N. Y. Supp. 940, the rule is so admirably stated as to justify the following excerpt therefrom: "It is a well-settled proposition in law, as well as in equity, that he who accepts and retains a benefit under an instrument, whether deed, will, or other writing, is held to have adopted the whole, and to have renounced every right inconsistent with it. The rule has found expression in

many actions, and with widely differing facts. A few of them only will be referred to. In *Chipman v. Montgomery*, 63 N. Y. 234, which was an action in the Supreme Court to obtain a judicial construction of a will, and for an accounting, Judge Allen, speaking for the court, said: "Two of the plaintiffs have received, in whole or in part, the legacies given them by the will, and, having accepted the benefits of the provision made for them, cannot be heard in opposition to other parts of the instrument, except by proof of circumstances showing that they had not intelligently elected to take under the will, rather than in opposition to it, and a return of all that has been received by them." And he quoted with approval Lord Redesdale's decision in *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, that this rule of election is applicable to every species of instrument, whether deed or will, and to be a rule of law as well as equity. The rule is also asserted in *Havens v. Sackett*, 15 N. Y. 365, and in *Mills v. Hoffman*, 92 N. Y. 181, which was an appeal from a decree of the surrogate's court compelling an administrator to account; the objection overruled by that court being that the petitioner was barred because of an entry of judgment in which she was a party defendant, although an infant, and the subsequent distribution of the estate in pursuance of the judgment, by which the moneys came into the hands of her guardian, and upon her majority to her. After this latter event the judgment was vacated and set aside, as to her, on the ground that the appointment of a guardian *ad litem* to represent her had been irregular, and the court of appeals held that she was estopped from controverting in the surrogate's court the judgment under which she had received benefits. In *Re Soule*, 1 Connolly, 18, 3 N. Y. Supp. 259, the right of a legatee who had received moneys under a will to claim revocation of probate without making full restitution to the executors was denied. Numerous cases have arisen under wills where this principle has been applied. *Hamblett v. Hamblett*, 6 N. H. 333; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 49; *Weeks v. Patten*, 18 Me. 42, 36 Am. Dec. 696; *Smith v. Guild*, 34 Me. 443; *Hyde v. Baldwin*, 17 Pick. 303; *Smith v. Smith*, 14 Gray, 532; *Bell v. Armstrong*, 1 Addams, Eccl. Rep. 365; *Braham v. Burchell*, 3 Addams Eccl. Rep. 243. The learned counsel for the appellant, while citing no authorities asserting a contrary proposition, has carefully analyzed and elaborately discussed nearly all the cases we have cited, in order to make it appear that they are distinguishable from the case at bar. In their facts they are different from this case, and they differ from each other; but they all tend to make good the assertion

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which may be found running through the books,—that he who receives money or property, or a benefit of any kind, under an instrument, whatever its character or his relation to the maker of it, cannot question the instrument, in whole or in part. But the appellant urges that the reason for the rule does not apply in this case, and therefore the rule should not obtain. Here he says no injury can result to the executors or anyone else because the petitioner is permitted to contest the will while retaining the \$7,000 which she received from the executors, because, if the will be set aside, she, as one of the next of kin, will be entitled to receive a larger sum of money than \$7,000, and therefore the executors can be amply protected by the surrogate. It may be true that, if the contest should proceed, it would so turn out, but of that we are not assured. It does not appear that, should the petitioner be successful in her contest, as a result her mother's intestacy will be established. There may be other and prior wills in existence, the validity of one of which may be established, with the possible result that the petitioner will not receive thereunder a legacy sufficient in amount to make good the advancement to her by these executors. Certainly the contrary cannot be safely assumed. The fact that the petitioner received this money and expended it before becoming aware of the facts which encouraged her to enter upon a contest of the will may perhaps be unfortunate for her. If misfortune it be, it arises, of course, from the necessities which induced her to expend the money. Where a person asks that a rule be not applied, on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the facts which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the result may be, no one can be the loser because of the payments originally made to her, she is not in a situation to attack the will."

The general doctrine of election is well stated in 11 Am. & Eng. Enc. Law, 2d ed. p. 59, and the note to the text, on page 60, contains a reference to a multitude of cases showing that the rule is almost universal. And on page 98 the same author says: "Applying the principle that knowledge is essential to constitute a valid election, it is established that where the act is induced by deception or fraud, or where the person electing acted under an ignorance of the facts or under a misapprehension of his rights, and innocent third parties will not suffer by a revocation, the act may be revoked or set aside. But such election can be revoked only by restoring the property

received under it." And at page 78 the author says that, while some courts hold that a married woman cannot elect, other courts hold to the contrary, and, in any event, if she seeks to revoke the election, she must bring the benefits she has received into court. In *Fos v. Windes*, 127 Mo. loc. cit. 511, 48 Am. St. Rep. 648, 30 S. W. 325, this court quoted the rule laid down by Herman on Estoppel as follows: "The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that anyone who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever. 2 Herman, Estoppel & Res Adjudicata, § 1028, p. 1156. See also 2 Story, Eq. Jur. 13th ed. § 1080. This doctrine of elections, which prevents the assertion of repugnant rights, is but an extension of the law of equitable estoppel. 1 Herman, Estoppel & Res Adjudicata, p. 11."

The sum of the matter, then, is that, as a general rule, one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity; but the general rule is subject to this qualification: That if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election, and contest the validity of the instrument, and claim under the law, provided that innocent third persons will not suffer by a revocation, and provided there has been no unreasonable delay in exercising the right of revocation, and provided he pays into court the benefits received. Apply this rule to the case at bar, and the case is easily solved. It expressly appears from the face of the petition that the plaintiff knew that she had a right to elect to take under the will or by operation of law at the time she received the legacies, for she says she "accepted the same under protest, and insisted that the will was invalid, and only received the same because, under the law, she would be en-

titled to one third of the entire estate,—a sum and an amount much larger than the amount received by her as herein stated." Therefore the plaintiff acted with full knowledge of her legal right of election, and there is no charge that she was induced to accept the benefit by any fraud or deception. It does not appear how long she waited after receiving the benefit before she attacked the validity of the will. The allegation that she is ready and willing to pay the amount received into court, or to have it deducted from her share of the estate, if the will is set aside, is not sufficient to bring her within the rule which entitles one to contest an instrument after receiving a benefit under it, for the rule requires that the benefits received shall be actually paid into court at or before the filing of the suit. In addition to this, innocent third persons will suffer if she is allowed to revoke her election upon returning the benefits she has received. The major portion of the benefits she has received arose out of the residuum of the estate. That means that all the special legacies had been paid before such residuum was ascertained and paid. These special legacies arose solely out of the will, and, without the will, that money would have gone to other persons. Upon the faith of the plaintiff's acceptance of the benefits conferred upon her by the will, the executors paid out the special legacies to other persons. The plaintiff stood by and saw the executors do so. If the plaintiff should now be permitted to have the will set aside, upon payment into court of the benefits received by her, the special legacies paid by the executors would be lost to them, for the money so expended would go to the heirs, of whom the plaintiff was one. Thus the executors would suffer by a revocation. It is true that the statute permits a will to be contested at any time within five years after its probate in common form, and the statute contemplates that the estate may or will be wound up before that time, and persons who take under a will know that the estate thus derived is liable to be devested by a successful attack thereafter upon the will. But whilst this is true, the lawmakers never intended to permit a legatee under a will to accept the benefits conferred by the will, and then stand by and see the estate wound up, or practically wound up, and then begin proceedings to contest the will, upon returning only the amount received by the contesting legatee. Such a proceeding falls within the rule that denies the right to contest where there has been unreasonable delay. In short, it is plain from the petition that the plaintiff thought she could accept the benefits, and then contest the will, and simply have the benefits received deducted

from her share of the estate after the will was set aside. By so doing she stood to gain everything if she succeeded, and to lose nothing if she failed, in the contest proceedings. The law does not sanction such a speculative proceeding. It follows that the plaintiff has not shown herself entitled to maintain this action.

It is contended, however, that estoppel is an affirmative defense, and cannot be raised by demurrer. Estoppel is an affirmative defense, and so is coverture and the statute of limitations, and contributory negligence, and payments, and release, and many others, and such defenses must be expressly pleaded in the trial court. But where the facts constituting such defense affirmatively appear on the face of the petition, the question can be raised by demurrer to the petition just as effectually and equally as scientifically as by answer or plea. The petition in this case stated the facts upon which the defense of estoppel is predicated, and it would seem as if the pleader had invited a determination by the inexpensive and speedy method of a demurrer in order to avoid the costly and tedious method of raising the same question of law by an answer and a trial. Wherever or however the essential facts appear, all else is a question of law, and can be raised by any of the methods provided for the determination of questions of law.

This conclusion makes it unnecessary to decide whether, since the adoption of the married women's acts, the five-year limitation for instituting suits to contest wills applies to a married woman.

The judgment of the Circuit Court is affirmed.

All concur.

Rehearing denied.

David E. WHEAT, *Respt.*,
v.

City of ST. LOUIS, *Appt.*

(.....Mo.....)

1. The driver of a milk wagon, who,

NOTE.—As to knowledge of person injured, of defect in highway as proof of contributory negligence, see also cases in note to Woodman v. Metropolitan R. Co. 4 L. R. A. 213; also the later cases of Dundas v. Lansing, 5 L. R. A. 143; Chicago & N. W. R. Co. v. Prescott, 23 L. R. A. 854; and Danville v. Robinson, 55 L. R. A. 162.

As to contributory negligence of traveler in deviating from usual thoroughfare, see Ely v. Des Moines, 17 L. R. A. 124, and note.

As to contributory negligence in use of sidewalks generally, see Brush Electric Lighting Co. v. Kelley, 10 L. R. A. 250, and note. 64 L. R. A.

knowing of the existence of a man-hole to a sewer which projects above the surface of the street, attempts to turn his horse and wagon around in its vicinity without paying any attention to his course, is guilty of contributory negligence; so that, in case the wagon strikes the obstruction and is overturned to his injury, he cannot hold the city liable therefor.

2. Persons driving upon a highway have no right to be so engrossed in their own affairs as to become oblivious to their surroundings, and fail to use reasonable care to observe and avoid obstructions and defects in the surface of the street.

(February 10, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles W. Bates and Benjamin H. Charles, for appellant:

The city is not an insurer of the safety of travelers on the streets.

Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319; *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921.

Although the city was negligent, still, as the negligence did not contribute to the injury, no recovery can be had on account of such negligence.

Hutchinson v. Missouri P. R. Co. 161 Mo. 246, 84 Am. St. Rep. 710, 61 S. W. 635, 852.

Failure to look where he was going, when he knew the street was obstructed by the manhole and was unsafe, if it was unsafe, is negligence, as a matter of law, on the part of the plaintiff.

Cohn v. Kansas, 108 Mo. 387, 18 S. W. 973; *Hudson v. Wabash Western R. Co.* 101 Mo. 13, 14 S. W. 15; *Roberts v. Missouri & K. Teleph. Co.* 166 Mo. 370, 66 S. W. 155; *Sindlinger v. Kansas*, 126 Mo. 315, 26 L. R. A. 723, 28 S. W. 857; *Hogan v. Citizens' R. Co.* 150 Mo. 36, 51 S. W. 473; 7 Am. & Eng. Enc. Law, 2d ed. p. 412; 4 Am. & Eng. Enc. Law, p. 15; *Benton v. Philadelphia*, 198 Pa. 396, 48 Atl. 267; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaefer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Hutchins v. Priestly Express Wagon & Sleigh Co.* 61 Mich. 252, 28 N. W. 85; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Cloney v. Kalamazoo*, 124 Mich. 655, 83 N. W. 618; *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90; *Bailey v. Brown Twp.* 190 Pa. 530, 42 Atl. 951; *Gribble v. Sioux City*, 38 Iowa, 390; *Dals v.*

Webster County, 76 Iowa, 370, 41 N. W. 1; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Nebraska Teleph. Co. v. Jones*, 59 Neb. 510, 81 N. W. 435; *Tasker v. Farmingdale*, 91 Me. 521, 40 Atl. 544; *Gilman v. Deerfield*, 15 Gray, 577; *Corlett v. Leavenworth*, 27 Kan. 673; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387; *Walker v. Reidsville*, 96 N. C. 385, 2 S. E. 74.

Messrs. William H. O'Brien, B. R. Brewer, and Robert A. Holland, Jr., for respondent.

Marshall, J., delivered the opinion of the court:

This is an action for \$10,000 damages for personal injuries sustained by the plaintiff on November 19, 1898, by his milk wagon running over and being upset by a manhole to a public sewer in Vernon avenue, in the city of St. Louis, nearly opposite 4635 Vernon avenue. The plaintiff recovered a judgment for \$1,000, and the defendant appealed. The negligence charged in the petition is that the city constructed and maintained a manhole to a sewer in the street, which projected 3 feet above the level of the street, and which was about 6 feet in circumference, and had earth piled around the manhole, which was 9 feet and 6 inches in diameter at the base, and sloped towards the top, which, it is alleged, was a dangerous obstruction. The answer is a general denial and a plea of contributory negligence. The facts are these: Vernon avenue is only 1 block long, and extends from West End avenue to Walton avenue, and is 60 feet wide. About a year before the accident the city had constructed a sewer near the center of the street, preparatory to constructing the street. The top of the manhole was made to conform to the grade of the street when it was constructed, but is about 3 feet above the level of the street in its present condition. This left a driveway on the north of the manhole 8 feet 4 inches wide, and one on the south of the manhole 12 feet 10 inches wide. When the city finished building the sewer, the appropriation for the improvement of the street ran out, and the work had to be stopped. So this condition had existed for about a year before the accident occurred. The plaintiff was employed by the Union Dairy Company as a driver of one of its milk wagons, and had been delivering milk in that neighborhood for over five years, and on Vernon avenue for over a year. He had to deliver milk to a regular customer at No. 4635 Vernon avenue, and an irregular customer on the opposite side of the street. That was the end of his route, and, when he delivered milk to these customers, he

turned and came east again. The manhole stood in the center of the street, and nearly opposite to the steps that lead up into the premises No. 4635 Vernon avenue. The plaintiff knew all about the manhole, and had seen it and driven around it every day for a year, sometimes west of it and sometimes turning east of it. On the morning of the accident he drove to 4635 Vernon avenue, and got out and delivered milk. When he got out of the wagon, he hung the reins up on a hook at the top of the wagon, which held the horse so he could not move without pulling the wagon by his mouth. He says his horse knew the way as well as he did, and did not need to be guided, and he frequently let him go along without directing him, and he knew where to stop. After delivering the milk, he got into the wagon and took the reins off of the hook, and the horse started. He says he does not remember whether he turned the horse, or whether he let the horse turn of his own accord. At any rate, the horse turned the wagon to go east again, and, in so doing, ran up on the pile of earth surrounding the manhole, upset the wagon, and the plaintiff was hurt. He says it was about 6 o'clock in the morning, and that, while it was after daybreak, the morning was dark and foggy, but not so much so as to prevent his seeing the manhole if he had looked. Other witnesses said that while it was foggy one could see across the street and anyone could see the manhole. The plaintiff says that he thought he had passed the manhole and consequently was not looking for it. At the close of the plaintiff's case and again at the close of the whole case the defendant demurred to the evidence. The court overruled the demurrers and the defendant excepted and relies solely upon this ruling upon this appeal.

The contention of the defendant is that the city was guilty of no negligence in constructing and maintaining the manhole in the condition shown, but then even if it was, its negligence was not the proximate cause of the injury, but that the plaintiff well knew the fact and the condition, and was guilty of such contributory negligence as bars a recovery. On the other hand, the plaintiff contends that, while he knew of the existence and condition of the manhole, and might have seen it and avoided it, still he was not obliged to keep it in mind, but had a right to think of something else, and that his mind was engrossed with his work, and he thought he had passed the manhole, and therefore he was guilty of no contributory negligence. The city had a clear legal right to build the sewer, and to leave it projecting 3 feet above the natural level of the unimproved street, and so that it would con-

form to the established grade of the street when it was improved. But it took the risk in so doing of someone who was unacquainted with its existence and condition, and who was traveling along the street in the nighttime, when he could not see the obstruction, running against it and being injured. Such a person would be entitled to recover, because as to him the city was negligent, and he was not. But the plaintiff does not fall within this rule, for he knew all about the manhole, and it was light enough at the time of the accident for him to see it; and, by the exercise of ordinary care, he could easily have avoided it, just as he had done every day, about the same hour of the day, for a year. It is not clear whether the plaintiff let the horse turn without guidance, or whether he directed him; but, in either event, he is responsible for the wagon striking the mound around the manhole and being upset, for, by the exercise of any care whatever, he could have avoided it. It is true, as claimed by the plaintiff that no one is precluded from traveling a highway in which he knows there are obstructions or defects, and on which he has business, and his knowledge of the condition of the street will not conclusively bar his recovery. *Barr v. Kansas*, 105 Mo. 550, 16 S. W. 483; *Market v. St. Louis*, 56 Mo. 189; *Buesching v. St. Louis Gaslight Co.* 73 Mo. 219, 39 Am. Rep. 503; *Loewer v. Sedalia*, 77 Mo. 431; *Staples v. Canton*, 69 Mo. 592. But whilst this is true, the person who knows of such defects, and is injured, must use reasonable care while traveling along such defective street, and that care must increase in proportion to his knowledge of the risk. *Foster v. Scope*, 41 Mo. App. 137. And such knowledge of the danger is admissible to prove contributory negligence. *Flynn v. Neosho*, 114 Mo. 567, 21 S. W. 903. As was well said by Lord Ellenborough, Ch. J.: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be right. . . . One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Butterfield v. Forrester*, 11 East, 60. And this court approved the rule so laid down, in an opinion per Gantt, P. J., in *Sindlinger v. Kansas*, 126 Mo. 315, 26 L. R. A. 723, 28 S. W. 857, and speaking of the rule said: "This is the general rule of law as to contributory negligence, which applies, as of course, to actions brought by travelers for injuries received by reason of defects or obstructions

upon the highway. *Beach*, Contrib. Neg. 2d ed. § 246. Ordinarily the question whether the plaintiff, under all the circumstances, has been guilty of contributory negligence, is one for the jury. *Loewer v. Sedalia*, 77 Mo. 431. But if the evidence elicited to establish the contributory negligence of plaintiff admits of no other fair inference than that he was negligent, and that his own negligence contributed directly to, or was, in other words, the proximate cause of, the injury, then it becomes one for the court, and a demurrer to the evidence will be sustained." The same rule was recognized in *Wiggin v. St. Louis*, 135 Mo. 553, 37 S. W. 528, and in *Cohn v. Kansas*, 108 Mo. 387, 18 S. W. 973.

The plaintiff in this case knew of the obstruction in the street, and knew that by the exercise of ordinary care he could avoid striking it while traveling along the street. His act in striking it was therefore, *per se*, contributory negligence. *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Church v. Howard City*, 111 Mich. 298, 66 Am. St. Rep. 396, 69 N. W. 651; *Salem v. Walker*, 16 Ind. App. 687, 46 N. E. 90; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1; *Yahn v. Ottumwa*, 60 Iowa, 433, 15 N. W. 257; *Benton v. Philadelphia*, 198 Pa. 396, 48 Atl. 267; *Nebraska Teleph. Co. v. Jones*, 59 Neb. 510, 81 N. W. 435; *Moore v. Richmond*, 85 Va. 545, 8 S. E. 387; *Walker v. Reidsville*, 96 N. C. loc. cit. 385, 2 S. E. 74; 7 Am. & Eng. Enc. Law, 2d ed. p. 412.

The contention of the plaintiff that he had a right to have his mind so engrossed in his business that he did not think of the obstruction, or thought he had passed it, is wholly untenable. Persons traveling on a highway are charged with a duty to exercise reasonable care to observe and avoid obstructions and defects. They have no right to be so engrossed in their own affairs as to be negligent of their own safety. As was well said by Campbell, Ch. J., in *Hutchins v. Priestly Express Wagon & Sleigh Co.* 61 Mich. 252, 28 N. W. 85, in speaking of a man who walked into an elevator shaft, instead of a door close to it: "The only explanation of his conduct is—what there is no difficulty in gathering from his own testimony, although he does not seem to be aware of it—that he is one of those persons who pay little heed to their surroundings, and go hither and thither on their errands absent-minded, or thinking only of some particular object, and shutting their eyes to everything else. Such inattention is sometimes dangerous to the person himself, and quite as often to his neighbors. It is a want

of that ordinary care which the safety of society requires all sane persons of mature age to exercise, and for which they are civilly responsible. Business could not be carried on without this requirement." The rule has recently undergone review in other jurisdictions. In *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121, the supreme court of Washington held that a person who is perfectly familiar with the condition of a sidewalk in which a defect exists has no right, while using it, to act on the ordinary presumption that it is in good condition. In *Cloney v. Kalamazoo*, 124 Mich. 655, 83 N. W. 618, the syllabus is as follows: "In an action for injuries to a pedestrian caused by his stepping into an unguarded excavation made in a cross walk of a city street in tearing up the pavement of the street for the purpose of repaving, it appeared that plaintiff knew that the work was being done at or near the crossing where the accident occurred, and, having seen the work going forward, must have been aware that such excavations were being made, and, though it was at night, he could have readily seen the excavation before stepping into it, as there was an arc light hanging over the street near such point, besides other lights in the vicinity. Plaintiff testified that he was observing a team at the time, and that he was not aware that the work was being done exactly at the crossing. Held, that a verdict should have been directed for the defendant city." To the same effect are *Dale v. Webster County*, 76 Iowa, 370, 41 N. W. 1, where the plaintiff knew of the defect, and walked along without looking where he was going; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1, where the plaintiff drove in one direction, and was looking and talking to persons in another direction; *Tasker v. Farmingdale*, 91 Me. 521, 40 Atl. 544, where the plaintiff was absorbed in looking at an electric car, and gave no thought to the dangers on the road, and drove a wheel of her conveyance over the end of a culvert; *Gilman v. Deerfield*, 15 Gray, 577, where the plaintiff knew of the defect in the highway, and while thinking of something else, and, temporarily unmindful of the defect, drove into it; *Nebraska Teleph. Co. v. Jones*, 59 Neb. 510, 81 N. W. 435, where the plaintiff knew of the defect, and, while thinking of something else, drove over a stump in the road. In short, the rule is supported, not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that

he is familiar with, or which by the exercise of ordinary care he could discover and easily avoid. And while the city may be negligent in the discharge of its duty, the citizen may also be negligent in the discharge of his duty. And if both are negligent, and their negligence contributes to the injury, there can be no recovery. And if the plaintiff's negligence necessarily contributes to the happening of the injury, there can be no recovery. Such is clearly this case. The negligence of the city had continued for a year. The plaintiff knew it, and by the exercise of ordinary care he had avoided injury from it every day, and about the same hour every day, for a year. He could have avoided it on the day of the accident if he had exercised ordinary care. He was negligent in letting the horse turn unguided, or in so guiding him as to strike the obstruction he knew was there. Without his contributory negligence, no injury would have resulted to him from the negligence of the city. He made out no case for the jury. The demurrers to the evidence should have been sustained.

The judgment is reversed.

All concur.

Fannie E. HALEY, *Appt.*,
v.

ST. LOUIS TRANSIT COMPANY, *Respt.*

(.....Mo.....)

Failure to stop a street car at the destination of a passenger, by reason of which he is carried to the next street, is not the proximate cause of his falling on a slippery pavement in attempting to return to the point where he should have been permitted to leave the car.

(December 23, 1903.)

APPEAL by plaintiff from a judgment of the St. Louis Circuit Court in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lyon & Swarts and Charles M. Polk for appellant.

Mr. G. W. Easley, with **Messrs. Boyle, Priest, & Lehmann**, for respondent:

NOTE.—As to duty of railway company to assist passenger in alighting after carrying her beyond station platform, see, in this series, *Foss v. Boston & M. R. Co.* 11 L. R. A. 367.

As to liability of street railway company for injury to passenger because of unevenness of ground at place used for alighting, see *Pool v. Consolidated Street R. Co.* 25 L. R. A. 744.

There was no causal connection between defendant's failure to stop the car at Garrison avenue and the plaintiff's injuries. Her injuries were not the "direct and immediate consequence" of carrying her past Garrison avenue.

Sira v. Wabash R. Co. 115 Mo. 138, 37 Am. St. Rep. 386, 21 S. W. 905; *Haley v. Chicago & N. W. R. Co.* 21 Iowa, 15; *Burlington & M. River R. Co. v. Rose*, 11 Neb. 177, 8 N. W. 433.

The sidewalk was no more dangerous to the plaintiff than to any others passing over it, and her fall bore no causal relation to her having been carried past Garrison avenue, and cannot be said to have been the proximate cause of her injury.

Louisville & N. R. Co. v. Johnson, 92 Ala. 204, 25 Am. St. Rep. 35, 9 So. 269; *Moak's Underhill, Torts*, 16; *Cooley, Torts*, 73; *Addison, Torts*, 40; *Wharton, Neg.* 138; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *McClelland v. Louisville, N. A. & O. R. Co.* 94 Ind. 276; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Bosch v. Burlington & M. R. Co.* 44 Iowa, 402, 24 Am. Rep. 754; *Brown v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 222; *Francis v. St. Louis Transfer Co.* 5 Mo. App. 7; *Henry v. St. Louis, K. O. & N. R. Co.* 76 Mo. 288, 43 Am. Rep. 762; *Ashley v. Harrison*, 1 Esp. 49; *Pittsburgh, C. & St. L. R. Co. v. Staley*, 41 Ohio St. 118, 52 Am. Rep. 74; *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. 22; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Ward v. Weeks*, 7 Bing. 211; *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19, 52 N. W. 1129.

Brace, P. J., delivered the opinion of the court:

This in an action for damages for personal injuries sustained by the plaintiff in consequence of a fall upon a sidewalk in the city of St. Louis. The defendant objected to the introduction of any evidence under the petition on the ground that it did not state facts sufficient to constitute a cause of action. The objection was overruled, and evidence introduced by plaintiff, at the close of which the court, at the request of the defendant, instructed the jury "that under the pleadings and the evidence in this case the plaintiff is not entitled to recover, and your verdict must be for the defendant." Thereupon plaintiff took a nonsuit with leave, and thereafter, her motion to set the same aside, duly filed, having been overruled, she appealed, and assigns for error the giving of defendant's instruction in the nature of a demurrer to the evidence.

The case made by the plaintiff's evidence

is substantially as follows: The plaintiff at the time of the injury was a dressmaker, sixty years of age, weighing 170 pounds, and resided at 1017 North Garrison avenue,—the southwest corner of Garrison and Easton avenues. She was in perfect health, and, in the language of one of her witnesses, "was robust, tall, proud, well dressed, had style about her, and earned \$2 a day making dresses." On the 30th of December, 1899, about 10 o'clock at night, the plaintiff boarded the west-bound Easton avenue car of the defendant at the crossing of Eighteenth street and Franklin avenue for the purpose of returning to her home at the southwest corner of Garrison and Easton avenues. As the car was approaching Garrison avenue, where she desired to alight, she pushed the button and rang the bell twice, once before the car reached the street next east of Garrison avenue, and again, when the car was a short distance east of Garrison avenue; but the car did not stop until it reached the next street—Cardinal avenue—one block west of Garrison avenue. When the car stopped she went to the door, "fussed" with the conductor, who was on the platform outside, for not stopping, got off the car on the north side, went to the north sidewalk of Easton avenue, and was walking east toward Garrison avenue and her home on that sidewalk, when she fell, and thereby sustained an intracapsular fracture of the femur, or a broken bone of the neck of the hip. The injury is serious and permanent. It further appeared from the plaintiff's evidence that on the 30th of December, 1899, the maximum temperature in St. Louis was 13, the minimum 7, and that there was a half inch of snow on the ground that evening, and the weather clear; that the snow fell principally on December 27th, on which day the fall was 1.3 inches; that the snow-storm on the 27th of December was general throughout the city, and there was no snow fall after 10:35 A. M. of that day; that the maximum temperature on that day was 24 and the minimum 18, and on the 28th the maximum was 26 and the minimum 15, and on the 29th the maximum was 19 and the minimum 11. The evidence further tended to show that the night of the 30th of December, although clear, was dark; that there was more light at the Garrison avenue crossing than there was at the Cardinal avenue crossing; that the sidewalk on which plaintiff was walking was covered with snow and ice, was slippery, was shaded by trees growing thereon, and that the stores along it were all closed, and that such was the condition at the place where she fell, which was about half way between the two streets.

The evidence for the plaintiff made a prima

facie case of negligence against the defendant, in that its servants failed to stop the car at Garrison avenue, in compliance with plaintiff's timely signal therefor, given in the manner and by the means provided by the defendant for that purpose, and the only question presented by the record is, Was such negligence the proximate cause of the injuries for which she seeks to recover damages in this action? The learned counsel for the plaintiff contend that it should be so held, and cite many cases in support of this contention. We have carefully examined all of these cases, and find that each of them is easily distinguishable from this case, and have found none in which a defendant has been held liable in circumstances like those of the case in hand. As was said by Mr. Justice Miller in *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, *loc. cit.* 52, 19 L. ed. 65: "It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In the opinion of Mr. Justice Strong in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, *loc. cit.* 475, 24 L. ed. 256, may be found perhaps as brief, and yet as comprehensive, an expression of the rule as can well be given. The learned justice there says: "The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." There was no wanton wrong in this case. The negligence consisted simply in a failure to stop the car, in obedience to the plaintiff's signal, at the crossing nearest to her residence, in consequence of which she was carried to the next crossing, one block further west, where, of her own volition, she left the car in safety. This was the negligence and the immediate and proximate consequence thereof. The plaintiff, after safely alighting at the crossing, in returning to the crossing at which she intended to alight, fell on the sidewalk leading from the one to the other. The injury she received was the

64 L. R. A.

result of such fall. The evidence tended to prove that the immediate cause of her fall was the slippery condition of the sidewalk, and that condition may be said to have been the proximate cause of her injury, and thus the causal connection between the negligence complained of and the injury received was broken by the independent and voluntary act of the plaintiff in leaving the car at the crossing one block west of the crossing where she intended to alight. Even if we can go back of the slippery condition of the sidewalk, which was the immediate cause of the injury, to that voluntary act of the plaintiff must the injury be attributed, unless such act and the injury resulting therefrom were the probable consequence of the negligent act of the defendant, and ought to have been foreseen by its servants in the light of the attending circumstances. It may be conceded that the act of the plaintiff in getting off at the next crossing, and in returning by the sidewalk towards the crossing which had been passed, were probable consequences of the negligence of defendant in failing to stop the car at the crossing for which she signaled, which ought to have been foreseen. But it does not at all follow that the accident which befell the plaintiff was one which, in the light of the attending circumstances, ought to have been foreseen by defendant's servants as the probable consequence of plaintiff's walking thereon with due and proper care. Such accident was not the natural and usual sequence of such a walk under such circumstances. The natural and usual sequence of the walk of an ordinarily prudent adult person in perfect health and of a robust constitution as plaintiff was, whether that walk be long or short, whether by day or night, whether in weather cold or hot, on the improved sidewalks of a city in good repair, in its much-traveled thoroughfare as this sidewalk was, is that such persons safely arrive at their destinations. Persons sometimes fall on these sidewalks and are injured, but these are unusual and extraordinary occurrences not to be expected or foreseen. If the sidewalk is defective, so as not to be reasonably safe, by which a pedestrian thereon in the exercise of due care is injured, the city is liable for damages. If he is injured by obstructions or dangers created therein by another, such other person is liable therefor, and the city may become so. But in neither event is the pedestrian thereon, or he who may have caused him to become such, in fault. The defendant in this case was charged with no other or different duty in regard to the sidewalk in question than was the plaintiff herself. The fact that by reason of climatic conditions, or other natural causes, the sidewalk may have been in less safe condition

than usual, in no way changes the relative rights, duties, or obligations of the parties. Such conditions only impose the necessity of being more cautious when walking thereon. Pedestrians exercising due care sometimes fall and are injured while walking on the public sidewalks under such conditions, but such occurrences are unusual and extraordinary, and not to be anticipated or foreseen. For support of their contention plaintiff's counsel seem to rely more upon the *dicta* contained in some of the opinions in the cases cited than upon the facts in judgment in those cases. Most of them are steam railroad cases, in which, in violation of the carrier's contract, the passenger was put off the car on the carrier's track in a dangerous situation, from which his injuries directly resulted, or at a distance from his destination, which he could only reach by pursuance of a dangerous way on or along its

tracks, and in which was located a peril known to the carrier, and which the passenger must encounter, and from which his injuries resulted. We find no difficulty in differentiating the case in hand from all the cases cited on the facts in each, and only in the facts in each case can the *dicta* in each be fully appreciated and rightly understood. We have neither time nor space for an adequate review of all those cases, nor do we deem it necessary, since no better rule could be deduced therefrom on the vexed question of proximate cause, as applicable to the facts in this case, than that already laid down, and under which it seems evident that the defendant's negligence was not the proximate cause of the plaintiff's injury.

The judgment of the Circuit Court is affirmed.

All concur.

NEW HAMPSHIRE SUPREME COURT.

BANCROFT *et al.*

v.

UNION EMBOSSING COMPANY.

(.....N. H.)

1. That the belief of the parties to a contract for the exclusive right to manufacture machines of a certain pattern that the principal feature in the machine was patentable proves to be erroneous is not such a failure of consideration as will entitle the one obtaining the right to make the machines to rescind the contract, since the rights of the parties are to be governed by the terms of the contract, and their belief as to the rights obtained is immaterial.
2. A contract by one selling the right to manufacture and sell a machine which he has devised, not to engage in the business of making such machines himself, nor grant anyone else the right to do so during the life of the contract, is not void as against public policy, where possible customers are limited in number and scattered throughout the country.
3. A contract not to compete in the manufacture of machinery under patterns, the right to use which is sold to the other contracting party, is not invalidated by the act of Congress of July 2, 1890, prohibiting restraints of trade and commerce among the several states and with foreign nations.

(December 31, 1903.)

EXCEPTIONS by both plaintiffs and defendant to rulings of the Superior Court for Hillsborough County made during the trial of an action to recover the contract price for the use of patterns in the construction of certain machines which resulted in a recovery in plaintiffs' favor for an amount less than their demand; the plaintiffs excepting to so much as denied a recovery for the full amount, and defendant excepting to so much as permitted any recovery. *Plaintiffs' exception sustained.*

The facts are stated in the opinion.

Messrs. Eastman & Hollis, for plaintiffs:

To entitle the defendant to rescind its contract, or to excuse it from performance of its promises, there must have been a total failure of consideration; mere inadequacy of consideration, or partial failure of consideration, will not suffice.

2 Parson, Contr. 5th ed. 679; 24 Am. & Eng. Enc. Law, 2d ed. p. 645; *Bedel v. Loomis*, 11 N. H. 9; *Sandborn v. French*, 22 N. H. 246; *Perkins v. Clay*, 54 N. H. 518; *Gove v. Newton*, 58 N. H. 359; *Probate Judge v. Adams*, 49 N. H. 150; *Cass v. Morey*, 1 N. H. 347; *Jenkins v. Abbotts*, 54 N. H. 447; *Clark v. Amoskeag Mfg. Co.* 62 N. H. 612.

NOTE.—For other cases in this series as to validity of contract, on sale or lease of business, not to re-engage in such business, see *Leslie v. Lorillard*, 1 L. R. A. 456, and cases in note; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 22 L. R. A. 673, and note; *Oakdale Mfg. Co. v. Garst*, 23 L. R. A. 639; *Cowan v.* 64 L. R. A.

Fairbrother, 32 L. R. A. 829; *Kramer v. Old*, 34 L. R. A. 389; *Lufkin Rule Co. v. Fringeli*, 41 L. R. A. 185; *Anchor Electric Co. v. Hawks*, 41 L. R. A. 189; *Trenton Potteries Co. v. Oliphant*, 46 L. R. A. 255; *Clark v. Needham*, 51 L. R. A. 785; *Pohlman v. Dawson*, 54 L. R. A. 913, and *Swigert v. Tilden*, 63 L. R. A. 608.

The failure of consideration alleged by the defendant is the disappointment of its expectation that a broad, fundamental patent would be obtained which would give it a monopoly of the business and enable it to prevent competition. But this defense is not open to it here for the simple reason that the plaintiffs made no promise or agreement to obtain such a patent, but, on the contrary, expressly stipulated in the written agreement that the contract should continue and bind the parties for twenty years, even if no such patent should be granted upon said machine.

24 Am. & Eng. Enc. Law, 2d ed. p. 645.

This contract is not a mere license.

Buss v. Putney, 38 N. H. 44; 24 Am. & Eng. Enc. Law, p. 431.

Since, at the time of the defendant's attempted rescission, there was a valid and subsisting, past and executed, consideration for its promise to pay, it must follow that it cannot repudiate its contract, and refuse to pay the sums stipulated.

Jarecki v. Hays, 161 Pa. 613, 29 Atl. 118; *Pressey v. Smith*, 45 N. J. Eq. 872, 19 Atl. 618.

Messrs. Arthur W. Morgan and Bradford & Hood for defendant.

Bingham, J., delivered the opinion of the court:

The questions in this case arise upon exceptions taken by the parties to the findings and rulings made in the superior court. At the time the contract in question was executed, the plaintiffs had not procured a patent upon their embossing machine; but the parties believed that its principal feature was novel, and that the plaintiffs would obtain a patent which would control the manufacture and sale of the machine. The plaintiffs, however, were not successful in obtaining such a patent, although patents were granted to them upon some minor parts. The defendant operated under the contract for a period of over two years, and down to May 27, 1901, when it notified the plaintiffs that it would not be further bound by it. After this notification the defendant manufactured and sold nine of the machines, four of which were sold before the middle of July, 1901, when the patterns mentioned in the contract were returned to the plaintiffs. This suit is brought upon the contract to recover the sum of \$200 for each of the nine machines so manufactured and sold. The superior court ruled that there was such a failure of consideration as entitled the defendant to rescind the contract; that a rescission was made within a reasonable time, but was not completed until the mid-

dle of July, 1901, when the patterns were returned; and that the plaintiffs could recover the price named in the contract for each of the four machines sold prior to the return of the patterns, but not for those sold after that time.

The plaintiffs claim that the fact that the parties believed the principal feature of the machine was patentable, when it was not, did not constitute a failure of consideration entitling the defendant to rescind the contract; that the consideration for the defendant's undertaking is to be found in the contract itself; that the belief of the parties as to the novelty and patentability of the principal feature of the machine is immaterial; and that the material question is what the parties understood, as gathered from the terms of the written contract. We are inclined to accede to this view of the case. This is not a proceeding to reform the contract, but to enforce its provisions as therein expressed. If the contract as drawn does not express the understanding of the parties at the time it was made, it can be reformed upon proper proceedings instituted for that purpose; but, until reformed, their understanding is to be ascertained from the written contract, viewed in the light of the circumstances under which it was executed; and a finding as to the belief of the parties, based upon evidence gathered from extraneous sources, is immaterial. *Horne v. Hutchins*, 72 N. H. 214, 55 Atl. 364.

It is apparent from the contract that the plaintiffs did not agree that they would be successful in obtaining patents, fundamental or otherwise, upon the machine, or that the defendant should be excused from complying with its terms in case a fundamental patent was not obtained. What the plaintiffs undertook to do is there set forth in plain and unambiguous terms. After stating that they were ready and willing to give the defendant "the exclusive right, so far as it is in their power, to manufacture and sell the said machines," they agree (1) that the defendant shall have "full and exclusive license under any letters patent which may be granted to them . . . for inventions and improvements contained in or relating to said embossing machine, for the full term for which any such letters patent are or may be granted, including any renewal, reissue, or extension thereof," whether obtained from the government of the United States or any foreign country; (2) "that they will not during the existence of this contract make, vend, or use any embossing machines" of the type named; (3) that they will give to the defendant "all patterns and drawings which they have relating to such machines, and

will furnish such drawings as may be necessary for the manufacture of the machine; and will give it the benefit of their advice and co-operation in the manufacture of the said machines so long as this contract shall remain in force;" (4) that they will transfer to the defendant "all orders which they now have or may hereafter have for embossing machines of the type . . . described," except two orders specifically named; (5) "that they will not during the existence of this contract in any way sell or assign any letters patent of the United States or any foreign country relating to said machine or any improvement thereon, or grant any rights thereunder;" and (6) that "this contract shall last for the full term for which any letters patent upon the applications of the [plaintiffs] . . . are or may be granted, including any renewal, reissue, or extension thereof; and, if no such patent shall be granted upon said machine, then this contract shall last for the term of twenty years from the date hereof." These undertakings of the plaintiffs constituted the consideration for those of the defendant; and it is found that the plaintiffs "did what in the agreement was covenanted and agreed," and that "in consequence . . . the defendant was relieved from competition with the plaintiffs." The contract was not a mere license to the defendant to manufacture and sell machines of this type, provided the plaintiffs were successful in obtaining an exclusive right by letters patent upon the principal feature of the machine, and an agreement to waive the enforcement of such right against the defendant; but was a sale of the plaintiffs' good will in the business of manufacturing and selling machines of this type, together with any patent rights which they might procure upon the machine from the government of the United States or any foreign country, and an agreement not to make, vend, or use the machine during the existence of the contract. *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573.

But the defendant says that, if such was the nature of the contract, it was in general restraint of trade and void, for the reason that it was unlimited as to territory, although limited as to time. An agreement in restraint of a man's right to exercise his trade or calling, according to the early common law of England, was void as against public policy. In those days a man could not lawfully exercise a trade to which he had not been duly apprenticed, and one so admitted was obliged by statute to follow and exercise his trade under a penalty. *Pol-*

lock, Contr. 313. Hence, to enforce such an agreement was to deny the covenantor the right to earn his living, and to require him to violate an express provision of law. When the courts first began to recognize as valid any restraint upon trade, such restraints were confined within very narrow limits. The limitations which were allowed were such as were clearly necessary to protect the covenantee in the ordinary exercise of his trade or calling, having reference to the state of society and the conditions under which business was then carried on. In the application of this principle of reasonable necessity, a classification of agreements in restraint of trade came to be recognized, to wit: (1) Where the restraint was unlimited both as to time and space; (2) where it was limited as to time, but unlimited as to space; (3) where it was limited as to space, but unlimited as to time; and (4) where it was limited as to both time and space. If the agreement fell within the first or second class, it was held to be void; but if within the third or fourth it was valid. In this jurisdiction three cases have arisen, two of which came within the second class, and one within the fourth class, and in all of them the contracts were upheld: *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317; *Eastern Exp. Co. v. Meserve*, 60 N. H. 198; *Perkins v. Clay*, 54 N. H. 518. Whether the contracts were considered reasonable, having reference to the nature of the business and the circumstances of each case, is not stated. No decision has been found in our Reports in which the restraint was of the nature now under consideration.

Within the past few years the above classification, as a hard and fast rule of decision, has been questioned; and the House of Lords and many of the courts of this country, after an extensive review of the cases, have refused to be bound by it. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L. R. A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 163, 4 N. Y. Supp. 861; *United States Cordage Co. v. William Wall's Son's Rope Co.* 90 Hun, 429, 434, 35 N. Y. Supp. 978; *Ru Ton v. Everitt*, 35 App. Div. 412, 54 N. Y. Supp. 896; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415; 24 Am. & Eng. Enc. Law, pp. 842-862. The conclusion reached in these decisions is that the validity of the agreement de-

pend upon the reasonableness of the restraint as applied to the particular circumstances of each case, and that the contract is necessarily unreasonable and void if it is not limited as to space. It has even been denied that the alleged rule as to limits of space ever existed in England, as a positive rule of law, in any class of cases. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 366. If, as is quite probable, this classification was the result of the application of the principle of reasonable necessity in a series of cases, at a time when trade and intercourse were necessarily confined to a given locality or to comparatively narrow limits, and the classification as applied to those conditions met the rule of reasonableness, there would seem to be no reason for its continued recognition and application, as a hard and fast rule, to cases arising under the enlarged and materially changed conditions in which trade and commerce are now carried on, but rather that there should be a recurrence to and application of the principle itself.

In *Wood v. Whitehead Bros. Co.* 165 N. Y. 545, 59 N. E. 357, Gray, J., in speaking of the doctrine which avoids a contract for being one in restraint of trade, says: "It had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was more or less necessary to the material well-being and welfare of the community and of the state. . . . The conditions which made so rigid a doctrine reasonable no longer exist. In the present practically unlimited field of human enterprise, there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that in some way the public interests were endangered. But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except as to the particular party to be affected. To say at the present day that such a contract as was made in this case was affected by a public interest, and was a matter of public concern, would be, in my opinion, unreasonable."

In *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464; 13 N. E. 419, Andrews, J., says: "When the restraint is general, but at the same time is coextensive only with the interest to be protected and with the benefit meant to be conferred, there

seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise, in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. If . . . there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice. It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the King, under claim of royal prerogative, led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint

of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition; and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combination between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing."

It seems to us that, inasmuch as public policy requires that a man should be free to sell in the most advantageous way what he has obtained by his skill or other means, the same public policy should permit him to enter into restrictive covenants in aid of the thing sold, provided the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. And it seems to be generally held that the question whether the restriction is reasonable, as applied in this class of cases, is one of law, and not of fact. *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L. R. A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906; *Linn v. Sigsbee*, 67 Ill. 75; *Haynes v. Doman* [1899] 2 Ch. Div. 24; *Pollock, Contr.* 316; 24 Am. & Eng. Enc. Law, p. 858. In the application of this principle, the question is whether the restraint affords more than a fair and reasonable protection to the party in whose favor it is imposed. If it does not, the contract should be upheld. It will be noticed that the contract in this case does not restrain the plaintiffs from manufacturing and selling embossing machines of every description, as was the case in *Berlin Match Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236, 38 N. W. 82, cited by the defendant, but simply those involving the specific feature which the defendant was to manufacture and sell under the contract; and considering the nature of the business, the admitted limited number of customers, and their location throughout the various states of this country, we do not think the restriction can be held to exceed what is necessary for the pro-

tection of the purchaser, or that it violates any principle of public policy.

The defendant also contends that the contract comes within the provisions of act of Congress, July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), preventing restraints upon trade and commerce among the several states and foreign nations, and is therefore void. But we fail to see how the contract comes within this statute. It does not place or contemplate any direct restraint upon the right of the defendant to make sales of the manufactured article in any of the United States or any foreign country. Under it, the defendant was at liberty to carry on its trade in all of the states of the Union or any foreign country. This contention was raised in *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573, where the restraint was of a similar nature, and it was held that the contract was not in contravention of the act or within its spirit; that if the "act were to be construed literally and technically, so as to embrace such a contract, . . . it would involve consequences most harmful to the commercial community, consequences which . . . were never contemplated by the lawmakers." See also *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271. The Supreme Court of the United States, in considering this statute, has said: "When it is seen that the agreement entered into does not directly relate to and act upon and embrace interstate commerce, and that it was executed for another and entirely different purpose, and that it was calculated to attain it, the agreement would be upheld, if its effect upon that commerce were only indirect and incidental." *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 221, 244, 44 L. ed. 140, 148, 20 Sup. Ct. Rep. 96, 108; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

We are therefore of the opinion that this contention of the defendant cannot be maintained, and that the plaintiffs are entitled to recover the contract price and interest on the five machines sold after the middle of July, 1901, in addition to what has already been allowed them.

Plaintiffs' exception sustained; defendant's exception overruled.

All concur.

KANSAS SUPREME COURT.

STATE of Kansas

v.

A. B. RYNO, Appt.

(.....Kan.....)

- *1. One charged in an information with shooting with intent to kill with a deadly weapon, under § 38 of the crimes act (Gen. Stat. 1901, § 2023), may, upon sufficient proof, be convicted, under § 42 (§ 2027) of the same act, of a wounding under circumstances that would have constituted manslaughter in the fourth degree if death had ensued.
2. Proof of the genuineness of a disputed writing may be made by a comparison with other writings of the same person, either admitted or clearly proved to be genuine.
3. The sufficiency of the proof of a writing to be admitted as a standard of comparison is a question to be passed upon in the first instance by the court, but the weight and effect to be given the evidence by comparison, including the genuineness of the standards, is ultimately a question for the determination of the jury.
4. An expert in handwriting may give, not only an opinion, but the reasons for his opinion, in his examination in chief; and,

*Headnotes by JOHNSTON, Ch. J.

NOTE.—Limitations of evidence to handwriting.

- I. Scope, 303.
- II. Immaterial facts, 303.
- III. Immaterial opinions, 305.
- IV. Limits of expert testimony, 307.
- V. Proof of marks, 313.
- VI. Proof of copies, 314.
- VII. Value or weight of the evidence.
 - a. Nonexpert testimony, 315.
 - b. Expert testimony, 317.
- VIII. Summary, 319.

I. Scope.

This note is concerned only with the limitations of evidence, whether of expert or nonexpert witnesses, in regard to disputed handwriting, and does not treat of the rules in regard to "comparison of handwriting," which has been fully covered in five notes in this series; as to *Comparison of handwriting* generally, in a note to *University of Illinois v. Spalding*, 62 L. R. A. 817; as to the *Examination of witnesses to handwriting by comparison*, in a note to *Hoag v. Wright*, 63 L. R. A. 163; as to the *Competency of handwritings as standards for comparison*, in a note to *Gambrill v. Schooley*, 63 L. R. A. 427; as to the *Competency of expert witnesses for comparison of handwriting*, in a note to *Tower v. Whip*, 63 L. R. A. 337; as to *Comparison of marks and spelling* in a note to *Re Hopkins*, *post* —. The reader is also referred to the note upon the *Competency of witnesses to handwriting*, generally, to the case of *Ratliff v. Ratliff*, 63 L. R. A. 963; and to the note upon *Procedure in proof of handwriting*, to the case of *State v. Hall*, *post*, — 64 L. R. A.

for the purpose of illustrating and explaining his testimony, and conveying to the jury the reasons for his opinion, may be permitted to make illustrations upon a blackboard.

5. Where there is a general instruction that each juror shall act upon his own judgment, and that each must be satisfied beyond a reasonable doubt that every element of the offense has been proved, before there can be a conviction, if it is not necessary to apply this rule of individual right and responsibility of jurors to each feature and element of the offense.
6. The defendant not having testified in his own behalf, the court instructed the jury that, "while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him." *Held*, that the giving of the instruction in this form was not prejudicial error.
7. Under the evidence in this case, wherein it appears that, if the defendant was guilty of any offense, it was one of a higher grade than a mere assault, the refusal of the court to instruct the jury as to assault is not error.
8. The evidence examined, and *held* to be sufficient to sustain the conviction.

(January 9, 1904.)

II. Immaterial facts.

Besides the fact of genuineness or nongenuineness of the writing to which the nonexpert witness may give his opinion, many other circumstances, adding light to the question, and corroborative of the testimony which the witness has been called in the first place to give, are capable of proof.

So it has been held to be unquestionably competent to prove, in connection with testimony tending to show the signature to a disputed instrument to be a forgery, that the party who sets it up as genuine is unusually clever in imitating the handwriting of others, and that he himself has boasted of that fact. *Croom v. Sugg* (1892) 110 N. C. 259, 14 S. E. 748.

And it was proper to admit a deposition in an action on a note alleged by the defendant to be forged, to the effect that the witness, two or three years before, saw the plaintiff writing in the office of the deponent's father, whose signature upon the note was disputed; that the plaintiff prepared an imitation of his signature; that the deponent compared the imitation with the genuine signature of his father; and that he found the resemblance so strong that he should have supposed that the imitation was a genuine signature if he had not seen the plaintiff write it. *Moody v. Rowell* (1835) 17 Pick. 490, 28 Am. Dec. 317.

Similarly, it was not reason enough for disturbing a verdict that one party, who was sought to be charged, was allowed, after a witness acquainted with his handwriting had testified that he believed the disputed writing to be his, to prove that signatures could be so perfect-

A PPEAL by defendant from a judgment of the District Court for McPherson County convicting him of assault with intent to kill. *Affirmed*.

The facts are stated in the opinion.

Messrs. John D. Milliken and F. L. Martin, for appellant:

Expert Shearman's "argument" to the jury with his blackboard demonstration under the guise of testimony was an abuse of discretion by the court, and grievous error.

Clark v. Field, 42 Mich. 344, 4 N. W. 19.

The defendant, by his plea of not guilty, denied every issuable fact. He denied that the so-called standards were written by him. He was entitled to have had this question of fact submitted to the jury, and it was the duty of the court to do so whether requested so to do, or not.

ly imitated by an adroit penman as to render detection extremely difficult. Here the court said: "If signatures proved to be spurious may have a resemblance equally striking it may not be sufficient to overbalance facts and circumstances calculated to throw suspicion upon the integrity of the instrument in controversy. That a resemblance is so far from being conclusive evidence on this point that it may be altogether delusive was proved by the testimony of the two witnesses taken together." *Page v. Homans* (1837) 14 Me. 478.

On a trial for forgery in altering an instrument by erasing words and writing other words in it, a witness who is not an expert may testify that a powder which was found in the possession of the accused had the effect, when applied upon a similar instrument, of extracting the writing upon it, and the other instrument may be exhibited to the jury. *People v. Brotherton* (1874) 47 Cal. 388. The opinion carefully distinguished the case from one where the nonexpert witness might be called to prove that certain chemicals would have the effect testified to in this case; the witness stated the fact which actually happened.

And in order to admit such proof by an expert, that there was a fluid by means of which writing might be removed from paper, it was not necessary to prove, as a foundation for the evidence, that a solvent fluid had been used on the writing in question, and that the party against whom the evidence was offered was conversant with its use. *People v. Dole* (1898) 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

Upon the introduction by one party of chemical experts, who testified that by the use of acids and gas writings could be so thoroughly eradicated as to leave no trace under the microscope, it was improper to admit in evidence another writing, foreign to the controversy, with which the other party had experimented, in order to show that an alteration could not be made without detection; an unsuccessful effort by one person to forge a name is plainly not competent evidence that another person did not succeed. *Birmingham Nat. Bank v. Bradley* (1895) 108 Ala. 205, 19 So. 791.

It is proper to ask a witness whether, during the time in which he was acquainted with the handwriting in question, it had always been the same, or whether there had been a change in it. 64 L. R. A.

Blashfield, Instructions to Juries, p. 105, note 59; *State v. Bige*, 112 Iowa, 433, 84 N. W. 518; *Craft v. State*, 3 Kan. 451, *State v. Brainard*, 25 Iowa, 572; *State v. Carter*, 112 Iowa, 15, 83 N. W. 715; *Territory v. Baca* (N. M.) 71 Pac. 469; *People v. Molinew*, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 307.

It was the duty of the court to instruct upon the rules controlling, where the state's evidence was wholly circumstantial.

Horne v. State, 1 Kan. 42, 81 Am. Dec. 499; *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *State v. Andrews*, 62 Kan. 207; 61 Pac. 808; *State v. Asbell*, 57 Kan. 411; 46 Pac. 770; *Wantland v. State*, 145 Ind. 38, 43 N. E. 931; *Kollock v. State*, 88 Wis. 663; 60 N. W. 817; *People v. Dick*, 32 Cal. 216; *Tatum v. State*, 61 Neb. 229, 85 N. W. 40;

State v. Henderson (1886) 29 W. Va. 147, 1 S. E. 225.

After one party, in order to prove that a signature is not genuine, has introduced testimony that the formation of one letter of the signature in question appears only in one out of four or five of the genuine signatures of the writer, testimony that this peculiarity is "by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found therein," is competent in rebuttal. *Throckmorton v. Holt* (1901) 180 U. S. 552, 45 L. ed. 663, 21 Sup. Ct. Rep. 474, Reversing 12 App. D. C. 552.

Upon the cross-examination of a witness called to disprove the genuineness of a signature, it was clear error to allow the introduction of two instruments acknowledged to have been signed by the witness, offered for the purpose of showing a variance between the signatures, as evidence that the handwriting of the person, whose the signature in question purported to be, varied, and that the witness might be mistaken in identifying her signature; a dissimilarity between the signatures of the witness would not tend to show a like difference in the signature of the person whose signature was in question. *Brown v. Tourtelotte* (1897) 24 Colo. 204, 50 Pac. 195.

On a trial for uttering a forged note, the admission of evidence, for the purpose of showing that the defendant had knowledge that the note was forged, that at about the time of the transaction in question he had in his possession another note purporting to be signed by the same persons whose signatures were upon the note in question, and that in the opinion of the witness the signatures upon the two notes were in the same handwriting, was error without the production in evidence of the note testified to; but the court did not commit itself to an opinion as to whether the testimony of the witness would have been admissible if the note had been produced. *State v. Breckenridge* (1885) 67 Iowa, 204, 25 N. W. 130.

When the plaintiffs in an action on a note apparently made by the defendant have introduced testimony to prove that the body of the note, as well as the signature, is in the defendant's handwriting, the defendant may be permitted to offer testimony that neither is his handwriting; since proof that the body of the note is not his handwriting is not irrelevant,

Hunt v. State, 7 Tex. App. 212; *State v. Smith*, 7 Tex. App. 382; *Crutchfield v. State*, 7 Tex. App. 65; *Irvin v. State*, 7 Tex. App. 109; *State v. Taylor*, 111 Mo. 538, 20 S. W. 239; *People v. Scott*, 10 Utah, 217, 37 Pac. 335; *Blashfield*, Instructions to Juries, § 312.

The state, being without any admitted evidence of the defendant's writing, produced certain writings. These were identified by witnesses, who testified that in their opinion they were in the handwriting of the defendant; or they testified to facts from which it was intended that such inference should be drawn. Thus the first inference drawn from an opinion was supplemented by another inference drawn from an opinion, and thus, from one inference drawn from another inference, the court and jury were asked to,

but has some tendency to prove that the signature is not his. *Keith v. Lothrop* (1852) 10 Cush. 453.

But the production of an instrument signed with a mark, by the person purporting to have executed the disputed instrument with a written signature, is not material as affecting the question of genuineness, since such a habit might have existed in the latter part of the life of the signer, who was not a person to whom writing was familiar or easy. *Wyche v. Wyche* (1821) 10 Mart. (La.) 408.

III. Immaterial opinions.

Opinions as to purely conjectural matters are objectionable because having no direct evidential value, and as confusing the issues. A good example of this kind of testimony is seen in *Burress's Case* (1876) 27 Gratt. 934, a prosecution for forgery. There the testimony of a witness not an expert, but acquainted with the handwriting of the accused, that he did not believe that the prisoner could have written the order alleged to be forged if he had tried to do so, was held not to be admissible. The fact that the prisoner, according to the witness, "wrote a good, plain, round hand, remarkably uniform and fixed and well defined," was no reason for the witness forming an opinion that the prisoner could not have written the order if he had tried to do so. The court said: "We know of no principle of the law of evidence which would make the statement of the witness excluded in this case admissible evidence. It is a statement, not of facts to which a witness generally testifies, but of mere matter of opinion to which he rarely testifies, and only in special cases and for peculiar reasons. This is not such a case, and such reasons do not apply to it. . . . The law, in its wisdom, excludes all such opinions from the jury as calculated not to enlighten, but to mislead."

And somewhat similar is *Boyle v. Coleman* (1852) 13 Barb. 42. That was an action on a promissory note, and, when the plaintiff had proved by a witness acquainted with the defendant's hand that in his opinion the signature to the note was the defendant's, and the defendant had given contrary evidence, and further evidence that the plaintiff had been seen imitating his hand, it was then improper for the plaintiff, recalling the first witness, to ask him, 64 L. R. A.

and did, draw still another inference; viz: That the defendant committed the crime charged in the information. A standard of comparison, a unit of value, cannot thus be created.

Gillett, Indirect & Collateral Ev. pp. 66, 277, §§ 219-221; *Abbott*, Trial Brief, p. 391; *Greenl. Ev.* 12th ed. § 580; 3 *Jones*, Ev. § 565; *State v. Miller*, 47 Wis. 530, 3 N. W. 31; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *United States v. Jones*, 20 Blatchf. 235, 10 Fed. 469; *Rose v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; *Com. v. Andrews*, 143 Mass. 23, 8 N. E. 643; *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Hickory v. United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334;

"What kind of a hand does the plaintiff generally write?" and, "From your knowledge of his handwriting should you think he could have written the note in question?"—when the witness had not been examined as to his knowledge of the handwriting; no foundation had been laid for the expression of an opinion by the witness whether the note was or was not in the plaintiff's handwriting; and, if there had been, it seems, it would have been improper to ask the witness his opinion as to the capabilities of the plaintiff; for the opinion of the witness may have been formed as well upon his knowledge of the general scholarship or habits of the plaintiff as from a legitimate knowledge of his handwriting.

Equally objectionable, logically, are opinions as to what would have been the judgment of the witness in a supposed situation; such are in effect opinions as to opinions.

So it was not error to refuse to allow a witness who had become acquainted with the handwriting in question from having seen signatures upon checks, and had testified as to the signature in question, to be asked whether he was quite sure that if he had those checks and the signature in question before him his opinion would not be altered. *Merritt v. Campbell* (1880) 79 N. Y. 825.

And upon a witness stating that a signature was a genuine writing of the person whose it purported to be, it was proper to refuse to allow him to be asked, on cross-examination, "Would you take it against his denial of the signature?" The inquiry was purely hypothetical, predicated on no known or authenticated fact; it called for a belief or opinion on a subject as to which no one can be called an expert, and, whether asked affirmatively or negatively, it would be immaterial. No witness can tell what he would have done in such a case; it calls for mere speculation and vague belief. The answer might create some doubt with a weak juror, or be the foundation of an *ad captandum* argument, but would be wholly immaterial as evidence. *Bank of Commonwealth v. Mudgett* (1871) 44 N. Y. 514. *Foster v. Collner* (1884) 107 Pa. 305, is in accordance with this.

When the testimony of a witness as to the genuineness of disputed promissory notes did not express a belief, existing at the time when the answers were given, that the signatures were genuine, but was merely that, if the notes

Williams v. Conger, 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933; *Macomber v. Scott*, 10 Kan. 335; *Joseph v. First Nat. Bank*, 17 Kan. 261; *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186; *State v. Zimmerman*, 47 Kan. 242, 27 Pac. 999; *Gaunt v. Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739; *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; *Lawson, Expert & Opinion Ev.* p. 372; *Re Foster*, 34 Mich. 21; *Turner v. Hand*, 3 Wall. Jr. 115, Fed. Cas. No. 14,257; *Borland v. Walrath*, 33 Iowa, 131; *Whitaker v. Parker*, 42 Iowa, 585; *Cowan v. Beall*, 1 Mac Arth. 271; *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272; *Archer v. United States*, 9 Okla. 569, 60 Pac. 288.

The fact that the expert was paid made him incompetent in a criminal case as a matter of public policy.

United States v. Mathias, 36 Fed. 892.

Messrs. Grattan & Grattan, D. P. Lindsay, and F. O. Johnson, for the State:

An expert may use a blackboard to illustrate or convey his testimony to the jury.

15 Am. & Eng. Enc. Law, 2d ed. p. 281; *McKay v. Lasher*, 121 N. Y. 482, 24 N. E. 711; *Dryer v. Brown*, 52 Hun, 321, 5 N. Y. Supp. 486.

The expert may in all cases give the reasons and grounds for his opinion.

15 Am. & Eng. Enc. Law, 2d ed. p. 280; *Kendall v. Collier*, 97 Ky. 446, 30 S. W. 1002; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Keith v. Lothrop*, 10 Cush. 453; *Demeritt v. Randall*, 116 Mass. 331; *Farmers' & M. Bank v. Young*, 36 Iowa, 44; *Winnie v. Tousley*, 36 Hun, 190; 9 Am. & Eng. Enc. Law, p. 295, note 4; *Koons v. State*, 36 Ohio St. 195.

had been presented to him at his bank, he would have paid them, a new trial was granted for the error of admitting the evidence. But it was suggested in this case that it would have been admissible if he had said that he would have paid them if they had been presented with notice of contest over them. *Foster v. Jenkins* (1880) 80 Ga. 476.

To ask an expert witness who has testified as to the genuineness of a disputed writing, whether he would pay a check so signed, is improper; but, when his previous testimony has been that the signature in question is not genuine, but forged, the question and his answer are merely superfluous, and could not cause prejudice. *Breck v. State* (1889) 4 Ohio C. C. 160.

It was declared, however, in *Holmes v. Goldsmith* (1892) 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288, that the allowance of a question to a witness who had testified to the genuineness of a disputed note, as to whether he would act upon the signature upon the note if it came to him in an ordinary business transaction, was proper as a means of showing the strength and value of his opinion, though such a question, standing alone, might be objectionable.

And other opinions, although not merely guesses as to assumed conditions, may be inadmissible because not sufficiently relevant.

On the trial of an indictment to which there was a plea in abatement of misnomer, the evidence of a witness, who testified that he was well acquainted with the handwriting of the pleader who drew the indictment, that he believed, from his knowledge of the handwriting, that the letter "v," as written in the indictment, was intended by the pleader for an "r," and that the pleader, although he generally made the letter "r" in the way in which it is usually written by others, sometimes made it as it appeared written in the indictment, so as to resemble a "v,"—was incompetent; since it did not appear upon what the opinion was based, and the witness furnished no fact from which he drew his conclusion, so that the opinion was a mere conjecture, and not the judgment of an expert. *Sayres v. State* (1857) 30 Ala. 15.

And it was not error to refuse permission to a party to give to the jury certain blank notes printed on paper like the note in suit, so that the jury might determine whether, by using such 64 L. R. A.

notes, names could be traced by placing them over the signature; this would possibly have had the effect of showing that such a thing could be done, but had no bearing on the issue as to whether it was done. *Doud v. Reid* (1893) 53 Mo. App. 553.

On an issue as to the genuineness of a writing purporting to be that of a deceased person, produced by one of the parties, when it was in evidence that a witness who had never seen the deceased person write had seen the party producing the paper in question copy a genuine signature of the deceased person, it was incompetent to inquire of the witness whether the imitation was a good one, for the purpose of showing that the signature in question might have been written by the party producing it. And it was also held by the court that, even if the witness had been so well acquainted with the dead man's handwriting as to be competent to give an opinion, he could only be asked his opinion in regard to the genuineness of the signature in question. *Reed v. Spaulding* (1860) 42 N. H. 114.

In *Winn v. Patterson* (1835) 9 Pet. 663, 9 L. ed. 266, it was held that an instrument which could not be produced was sufficiently proved, prima facie, by the oath of a witness who was acquainted with the handwriting of the person executing it, having recorded it in the county records, that he believed it to be genuine, since the signature of the person executing it must have induced him to commit it to the record.

This, however, was simply upon the ground that the evidence was the best producible under the circumstances, the instrument not being produced.

So the evidence of a witness called to prove, from his acquaintance with the handwriting of the supposed author, certain lines written on the margin of the letter, that he believed them to be written by that person because they were on that paper which had been proved to be in his hand, and that he would not recognize them as his if he had seen them elsewhere, was incompetent as proof of the genuineness of the handwriting. *Taylor v. Sutherland* (1855) 24 Pa. 333.

It is interesting to note, however, in connection with the question of the competency of opinions as to the genuineness of disputed handwriting which are founded on matters other than the internal evidence of the handwriting

The expert may not only give the grounds and reasons for the opinion given, but may give them in his examination in chief by the party calling him.

Keith v. Lothrop, 10 Cush. 454; *Lewis-ton Steam Mill Co. v. Androscooggin Water Power Co.* 78 Me. 274, 4 Atl. 555; *Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574; *Butler v. Mehrling*, 15 Ill. 488; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. 359.

He may point out the characteristics and differences in the writings.

Moon v. Crowder, 72 Ala. 79; *Hanriot v. Sherwood*, 82 Va. 1; *Calkins v. State*, 14 Ohio St. 222; *Keyser v. Pickrell*, 4 App. D. C. 198; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Grand Island Bkg. Co. v. Shoemaker*, 31 Neb. 124,

itself, that in *Throckmorton v. Holt* (1898) 12 App. D. C. 552, Reversed in (1901) 180 U. S. 552, 45 L. ed. 683, 21 Sup. Ct. Rep. 474, the court indulges in a query as to whether evidence of opinion in respect to the authorship of a writing, by a competent judge familiar with the learning, culture, and literary style of the alleged writer, is not equally competent and credible with that based solely on knowledge of handwriting.

IV. Limits of expert testimony.

(The discussion of expert testimony here is not concerned with expert testimony from comparison of handwritings; as to that the reader is referred to the note to *University of Illinois v. Spaulding*, 62 L. R. A. 817.)

The introduction of the testimony of experts as a distinct class of evidence is generally assigned to the decision of Lord Mansfield in *Folkes v. Chadd* (1782) 3 Dougl. 157, in which he admitted the opinion of an expert upon a question whether a phenomenon arose from a natural or artificial cause; since, as he said, "handwriting is proved every day by opinion, and for false evidence on such questions a man may be indicted for perjury."

But long before this decision experts—opticians, an engraver, and a writing master—had been permitted, in the King's bench, to give the results of their examination of forged papers, and their opinions, from the identity of three signatures, that two must have been traced from the third. This was in *Kemp v. Mackrill* (1754) Sayer, 130.

When comparison of handwriting by experts was in process of extinction in England, the strong efforts made to broaden the rules of evidence in regard to handwriting were productive of one narrow and limited result. This was the admission of the opinion of experts in handwriting that writings, alleged to have been forged, showed upon their face that they were "true," and "genuine," or that they were written in a "feigned," "disguised," "imitated," "simulated," "studied," or "fabricated," hand.

Such was the effect of *Goodtitle ex dem. Revett v. Braham* (1791) 4 T. R. 497; *Stranger v. Searle* (1793) 1 Esp. 14; *King ex rel. Jackson v. Cator* (1802) 4 Esp. 117; *Reilly v. Rivett* (1792) 1 Phillim. Eccl. Rep. 78, note; *Saph v. 64 L. R. A.*

47 N. W. 696; *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28; *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257; *Durnell v. Sowden*, 5 Utah, 216, 14 Pac. 374; *Bridgman v. Corey*, 62 Vt. 1, 20 Atl. 273; *State v. Folwell*, 14 Kan. 105.

Handwritings to be used in comparison must either be admitted to be genuine by the parties seeking to use them, or at least clearly proved to be genuine.

State v. Stegman, 62 Kan. 476, 63 Pac. 746; *State v. Zimmerman*, 47 Kan. 242, 27 Pac. 999; *Gaunt v. Harkness*, 53 Kan. 407, 42 Am. St. Rep. 297, 36 Pac. 739; *Holmberg v. Johnson*, 45 Kan. 199, 25 Pac. 575; *Gilmore v. Swisher*, 59 Kan. 174, 52 Pac. 426; *Ort v. Fowler*, 31 Kan. 485, 47 Am. Rep. 501, 2 Pac. 580; *Arthur v. Arthur*, 38 Kan. 691, 17 Pac. 187; *Macomber v. Scott*, 10

Atkinson (1822) 1 Addams Eccl. Rep. 162; and *Roupell v. Haws* (1863) 3 Fost. & F. 784. (In *Carey v. Pitt*, Peake N. P. Add. Cas. 130, 4 Revised Rep. 895, the contrary was stated; and in *Gurney v. Langlands* [1822] 5 Barn. & Ald. 330, 24 Revised Rep. 396, the exclusion of such evidence was held not to be sufficient ground for a new trial, even if it were admissible, which was doubted; but these decisions are unrepresentative.)

There is now no question as to the admissibility of this evidence. *People v. Hewit* (1823) 2 Park. Crim. Rep. 20; *Lyon v. Lyman* (1831) 9 Conn. 55; *Hess v. State* (1831) 5 Ohio, 5, 22 Am. Dec. 767; *Moody v. Rowell* (1835) 17 Pick. 490, 28 Am. Dec. 317; *Burkholder v. Plank* (1871) 60 Pa. 225; *Cox v. Dill* (1882) 85 Ind. 334; *Sudlow v. Warshing* (1888) 108 N. Y. 520, 15 N. E. 532. (*People v. Spooner* [1845] 1 Denio, 343, 43 Am. Dec. 672, however, is to contrary effect.)

An expert who professed to have no knowledge whatever of the handwriting of the supposed testatrix was held to have been properly allowed to testify that he did not think the signature was the genuine signature of anybody. *Withee v. Rowe* (1858) 45 Me. 571.

But when one party, against whom a paper bearing his name has been produced, has merely testified to the fact that it was not signed by him, and has not introduced any evidence to show that it was in a simulated handwriting, it is proper to reject evidence offered by the other party, to the effect that the signature was not in a simulated handwriting. As the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was not competent for the purpose of establishing that it was in the hand of the party against whom it was offered. *Kowing v. Manly* (1872) 49 N. Y. 193, 10 Am. Rep. 346.

It was held in *Daniel v. Toney* (1859) 2 Met. (Ky.) 523, that the testimony of a witness who was not familiar with the handwriting of the justice before whom the depositions in question were taken, or of the witnesses who deposed; and had never seen either of them write; and who was merely called as an expert to state his opinion as to the character of the handwriting of the justice and the witnesses,—was incompetent, when the purpose of his testimony was to impeach the genuineness of an official

Kan. 341; *State v. Zimmerman*, 47 Kan. 245, 27 Pac. 999.

The genuineness or falsity of disputed handwritings can be proved by the nonexpert who is acquainted with the handwriting of the supposed writer.

Rogers v. Ritter, 12 Wall. 317, 20 L. ed. 417; *Redding v. Redding*, 69 Vt. 500, 38 Atl. 230; *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Com. v. Nefus*, 135 Mass. 533.

The nonexpert who testifies that he is familiar or acquainted with one's handwriting is prima facie competent to testify to the above, and the burden is on the opposite party to show that his sources of information are insufficient to qualify him.

Hinchman v. Keener, 5 Colo. App. 300, 38 Pac. 611; *Stoddard v. Hill*, 38 S. C. 385,

17 S. E. 138; *Pate v. People*, 8 Ill. 644; *State v. Minton*, 116 Mo. 605, 22 S. W. 808; *Davis v. Higgins*, 91 N. C. 382; *Anderson v. Logan*, 99 N. C. 474, 6 S. E. 704.

It is enough that a nonexpert had seen the alleged maker of the instrument write once, and only his name, or had seen only one specimen.

Kendall v. Collier, 97 Ky. 446, 30 S. W. 1002; *Jacob v. Watkins*, 10 App. Div. 475, 42 N. Y. Supp. 6; *Ponchin v. Furth*, 15 Wash. 201, 46 Pac. 241; *Redding v. Redding*, 69 Vt. 500, 38 Atl. 230; *Magee v. Osborn*, 32 N. Y. 669; *Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. 1047; *Berg v. Peterson*, 49 Minn. 420, 52 N. W. 37; *Woodman v. Dana*, 52 Me. 9; *State v. Hastings*, 53 N. H. 452; *Hynes v. McDermott*, 82 N. Y. 41,

document coming from the hands of a public official of a sister state.

And much the same kind of evidence is that to the effect that the disputed writing has been "traced" from another. This is clearly competent. *Dolan v. Meehan* (1904; Tex. Civ. App.) 80 S. W. 99. (Apparently *contra*, however, as to "painting" a signature, is *Robson v. Rocke* [1824] 2 Addams Eccl. Rep. 53, *infra*, VII. b.)

It is equally well settled that experts may be called to assist the court and jury in deciphering obscure writing. *Masters v. Masters* (1718) 1 P. Wms. 421; *Goblet v. Beechey* (1829) 3 Sim. 24, 9 L. J. Ch. 200; *Remon v. Hayward* (1835) 2 Ad. & El. 666; *Stone v. Hubbard* (1851) 7 Cush. 595; *Beach v. O'Riley* (1878) 14 W. Va. 55; *Kux v. Central Michigan Sav. Bank* (1892) 93 Mich. 511, 53 N. W. 828.

California Code Civ. Proc. (1903), § 1863, is to the same effect.

As to whether experts may testify as to the age of a manuscript, the cases are not in harmony.

In *Crouch v. Hooper* (1852) 16 Beav. 182, experts were allowed to speak to the age of the disputed document and the character of the handwriting.

In *Tracy Peerage* (1843) 10 Clark & F. 154, however, it was declared that the evidence of several expert witnesses whose occupations have made them familiar with manuscripts of different periods before the year 1700, that writings were written in the early part and before the middle of the 18th century, although admissible, was but "small testimony," and entitled to little weight.

The opinions of witnesses that certain instruments purporting to have been executed several years before had been only recently executed, based only upon the appearance of the notes when the witnesses saw them, without any knowledge of the prior appearance or character of the paper or the ink, or as to the places where, or conditions under which, they had been kept, was incompetent, since information of the witnesses was insufficient. *Williams v. Clark* (1891) 47 Minn. 53, 49 N. W. 398.

Cheney v. Dunlap (1886) 20 Neb. 265, 57 Am. Rep. 828, 29 N. W. 925, is to somewhat the same effect. The court in this case (following *Clark v. Bruce* [1877] 12 Hun. 271, and *Ellingwood v. Bragg* [1872] 52 N. H. 490) in declaring L. R. A.

ing that the evidence of experts from mere inspection of the documents, to the effect that signatures upon them had been made recently and since their alleged date, should have been excluded, said: "It does not present a question of science, skill, or trade, nor one of a like kind. In other words, I do not think that any amount of science, study, or skill would enable a person by mere inspection to judge or testify of the age of handwriting with that accuracy necessary to its value or safety in judicial proceedings. The appearance of a written paper, some years or even months old, will depend greatly upon the color, kind, and quality of the ink used, and greatly upon the receptacle or place where the paper has been kept,—whether excluded from the air or sunshine, whether in a dry or damp, hot or cool, place,—and other conditions, the knowledge of which must be derived from source's other than inspection. Again, there is no recognized science or trade in which it can be said to be necessary that persons engaged in it should be skilled in detecting the age of writings by inspection. The science of the law, perhaps, comes nearer to it than any other, and the instances in which it becomes necessary, or even useful, that the legal practitioner should possess such skill are very rare."

When the controversy is as to whether a document in part genuine has been altered, either by another person or by the author of the document under irregular circumstances, countless questions may arise, as the means of investigation are numerous, as to the extent to which the testimony of experts should be permitted to go, and the decisions show little uniformity or connection.

In *Norman v. Morrell* (1799) 4 Ves. Jr. 769, 4 Revised Rep. 347, an engraver was examined upon the question whether a figure was originally "8," or "3," having been altered to 8 by drawing the pen over it again, extending the upper and lower parts of the figure towards the center. And the same thing was allowed in *Nelson v. Johnson* (1862) 18 Ind. 320.

So on an indictment for the forgery of a will the evidence of an engraver was proper, that he had examined the paper with a mirror to see if there were marks of pencil, and had been able to trace letters and words, but it was held that the weight of the evidence would depend upon the way in which it was confirmed. *Reg. v. Williams* (1838) 8 Car. & P. 434.

A witness shown to be an expert in the use

37 Am. Rep. 538; *Armstrong v. Fargo*, 8 Hun, 175; *Baker v. Squier*, 1 Hun, 448; *Robinson Consol. Min. Co. v. Craig*, 25 N. Y. Week. Dig. 512; *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369; *Southern Exp. Co. v. Thornton*, 41 Miss. 216; *Empire Lfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 521; *Thomas v. State*, 103 Ind. 419, 2 N. E. 803; *Pearson v. McDaniel*, 62 Ga. 100; *Clark v. Freeman*, 25 Pa. 133; *Chaffee v. Taylor*, 3 Allen, 598; *Parker v. Amazon Ins. Co.* 34 Wis. 363; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216.

Mr. C. C. Coleman, Attorney General, also for the State.

Johnston, Ch. J., delivered the opinion of the court:

On the night of July 5, 1902, while Maud

Holmes was in her chamber, preparing to retire, a gun was fired near the house, a charge of shot from which passed through a screen window near which she was standing, striking her head, neck, and breast, and inflicting serious wounds. She was a young unmarried woman, who lived on a farm with the other members of the Holmes family, consisting of her father, mother, and sister, all of whom were in the house when the shooting occurred. No one was seen to fire the gun, and who did it was for some time, at least, a puzzling problem. Attention was finally directed toward A. B. Ryno, who resided in another neighborhood, about 3 miles distant from the Holmes place. He was about fifty years of age, married, and having a family of five children, the youngest of whom was sixteen years of age. It

of the microscope may properly be examined as to what he saw, when he examined a note alleged to be forged, in regard to its appearance; although it is error to allow one shown only to be an expert in the use of the microscope to go further and express his opinion that one character has been changed to another. *Stevenson v. Gunning* (1892) 64 Vt. 601. 25 Atl. 697.

In *Gentner v. Ulmer* (1882) 15 Phila. 233, the offer to prove by an expert the character and general uniformity of execution, and the peculiarities and minute structure of some parts of the genuine signature of the person whose handwriting was in dispute, was held to have been properly rejected; but the decision seems to have been upon the ground that the offer was intended to evade the (former) Pennsylvania rule forbidding comparison of handwriting by witnesses.

A question to an expert as to whether the witness, as a bank officer, found anything on the face of the note in question of a suspicious character that would cause him to distrust it if the note were offered for discount was properly rejected. The court said: "What the witness would do as a bank officer had the note been offered to him for discount was irrelevant. So was his mere opinion that the face of the note was of a suspicious character. . . . It was competent for him to point out any irregularity upon the face of the note,—any fact tending to show that it had been tampered with; and the jury would then have had something to base a verdict upon. But a mere opinion, not based upon particular facts pointed out to the jury, was of no value, and might have misled them." *Foster v. Collner* (1884) 107 Pa. 305.

It is proper to ask an expert in handwriting, in regard to a disputed promissory note, whether there appeared to have been an erasure in it; whether the erasure was made before or after the body of the note was written; and whether the edges of the note were cut edges or the ordinary edges of foolscap paper; and the objection to these questions, that they asked for the opinion of the witness, was mistaken, since answers to them elicited facts, and facts material to the pending investigation. ² *Dubois v. Baker* (1864) 30 N. Y. 355.

When the defendant in an action on a note alleged by him to be forged had called two expert witnesses who testified that they had examined the note under a microscope and dis-

covered certain superadditions and retouchings to portions of words and letters in the note and signature; and then the plaintiff also called as witnesses two expert microscopists, and examined them in detail as to the appearance of the note and as to its various letters and lines,—the objection of the defendant, upon the ground that the witnesses were asked to describe the appearance of the letters and lines and the paper upon which they were written, and not whether the signature was genuine or simulated, was properly overruled; since the testimony objected to bore directly upon the question whether the note had been changed or tampered with after it was written, and so was a contradiction of the testimony of the defendant's witnesses. *Haddock v. O'Rourke* (1889) 25 N. Y. S. R. 55, 6 N. Y. Supp. 549.

Where the appearance of a loop to the letter "r" in a contested instrument was relied upon to show that it was a forgery, it was competent to examine an expert witness in detail as to the appearance of this particular letter,—how far the ink mark ran, and where the paper appeared to have been dug out; whether he saw any evidence of a superadded line at that point, and whether there was anything in the appearance of the paper upon which he could safely base an opinion that there was a loop there when the letter was originally written. *Ibid.*

And in *Card v. Moore* (1902), 68 App. Div. 327, 74 N. Y. Supp. 18, experts were allowed to testify that a typewritten agreement, upon careful inspection under the microscope, showed that a date had been tampered with; but the court was not impressed with the importance of the testimony as against that of several witnesses testifying to the genuineness of the document.

After an expert had testified that, in his opinion, a letter and an erasure with ink on the envelope of another letter could not have been done with a pen or a brush, it was held by Shaw, Ch. J., that the witness's opinion as to how the erasure was made, or as to whether it was made with an instrument produced to him, being a small stick as large as a goose quill and having a small wad of cotton wound around one end and tied on with a string, which had been found in the defendant's possession, was quite inadmissible. *Com. v. Webster* (1850) 5 Cush. 295, 52 Am. Dec. 711.

But an expert was properly allowed to testify as to his opinion, from the appearance of

appears that in January, 1901, someone representing himself to be George R. Clark wrote to Maud Holmes, proposing a correspondence with her. He claimed to be from Ohio, and was in Kansas, looking for investments, and dated his letter at Canton, Kansas, a point in the county in which Maud Holmes lived. She consented to, and did, correspond with him for a time, keeping copies of the letters which she sent to him. Although his letters were posted from neighboring places and on railway trains near Maud Holmes's home, he did not call on her until October 8, 1901, when he introduced himself as the George R. Clark who had been carrying on the correspondence. At the same time he also met Maud's father and mother, and, as the visit lasted

about three hours, all had an opportunity to observe his appearance, manners, and peculiarities. He talked about the correspondence and the subjects about which they had been writing and undertook to explain the reasons why his letters had been so strangely posted at different places. At that time Maud indicated that she did not desire to carry on the correspondence further, but he continued to write to her and to other members of the Holmes family until shortly before the shooting. The letters first suggested love; a desire for matrimony; an effort to have Maud meet him at different places, and to take a trip to Ohio. There were some sensual allusions. They suggested resentment because she did not conform with his wishes; jealousy of a

the paper, whether certain words on a writing were written before or after the paper was folded, that the ink had spread into the fibers broken by the folding, and also as to the way in which the letters were formed, their appearance and the peculiarities observed by him, as to where the pen was taken off, as to the angles in the letters and to a stiffness in a portion of the writing; and to state his opinion as to the ink in which the body of the instrument was written as compared with the ink in the signature and date. *Bacon v. Williams* (1859) 18 Gray, 525.

The testimony of an expert that, in his opinion, all the words in the note in suit were written at the same time was not improper. *Quinsigamond Bank v. Hobbs* (1858) 11 Gray, 250. *Following Cooper v. Bockett* (1844) 4 Moore P. C. C. 433, 10 Jur. 931, in which the expert was allowed to say which of two words which intersected was written first.

But as to testimony that different writings were executed at the same time, there is some dissent.

So in *Phoenix F. Ins. Co. v. Philip* (1834) 18 Wend. 81, an expert witness, offered to prove that several documents dated at different times were written at the same time, was held to have been properly rejected upon the authority and analogy of *Gurney v. Langlands* (1822) 5 Barn. & Ald. 330, 24 Revised Rep. 396, *supra*, which was later overruled so far as it discredited expert testimony to the effect that writings were in a genuine or simulated handwriting; and the court held that the opinions of expert witnesses were worth no more than the individual opinions of the jurors themselves.

And later, in *Sackett v. Spencer* (1859) 29 Barb. 180, it was held that the evidence of a witness who was qualified as an expert in handwriting, being the teller of a bank, was properly rejected upon the question whether the portion of a guaranty indorsed across a lengthwise fold in a promissory note was written since the paper had been folded and soiled, and since it had been stained; and also as to whether, in his judgment, from the luster and brightness of the ink, the guaranty could have been written as long as six years before. The court held, persisting in the error of *Phoenix F. Ins. Co. v. Philip* (1834) 13 Wend. 81, *supra*, that "the question was not one upon which the opinions of witnesses were admissible. . . . The evidence of experts has been allowed in some in-

stances to show that a signature was in a simulated hand, but this is now disapproved of."

These last two cases, however, are not representative of the law.

And on an issue as to whether an instrument attested by the signature of a witness was executed at a certain place and time, or at two places, expert evidence that the two signatures were with different ink was held to be admissible. *Forell v. Cavanaugh* (1898) 69 N. H. 364, 41 Atl. 860.

So the testimony of an expert in handwriting and inks, offered to show an alteration in an instrument on file by adding a statement in ink, should have been admitted. *Rass v. Sebastian* (1896) 160 Ill. 602, 43 N. E. 708, *Affirming* (1894) 57 Ill. App. 417.

And the opinion of an expert is competent to go to the jury in the case of an alleged alteration in an instrument and retracing part of the instrument in different ink. But here such evidence was held to be intrinsically weak and to be received and weighed by the jury with great caution. *Moye v. Herndon* (1855) 30 Miss. 110.

It was error to refuse to allow a party to cross-examine experts in handwriting as to the effect of acids on writing, and as to whether, in their opinion, the writing could be altered or removed by the use of such means so as to escape detection, upon the ground that the witnesses were not experts in the use and effect of acids upon ink. In this case the court stated that, if the witnesses had declared that they knew nothing of the effect of acids upon ink, their testimony as to the genuineness of the check in question, and that it had not been altered, would have been properly considered in connection with the admission on their part that they had no knowledge or experience of the effect of acids on writings; it is right, and in fact necessary, that expert testimony should be subjected to every legitimate test on cross-examination, in order properly to weigh it. *Birmingham Nat. Bank v. Bradley* (1895) 108 Ala. 205, 19 So. 791.

But after one party had introduced chemical experts who testified that by the use of acids and gas writing could be so thoroughly and skilfully removed as to leave no discernible trace, so that the paper would present the same appearance to the eye or under microscopic examination as if it had never been written upon, and in rebuttal witnesses who were qual-

young man with whom she was keeping company; a possible or impending tragedy in the family; and references to the poisoning of the Holmes dog; an attack on, and fright of, Maud a short time before she was shot; and other occurrences about the Holmes home about which only a participant could well have knowledge. Ryno was recognized by Maud and the other members of her family as the George R. Clark who called at the Holmes place, and then acknowledged the writing of the letters sent prior to the visit. These, with other circumstances, pointed to him as the guilty one, and a prosecution was instituted against him. He was charged with an assault upon Maud Holmes with an intent to kill her, under § 38 of the crimes act (Gen.

Stat. 1901, § 2023). In a trial the jury found him guilty under § 42 (§ 2027) of the same act, of wounding Maud Holmes under circumstances which would constitute manslaughter in the fourth degree if death had ensued.

On an appeal he complains, first, that the court submitted the case on the theory that the offense defined in § 42 of the crimes act was included in the offense charged under § 38; and he contends that the offense of which he was found guilty is not included in the one charged in the information, and that the verdict rendered was equivalent to an acquittal of the charge. In effect, the same question was raised in *State v. Burwell*, 34 Kan. 312, 8 Pac. 470, and decided contrary to the contention of the appellant.

lified as experts were offered to testify as to the genuineness of the check in question, it was not error to receive their evidence over the objection that it had not been shown that they were experts as to the effect of acids and gas upon writings, since no witness had testified that the check in question had been subjected to acids or gas. *Ibid.*

Upon a question as to the fact of an erasure and alteration in a note, when the person who drew it has testified to the erasure of words and the substitution of others since its execution, it is not reversible error to refuse to allow him, when called as an expert, to be asked whether a certain chemical had been used in the erasure; after this testimony the mere opinion of the witness was of little, or no, additional value. *Charles T. Hayden Mill. Co. v. Lewis* (1891; Ariz.) 32 Pac. 263.

Also, when such an instrument is not produced in court and offered in evidence, the writing itself is the best evidence of an erasure by the use of chemicals upon it, and the best-evidence rule applies as against the evidence of a witness called as an expert to prove erasure and alteration by chemicals. *Ibid.*

Many decisions excluding the evidence of experts have been grounded upon the principle which forbids usurpation by experts of the functions of the jury.

So in *Frank v. Chemical Nat. Bank* (1874) 5 Jones & S. 26, it was held that it was error to allow an expert to be asked whether there was any possibility, in his judgment, of the instruments in question being genuine, since the response to the question took the place and usurped the functions of the jury.

And where the trial court refused to permit an expert witness to say whether, in his opinion, an indorsement on the back of a note sued upon had been erased, no error was found. Upon appeal the court said: "It cannot be perceived how skill in judging of handwritings can enable a witness to judge what is an erasure better than another man who knows how to write, and knows the meaning of the word 'erasure.' Whether the indorsement was erased or not was a fact for the jury to find on inspection of the paper." *Swan v. O'Fallon* (1841) 7 Mo. 231. And this was followed by *Wagner v. Jacoby* (1858) 28 Mo. 530.

Similarly, when the subject-matter of the dispute was whether an alteration in a promissory note by drawing a line through several printed

words had been made at the time of the execution of the note or afterwards, it was held that the subject was not one for the testimony of experts, and that the jury were as competent to form a correct conclusion as the experts. The court said: "The matter about which the witnesses were testifying was not in reference to the genuineness of handwriting; . . . nor was it a question whether there had been alterations and erasures in the note; . . . nor was the matter about which they were testifying a subject of science, skill, or long experience in a particular trade or profession; but it was a simple question of fact as to when the note had been altered by drawing the pen and ink lines through the printed words." *Collins v. Crocker* (1884) 15 Ill. App. 107.

The same reason was the ground for the decision in *Jewett v. Draper* (1863) 6 Allen, 434. It is not proper to allow an expert witness to testify that certain words had been interpolated into a contract after the signature was written, the ground of the statement being that the words were not written in the usual place above the signature, but by the side of it, and that the words were crowded and huddled together in appearance; a juror of ordinary intelligence was as competent to judge of these facts and draw a proper inference from them as a witness could be. Skill in the detection of counterfeits could give no aid in determining whether the words or the signature were written first.

But this is directly controverted in a Pennsylvania case, deciding that in an action involving forgery the testimony of an expert to support the inference that the instrument had been written over an existing signature, that it had the appearance of having been extremely crowded to get the writing into such a limited space, was competent, since "in all such inquiries great latitude in the admission of testimony is not unreasonable or improper." *Brant v. Dennison* (1885; Pa.) 1 Cent. Rep. 400, 5 Atl. 869.

On the other hand, also, it was error to exclude the testimony of an expert witness, that upon an examination under the microscope of the paper bearing the writing in question he discovered traces of pencil marks, and that the fiber of the paper had the appearance of being broken and rubbed before the ink was laid. Expert evidence was competent for that purpose; and it was a mistake to exclude it upon the ground that the microscope, being in court,

In that case the charge was, under the same section, of shooting with intent to kill with a deadly weapon; and the verdict was the same as the one returned in the present case,—of a wounding under circumstances that would have constituted manslaughter in the fourth degree if death had ensued. We see no reason to change the rule which has been so long followed, and which, no doubt, guided the court in the submission of the case. See also *State v. Fisher*, 8 Kan. 208; *State v. Terreso*, 56 Kan. 126, 42 Pac. 354; *State v. Smith*, 57 Kan. 674, 47 Pac. 541; *State v. Countryman*, 57 Kan. 815, 48 Pac. 137.

Error is assigned on the admission of the testimony of J. F. Shearman, or, rather, on the manner in which he gave his testimony.

could be used by the jury, and that they were as well able to judge of the facts to which the witness's attention was proposed to be called as the witness. *Bridgman v. Corey* (1889) 62 Vt. 1, 20 Atl. 273. This, it will be observed, is in accordance with *Bacon v. Williams* (1859) 13 Gray, 525, *supra*.

The opinions of experts are often objectionable as being mere inferences, and not facts.

So the testimony of persons called as experts to express their opinions whether a man could, within a short time, so improve his handwriting as shown by signatures offered as standards as to make a signature of as good a handwriting as that of the instrument in question was held not to be a subject for the testimony of experts, and incompetent. *McKeone v. Barnes* (1871) 108 Mass. 344.

And it was clearly not error to refuse to allow an expert to be asked as to whether the fact that one letter of a word appeared to have been altered was not strong evidence that another letter of the same word had been similarly altered; since the witness was called to testify as to facts, and not as to inferences to be derived from facts. *Kruse v. Chester* (1885) 66 Cal. 353, 5 Pac. 613.

It was not error to refuse to allow an expert to be asked whether one could lay the note in suit over a signature and trace it accurately with a point of a pencil. Even if this were a matter for expert testimony, it was not a matter relevant to this case. The fact would have too remote a tendency to prove that the signature in question was traced. *Doud v. Reid* (1893) 53 Mo. App. 553.

And in an action on a promissory note which the plaintiff alleged had been signed in the plaintiff's presence, by the defendant, who was illiterate, by copying his name from a copy set him by the plaintiff on another piece of paper, it was error to allow an expert to be shown a letter identified by the plaintiff as his own handwriting, and to be asked: "Do you not think it possible that a person unaccustomed to write might copy the signature in question by the aid of another signature before him, written on a separate sheet of paper by the person who wrote the letter in evidence?" The court said. "An affirmative answer to the question, at most, would only show, inferentially, not the probability, but the possibility, that the defendant wrote the signature in question. The question for the jury to decide was not whether the de-

It is said that he is a member of the bar, and a clerk in the Federal court, with a state reputation as an official and citizen of exceptional natural ability and unusual accomplishments; that he is of fine personal appearance, and has had an experience of fifteen years in studying and testifying as an expert in handwriting; and that he gave his testimony with illustrations on a blackboard, in an argumentative and very impressive way. The testimony does show that he had given the subject of handwriting much study, and that his qualifications as an expert had been recognized in many of the state and Federal courts where he had been called to give testimony. His apparent intelligence, study, and experience leave no doubt of his qualifications, and in fact the

defendant might have written the signature to the note, but whether he actually did write it. It would be unsafe to infer an actuality from an inferential possibility. If such testimony were admissible on the part of the plaintiff it would be competent for the defendant to rebut it by evidence, (1) that such a person could not thus write the signature in question, and (2) that it would be impossible for him to do it,—an issue quite too remote to be serviceable in eliciting the truth called for by the pleadings. We know of no rule of law by which such a question is admissible." *Thayer v. Chesley* (1868) 55 Me. 393.

After an expert witness had stated certain facts which he had discovered by an examination, and peculiarities which he had observed in regard to the signature in question, he might be asked whether, from that examination, the signature, in his opinion, was genuine, over the objection that an expert witness must testify only in answer to a hypothetical question based upon facts either stated by himself or by other witnesses. The question fairly imported that the opinion asked for was based upon the facts derived by him from his examination, and the witness was not asked to give his opinion on what he supposed he knew. *McDonald v. McDonald* (1895) 142 Ind. 55, 41 N. E. 336.

A hypothetical question to an expert in handwriting, which assumed that, before the person alleged to have executed an instrument wrote it, he walked some distance carrying a large satchel, as to what effect this exertion would have upon his handwriting, was held to be incompetent; and it was held that the question, if proper for an expert at all, was one for a medical expert, rather than for an expert in handwriting. *Langley v. Wadsworth* (1883) 18 N. Y. Weck. Dig. 148.

The decision of *STATE v. RYNO*, allowing the use of the blackboard by an expert witness, has the authority of the only cases decided upon the exact point. They are *McKay v. Lasher* (1890) 121 N. Y. 477, 24 N. E. 711, and *Dryer v. Brown* (1889) 52 Hun. 321, 5 N. Y. Supp. 486. And as to the abuse of discretion of the trial court in permitting the witness to give his opinions without prompting from counsel, and to extend his answers beyond the usual length of such responses, there is no direct authority controlling the court's discretion in that matter. Further, in *Clark v. Field* (1880) 42 Mich. 342, 4 N. W. 19, the court, in declaring that

appellant does not much question his competency, but does complain of the use of the blackboard with which he illustrated his testimony. For the purpose of illustrating and explaining his testimony, an expert as to handwriting may make use of a blackboard. In this way he can convey to the jury the reasons for his opinion, and make the points of similarity or difference upon which his opinion rests more intelligible to the jury. *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711; *Dryer v. Brown*, 52 Hun, 321, 5 N. Y. Supp. 486; 15 Am. & Eng. Enc. Law, 2d ed. p. 281. There were submitted to this witness a large number of letters and other writings, and he made a comparison between those and other writings admitted or proved to be genuine. His testimony

was therefore necessarily quite extended. It was competent to inquire of him on the direct examination the reasons for his opinion, and the blackboard illustrations served this purpose efficiently. His opinion, unexplained, might have little value; but, when the reasons upon which it was based were given, the jury could then determine the soundness of his reasons and the correctness of his conclusions. In *Lewiston Steam Mill Co. v. Androscoggin Water Power Co.* 78 Me. 274, 4 Atl. 555, it was expressly decided that the expert may give, not only his opinion, but the reasons for his opinion, in his examination in chief; and, of course, the defendant is always at liberty to make a more detailed examination as to the basis of the expert's opinion upon cross-examination.

the trial court's refusal to allow a witness to give his testimony spontaneously, and without questioning, was a reasonable exercise of discretion, says that undoubtedly cases occur which justify such indulgence. It would seem, moreover, that the matter of the examination of witnesses generally is wholly discretionary with the trial court, and is not reviewable. (See upon this point the note, upon the *Examination of witnesses to handwriting by comparison*, to the case of *Hoag v. Wright*, 63 L. R. A. 163, at p. 166, and the note upon *Procedure in proof of handwriting*, div. IV. to the case of *State v. Hall*, post, —. In regard to the proof necessary to establish proper standards for comparison of handwriting, the reader will find the subject fully treated in a note to *Gambrill v. Schooley*, 63 L. R. A. 427.)

V. Proof of marks.

(In regard to the proof of marks by comparison in court, the reader is referred to the note upon that subject to *Re Hopkins*, post, —.)

As to whether a signature made by a mark may be proved or disproved by the evidence of persons professing to be familiar with the mark habitually made by the person in question, there is no general agreement.

In some decisions the courts content themselves with the bald statement that a mark is not capable of proof at all.

Thus in *Engles v. Brulington* (1807) 4 Yeates, 345, it is declared that to attempt to prove a mark to a will would be idle and ridiculous.

And in *Gilliam v. Perkinson* (1826) 4 Rand. (Va.) 325, the court says that where one makes a cross-mark, perhaps the first and last he ever made in his life, to attempt to prove such a signature would be a mockery of justice.

So in *Delony v. Delony* (1862) 24 Ark. 7, it is held that it is not to be presumed that a signature made by a simple cross-mark can be proved or identified like the handwriting of a signature; in *Jackson ex dem. Van Dusen v. Van Dusen* (1809) 5 Johns. 144, 4 Am. Dec. 330, it was held that, a testator having made his mark to his will, no evidence could be given or expected to prove his handwriting; and a mark is not a signature under the Missouri statute providing for the proof of deeds. *Allen v. Moss* (1858) 27 Mo. 354.

In *Carrier v. Hampton* (1850) 33 N. C. (11 Ired. L.) 307, it is said that "although in some very extraordinary instances the mark of an

illiterate person may become so well known as to be susceptible of proof, like handwriting, yet, generally, a mark, a mere cross, cannot be identified."

This distinction, as to there being some distinctive characteristic about the mark, would seem to be the proper one, but even when the witness swears to a peculiarity observed by him, it has been held in Pennsylvania, *Following Engles v. Brulington* (1807) 4 Yeates, 345, *supra*, that the evidence is not good.

Thus on the trial of an issue of the validity of a will purporting to have been executed by the testatrix attaching her mark instead of her signature, the court improperly allowed a witness to testify to his belief that the mark was genuine, although he stated as the foundation of his belief that he was acquainted with the mark of the testatrix, and that it had certain peculiarities which distinguished it from others. The court said, upon appeal: "Where a mark on inspection appears to have nothing in its construction to distinguish it from the ordinary marks used by illiterate persons to authenticate their contracts, it is not the subject of this description of evidence." *Shinkle v. Crock* (1851) 17 Pa. 159.

And it was held in *Watts v. Kilburn* (1849) 7 Ga. 356, that, there being nothing distinctive to fix the identity of the signature of an attesting witness made by a mark, which was not handwriting, such a signature should be treated as a nullity, and the handwriting of the party should be proved.

But these cases are not representative.

In the English courts distinctive cross-marks are capable of proof.

In an action (which was undefended) against the acceptor of a bill of exchange drawn by Ann Moore to her order and indorsed by her mark and the writing "Ann Moore her mark," the indorsement being in the plaintiff's hand, a witness was called to prove the indorsement, and stated that he had frequently seen Ann Moore make her mark and so sign instruments, and he pointed out some peculiarity; *Tindal*, Ch. J., after some hesitation, admitted the evidence as sufficient. This was in *George v. Surrey* (1830) *Moody & M.* 518, 31 Revised Rep. 755; and there is a declaration in *Sayer v. Glossop* (1848) 12 Jur. 465, 17 L. J. Exch. N. S. 300, 2 Exch. 409, which is apparently in accord.

And, moreover, in an action on a promissory note an affidavit that the maker was a marks-

The objection that the testimony was not drawn out in the usual manner, by question and answer, is not sustained. We see nothing unusual in the method of the interrogation, and, while some of his answers were lengthy, they were responsive to the question asked, and the subject-matter necessarily required an extended answer. We find nothing in the conduct of this inquiry that trench upon the rights of the defendant, or furnishes ground for serious complaint.

Complaint is also made of the use of certain writings not acknowledged to be in the handwriting of defendant as standards of comparison. Some of these were admitted to be genuine, but a larger number were only shown by the testimony of the state to be the handwriting of the defendant. Among

the papers so used were the recognizances in the case, as well as school orders, agreements, and leases which witnesses saw the defendant sign. There were other writings upon which defendant had acted, or which he acknowledged to witnesses to be his own, or were shown by testimony to be his. There was practically no dispute in the testimony as to the genuineness of these writings, although as to most of them there was no acknowledgment at the trial that they were genuine. Most of the witnesses who identified the papers and proved them to be the defendant's writing were not cross-examined, and no testimony contradicting the proof so made was offered by defendant. Under the rule which has been applied in this state, an acknowledgment is not essen-

man, and that the sign or mark upon the note was his mark or sign used by him in place of signing his name, was held to be sufficient proof of the signature. *Pearcy v. Dicker* (1849) 13 Jur. 997. In harmony with the English cases is found *Paisley v. Snipes* (1807) 2 Brev. 200.

And the true rule seems to be laid down in *Strong v. Brewer* (1850) 17 Ala. 706, where it was held that the signature on an instrument, made simply by a mark, was capable of proof like an ordinary signature, by the evidence of a witness who swore that he knew the mark of the person whose signature it purported to be, and believed it to be his. In this case the court declared: "The general rule which admits of proof of the handwriting of a party is founded on the reason that in every person's manner of writing there is a peculiar prevailing character which distinguishes it from the handwriting of every other person, and therefore that one who knows the handwriting of the party is competent to testify to it. This kind of evidence, too, like all other probable evidence, admits of every degree from the lowest presumption to the highest moral certainty. . . . The degree of weight to be attached to it depends, not only upon the character of the witness, but also upon the opportunity he has had of acquiring a knowledge of the party's handwriting. It may be more difficult to acquire a knowledge of a simple mark by which an illiterate man executes a deed, than the knowledge of the handwriting of one who can write his name in full; but we cannot perceive why it may not be done. In some instances the peculiarity may be as strong as that which marks the characters of one who can write, and in other instances, not perhaps so great; yet in all we apprehend would be found something distinct and peculiar which would enable one who had frequently seen the party make his mark to know it. We can, therefore, see no reason why one who has frequently seen a party make his mark to deeds or other writings, and who can testify that he believes that he knows it, may not be permitted to prove the execution of a deed thus subscribed."

It is true that in *Jones v. Hough* (1884) 77 Ala. 437, it was held, citing and following *Gilliam v. Perkinson* (1826) 4 Rand. (Va.) 325, that, although there is a distinct individual character in the handwriting of every man who can write, and with those who have written much that character is so fixed and striking

that persons acquainted with it would feel no more difficulty in recognizing it than in knowing the face of the writer, it is different in the case of a mere cross made instead of a signature. But in *Jones v. Hough* there is no mention whatever of the well-considered earlier Alabama case of *Strong v. Brewer* (1850) 17 Ala. 706.

Under § 764 of Hill's (Or.) Code, providing that the handwriting of a person may be shown by anyone who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting, it was competent for a witness to testify, from his own knowledge acquired in one of those modes, as to the genuineness of a signature by a mark. *State v. Tice* (1897) 30 Or. 457, 48 Pac. 367.

In *Lansing v. Russell* (1848) 3 Barb. Ch. 325, it is held, very properly, that the testimony of experts, who had been in the habit of examining signatures and marks of young persons as well as of very aged ones, to prove that the signature marks upon deeds could not have been the genuine marks of the unaided hand of an old and decrepit man, was proper as legal evidence to establish that fact.

And a case upon the border line between what is handwriting and what is merely a mark is found in another New York case, *Jackson ex dem. Van Dusen v. Van Dusen* (1809) 5 Johns. 144, 4 Am. Dec. 330. There one of the witnesses to a will made his mark upon it by way of attestation with his two initials "S. W.," rudely executed, and it was competent to prove this signature by a witness who testified that he had once seen the same person make the initial letters of his name, and that from the peculiar character and structure of these letters, particularly the letter "S," which was inverted, he believed the letters upon the will to have been made by that person.

VI. Proof of copies.

The question under what circumstances copies of instruments, instead of the originals, may be introduced in evidence, is properly a part of the subject of the proof of documents, and so not part of the subject of the proof of handwriting. What is intended to be discussed under the caption above is: What copies may be proved to be copies of genuine handwriting by reference to the copies themselves, and from

tial to establish the genuineness and warrant the use of a standard of comparison. The courts of the country are not in accord on this question, but "it is the established law of this state and of many other states of this country to permit proof of the genuineness of a disputed signature by comparison with other signatures on other instruments in writing admitted or proved to be genuine." *Holmberg v. Johnson*, 45 Kan. 199, 25 Pac. 576. The recent case of *State v. Stegman*, 62 Kan. 476, 63 Pac. 746, was a prosecution for the forgery of a bond purporting to be the act of another, and involved the point whether the standards of comparison used by experts called as witnesses must be admitted to be genuine, or can be proved to have been written by the

party. It was there held that "a writing clearly proved to be genuine, and about which there is no dispute in the evidence, may be used as a basis for comparison of handwritings, and to show that a certain other writing with which it is compared is not genuine." See also *Macomber v. Scott*, 10 Kan. 335; *Joseph v. First Nat. Bank*, 17 Kan. 256; *State v. Zimmerman*, 47 Kan. 242, 27 Pac. 999; *Gaunt v. Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739.

There is some complaint that the court did not submit to the jury, as a question of fact, whether these standards of comparison were written by the defendant. Whether the writings offered as standards have been sufficiently proved to be genuine to be used as standards must be determined by the

the knowledge possessed by the witness of the genuine handwriting of the person whose they are alleged to be? So questions in regard to copies as secondary evidence are not within the discussion here.

The subject of letter-press copies was fully treated in *Com. v. Jeffries* (1863) 7 Allen, 548, 83 Am. Dec. 712. Press or machine copies of certain letters purporting to have been written by the accused were admitted in evidence upon the testimony of a witness who knew his handwriting and was acquainted with the process of taking press copies, the witness being asked: "In whose handwriting was the original of which this purports to be a copy?" The court said: "The press copies, as they are called, were in fact proved to have been in the handwriting of the defendant. They were in truth a part of the original letters as written by him, transferred by a mechanical pressure to other sheets. But such transfer did not destroy the identity of the handwriting as shown on the impression, or render it unrecognisable by persons acquainted with its characteristics. These to a considerable extent it must necessarily still retain, so that a person having adequate knowledge could testify to its genuineness with quite as much accuracy as if he had before him the original sheets on which the letters were first written. Writings thus transferred are not unlike written documents which have been defaced or partially obliterated by exposure to dampness, rough usage, or the wasting effect of time. Such papers may not possess all the distinctive features of the original handwriting, but their partial destruction or obliteration will not render them inadmissible as evidence, if duly identified by testimony. . . .

Although incompetent as a means of comparison by which to judge of the characteristics of a handwriting which is in dispute, it might still retain enough of its original character to be identified by a witness when its own genuineness was called in question. . . . The mode of putting the inquiry to the witness was defective and irregular. Strictly he should have been asked if the letters shown to him appeared to be in the handwriting of the defendant; then, by proving that they were press copies, it would follow that the letter from which the impressions were made were his also. The defect was in so framing the question as to elicit the opinion of the witness concerning the handwriting, and the necessary consequence of that opinion, 64 L. R. A.

in the same answer. But the substance of the evidence was clearly competent."

And a letter-press copy of a letter if otherwise competent may be shown to be in the handwriting of a party who, as a witness, denies all knowledge of it. *Clark v. Finn* (1882) 12 Mo. App. 583, Appx.

In *Nodin v. Murray* (1812) 3 Campb. 228, 13 Revised Rep. 796, it was proposed to give in evidence as an original letter a duplicate taken from the autograph at one impression by means of a copying machine, but Lord Ellenborough said that he could only treat this as a copy, although it was likely to be more accurate than one taken by successive impressions, and therefore it could not be read without a notice to produce the original, written by the party's own hand.

As for photographic copies, where application was made to the court to take certain documents from the files for the purpose of sending them out of the country with a mandamus, the court refused the application, but suggested that, if it was necessary to identify the handwriting in the documents, that difficulty might be got over by taking photographic copies of them. *Re Stephens* (1874) L. R. 9 C. P. 187.

And photographic copies of documents on file in the War Department, which could not, without public detriment and inconvenience, be removed, are admissible as the best evidence of which the case admits, upon an authentication of their genuineness in the usual way by proof of handwriting. *Leathers v. Salvor Wrecking & Transp. Co.* (1875) 2 Woods, 680, Fed. Cas. No. 8,164.

(For a discussion of the question of the competency of copies as standards for comparison of handwriting, the reader is referred to the note to *Gambrill v. Schooley*, 63 L. R. A. 427.)

VII. Value or weight of the evidence.

a. Nonexpert testimony.

If one witness deposes positively to the handwriting of an instrument, whether lost or existing, it is sufficient prima facie evidence to allow the instrument or copy to go to the jury without regard to how many other witnesses may deny it, or what circumstances may be proved to cast doubt upon it. *Krise v. Neason* (1870) 66 Pa. 253.

A charge that the uncontradicted testimony of the attorney of the person whose handwriting

court in the first place, but the weight and effect of the evidence by comparison, including the genuineness of the standards, is ultimately a question for the determination of the jury. Here no special instructions with respect to the standards were asked, and none were given; but the court submitted this, with all other testimony, to the jury, with the admonition that they were the sole and exclusive judges of all the facts in the case, and should give such weight to the testimony and opinions as to handwriting as they should deem them entitled to. There was no intimation in the rulings or instructions of the court that the genuineness of the standards of comparison used by the experts was not submitted as a question of fact for the jury, with the other testimony offered in proof of handwriting.

Error is assigned on the refusal of the court to instruct the jury that defendant was not on trial for the writing of letters to Maud Holmes, and that the letters could not be considered for any purpose, except as they might throw light on the motive of the defendant. This instruction was properly refused. In the first place, it was unnecessary for the court to name any offenses or charges for which the defendant was not on trial. The court did clearly define the offense with which the defendant was charged, and for which he was on trial, and did direct the application of the testimony to that charge. In the second place, the letters were receivable for other purposes than the mere motive of the defendant. They tended to establish the identity of the author of the letters, as well as the

was in dispute as to its genuineness, who had seen him write his name ten years before, and swore that he could remember the looks of his signature, must be accepted by the jury as true unless there were something in the case which cast discredit upon the witness's testimony, was proper. *Engmann v. Immel* (1884) 59 Wis. 249, 18 N. W. 152.

When the genuineness of a signature is in dispute, the number of witnesses upon two sides of the question does not always control; the knowledge of a witness and the means of his knowledge, his honesty and intelligence, are to be considered in determining what weight should be given to his evidence. *Long v. Little* (1886) 119 Ill. 600, 8 N. E. 194.

The jury must conclude, from the facts stated by the witness, the times, places, opportunities, and circumstances under which he acquired his knowledge, whether he really knows it or not; and they should consider the capacity and experience of the witness. If he is an illiterate man, or one whose business seldom brings him into contact with writing, his opinion would be entitled to much less weight than if he were an educated man, himself a penman accustomed to correspondence and to seeing people write, even if he be in no sense an expert. *United States v. Gleason* (1889) 37 Fed. 331.

The weight of such an opinion as evidence will in general depend upon the credibility of the witness and the extent of his means or opportunity of becoming familiar with the handwriting or signature of the individual in question; it may also be affected by the testimony of other witnesses to the same point, as well as by other facts and circumstances developed at the trial. *Salazar v. Taylor* (1893) 18 Colo. 538, 33 Pac. 369.

But a verdict establishing the genuineness of a disputed signature was set aside as against the weight of evidence, where only one witness expressed a belief as to the genuineness of the signature, and nine witnesses, one of them called by the party producing the instrument, all being equally familiar with the handwriting in question, swore that they had no doubt the signature was a forgery. *Bell v. Shields* (1842) 19 N. J. L. 93.

As against the testimony of eyewitnesses, the opinions of other witnesses, merely from knowledge of the handwriting, do not find favor. 64 L. R. A.

So an instruction that the opinions of witnesses based upon their acquaintance with the genuine signatures of a party are unsatisfactory, and ought not to overthrow positive and direct testimony of a credible witness who testifies from personal knowledge; but that, in case of a conflict between the positive evidence of witnesses in regard to the genuineness of handwriting, they are important as corroborative evidence,—is not erroneous. *Bruner v. Wade* (1892) 84 Iowa, 698, 51 N. W. 251. And *Hunsberger's Estate* (1895) 11 Montg. Co. L. Rep. 165, and *Risley v. Indianapolis, B. & W. R. Co.* (1877) 7 Biss. 408, Fed. Cas. No. 11,859 accord.

But the testimony of a man that he has not signed a document is not of a higher grade of evidence than the testimony of a man who is acquainted with his handwriting and swears as to his opinion of it. *Lefferts v. State* (1886) 49 N. J. L. 26, 6 Atl. 521.

So a letter proved to be in the handwriting of one of the parties by the testimony of three witnesses acquainted with his handwriting, was properly allowed to go to the jury, although the signature was denied by the testimony of the party charged with it. *Burgess v. Burgess* (1895) 44 Neb. 16, 62 N. W. 242.

In an action on a promissory note, when the plaintiff produced several witnesses, two of whom were acquainted with the defendant's handwriting and believed the signature to be his, and another testified as an expert, from comparison, that it was genuine, and a fourth gave evidence tending to show an admission of the signature by the defendant, a verdict for the defendant, whose only evidence on the other side was his own testimony, was set aside. *Canadian Bank of Commerce v. McMillan* (1871) 31 U. C. Q. B. 596.

But in Louisiana the conflicting evidence of witnesses to the genuineness of a writing will be outweighed by the sworn statement of an unimpeached witness charged with the writing, that he did not execute it. *Bayly v. Fourchy* (1880) 32 La. Ann. 136.

It is not a violation of N. C. Code, § 413, forbidding the judge to express "an opinion whether a fact is fully or sufficiently proved," to charge the jury that an opinion as to the handwriting of an individual ought to be received with caution, and that direct evidence that an individual, when he saw the note in

connection of the defendant with the offense charged, and hence to have limited that proof to mere motive would have been error.

Exception was taken to the refusal of the court to give the following instruction: "If the jury, or any one of the jury, after having considered all the evidence in this case, and after having consulted with his fellow jurymen, should entertain a reasonable doubt of defendant's guilt, or, after such consideration and consultation, should entertain a reasonable doubt as to whether or not the defendant was present at the time and place of commission of the alleged shooting, then the jury cannot find the defendant guilty." While this request was not allowed, the court did not overlook the individual duties and responsibilities of the jurors. In one

question, admitted having executed it, was entitled to greater weight than the expression of opinion by witnesses or experts as to the falsity of the handwriting. *Buxly v. Buxton* (1885) 92 N. C. 479.

The weight to be given to the testimony of similarity of signature is much more persuasive and satisfactory than that resulting from evidence of dissimilarity; for it is the experience of all business men that persons often vary materially in their signatures, depending sometimes upon the character of the pen, quality of paper or ink, and nervous condition of the writer, his posture in writing, his freedom from every interference, and many other circumstances, all of which serve to occasion dissimilarity. *Sarvent v. Hesdra* (1880) 5 Redf. 47.

The evidence of a witness who swears that he saw one of the parties sign the disputed instrument ought to outweigh the statement of another and equally credible witness, who testifies that he is acquainted with the handwriting of the alleged signer, and that he does not believe the signature to be genuine. Dissimilitude may be occasioned by a variety of circumstances,—by the state of health and spirits of the writer, by the materials, by his position, by his hurry or care. The testimony of a witness who speaks from his own personal knowledge is more satisfactory and convincing than the testimony of another who speaks of matters that lie in opinion only. *Risley v. Indianapolis, B. & W. R. Co.* (1877) 7 Biss. 408, Fed. Cas. No. 11,859.

And clearly the testimony of witnesses upon a trial for forgery, who swear that they are acquainted with the handwriting of the accused, and that the signature alleged to be forged is not in his handwriting, is not such that much reliance can be placed upon it; since the forger seeks to disguise his own handwriting, and to imitate that of the man whose signature he forges. *Langdon v. People* (1890) 133 Ill. 382, 24 N. E. 874.

A deposition in which the deponent swears that a writing purporting to be a will, which had been shown to him by the propounder of the will some time before the taking of the deposition, was in the handwriting of the deceased, was held to be competent evidence in spite of the objection that it was not competent for the witness to give evidence of the handwriting of a paper shown to him before the deposition was

of the instructions given, they were told that "the state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror, beyond a reasonable doubt." This was a sufficient admonition that each juror might act upon his own judgment, and each should be satisfied beyond a reasonable doubt that every element of the offense had been proved, and unless it was so proved there could be no conviction. It is argued that this rule of individual responsibility should have been applied to the matter of alibi. It is not necessary, nor would it be proper, for the court to make special application of the rule of individual right and duty of each juror to every branch and feature of the case. When the rule has been stated to the jury, and ap-

made, and without having the paper before him when he made his deposition; there being no distinct proof that the paper shown to him was the paper offered for probate. The objection went rather to the weight of the evidence than to the competency of the witness. Whether the testimony proved the identity of the paper was a question for the jury,—especially as the witness had been cross-examined on the occasion when his deposition was taken. *Nuckols v. Jones* (1851) 8 Gratt. 267.

When a plea of forgery is made to an action on an obligation, and is supported by the oath of a party, in Louisiana, much stronger evidence should be required of the execution of the instrument than in the ordinary case of a general denial. So proof by witnesses who have not seen the person in question write or sign, and who only express their belief or knowledge of the genuineness of the signature in dispute from its similarity and likeness to signatures of the same person which they have seen, is insufficient to support a verdict establishing the obligation. *Robinson v. Arnet* (1840) 15 La. 282.

The mere proof of handwriting, of persons who did not subscribe the instrument in question as witnesses or see it executed, is not sufficient, without any record evidence in confirmation, to establish the validity of a claim to land under the Federal statutes in regard to rights or titles derived from the Spanish or Mexican governments. *United States v. Oslo* (1859) 23 How. 273, 16 L. ed. 457.

b. Expert testimony.

(For treatment of the subject of the weight of evidence of handwriting from comparison, see the note, XII. a, to University of Illinois v. Spalding, 62 L. R. A. 817.)

Of all kinds of expert testimony that as to handwriting is probably looked upon with the least favor; as is declared in *Sarvent v. Hesdra* (1880) 5 Redf. 87. Besides the frequent charge of venality, made against the handwriting expert, well illustrated by the words of Lord Campbell in *Tracy Peerage* (1843) 10 Clark & F. 154, where he voiced his opinion "that hardly any weight is to be given to the evidence of what are called scientific witnesses," and that "they come with a bias on their minds to support the cause on which they are embarked,"

plied generally to every phase of the case and every ingredient of the offense, the purpose of the law has been subserved. There was no request for a special and distinct declaration on the law of alibi, nor any allusion to the subject, except the incidental reference to it in the requested instruction as to the individual duties and responsibilities of jurors. If the defendant desired a distinct instruction as to that defense, it should have been requested; and the failure, therefore, to give a special declaration, is not a ground for reversal.

Complaint is also made of a portion of the charge given which stated that, "while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do

so, and the statute expressly declares that his neglect to testify shall not create any presumption against him." This was evidently given for the benefit of the defendant, who failed to testify in his own behalf. The complaint is that the court did not call attention to the further provision of the statute that the prosecuting attorney cannot refer to the circumstance that defendant did not testify, and that it should not be considered by the court or jury before whom the trial takes place. We think the instruction as given was beneficial to the defendant, and we cannot conceive that the omission of the other provision of the statute could have prejudiced the defendant.

There is criticism of the instruction as to circumstantial evidence, but we think it a

the evidence is most frequently attacked on the ground of uncertainty and inconclusiveness.

So courts are found declaring that the evidence of experts "is so weak and decrepit as scarcely to deserve a place in our jurisprudence" (*Cowan v. Beall* [1874] 1 MacArth. 271); or "much too loose and unsatisfactory to lay the foundation for a judicial decision" (*People v. Spooner* [1845] 1 Denio, 343, 43 Am. Dec. 672); or far from satisfactory, and to be received with great care and caution (*State v. Van Tassel* [1897] 103 Iowa, 6, 72 N. W. 497; *Daniels v. Foster* [1870] 26 Wis. 686).

An instruction in regard to the testimony of handwriting experts, that it should be received by the jury with great caution; that they were at liberty to reject it, like the testimony of any other witness, if, after due consideration, they deemed it not well founded in fact; and that they were not legally compelled to follow the opinion of any such witness unless they were satisfied that it was correct,—was not erroneous. *Haight v. Vallet* (1891) 89 Cal. 245, 23 Am. St. Rep. 485, 26 Pac. 897.

So the jury were charged, in *United States v. Malloy* (1887) 31 Fed. 19, that the testimony of an expert as to handwriting is simply an expression under oath of an opinion which he entertains; and the jury are not bound by it further than it coincides with their own opinion on an examination made by them of the handwriting in question, or than they think deserves to be credited with an account of the experience of the witness.

And a charge that the opinion of handwriting experts was to be considered in connection with other evidence, but was not of itself conclusive; that the rule permitting experts to testify was grounded on the fact that such an opinion was generally correct, but that its value was to be determined by the jury with reference to the skill which the witness manifested; that experts were not infallible, but that their opinion was generally reliable,—was not improper. *Pratt v. Rawson* (1868) 40 Vt. 183.

Unless an expert who expresses his opinion as to the genuineness of a handwriting also states the reasons for his opinion, the evidence amounts to very little, if anything whatever, and in this case was stricken from the records. *Re Koch* (1900) 33 Misc. 153, 68 N. Y. Supp. 875.

The cashier of a bank, as a witness to handwriting with which he is acquainted, is entitled to no more credit than any other person

of equal skill. *Murphy v. Hagerman* (1833) Wright (Ohio) 293.

In Mississippi an instruction to the jury to the effect that, while the opinion of an expert is competent to go to the jury on an issue involving the genuineness of a written instrument, such evidence is intrinsically weak and ought to be received and weighed by the jury with great caution, is error. The weight and value of such evidence must be judged by the jury without any influencing instruction, either weakening or strengthening, from the court. *Coleman v. Adair* (1898) 75 Miss. 660, 23 So. 369.

In *Robson v. Locke* (1824) 2 Addams Eccl. Rep. 53, it was declared that the fact that a signature gives the appearance of having been "painted," or touched up, proves nothing, since many persons have a trick or habit of retouching their letters. It may happen to any person not in the habit of it to pass over his letters a second time from a failure of ink in the pen; and this circumstance of "painting" is in itself extremely trivial.

The opinions of experts, however skilful they may be, are weaker in degree of certainty than the direct evidence of a subscribing witness who swears to the genuineness of both signatures. *Brown v. Mutual Ben. L. Ins. Co.* (1880) 32 N. J. Eq. 809.

Thus on a contest as to the genuineness of the handwriting of a deed, when there was clear and distinct evidence of a surviving witness, who was not cross-examined, that he saw the deed signed, which evidence was unimpeached, it was not error in the vice chancellor to decide upon the point at issue, without granting an issue as to whether the signature of the deed was genuine, from the evidence of certain persons skilled in handwriting that in their opinion, looking at the handwriting of the signature, it was not genuine. The court said here: "That could be no counterbalance to the direct evidence of the attesting witness, and under all the circumstances of the case it would have been very indiscreet to grant such an issue." *Newton v. Ricketts* (1861) 9 H. L. Cas. 263, 31 L. J. Ch. N. S. 247, 7 Jur. N. S. 952, 5 L. T. N. S. 62, 10 Week. Rep. 1.

The testimony of expert witnesses to handwriting is not entitled to the same weight as the testimony of persons who speak concerning matters within their personal observation; and, as these witnesses simply express opinions which

fair statement of law as applied to the facts in this case, and that nothing in it could have misled the jury.

No error was committed by the court in declining to give an instruction on assault. The act was committed with a deadly weapon, and, under the testimony, if the defendant was guilty of any offense, it was one of a higher grade than mere assault.

In connection with defendant's letters to Maud Holmes, her letters to him were read to the jury. Objections were made to the admission of these, and although the ruling was not duly assigned as error, we are now asked to consider it. Her letters were made in duplicate, one of which she sent to him, and the other she retained. His letters were responsive to those written by her, and hers

explained those written by him. Her letters were, in a sense, adopted by him, and made a part of his own, and together constituted a single and continuous correspondence. If error had been regularly assigned on the reception of these letters, we would not regard it as ground for reversal.

The sufficiency of the testimony is challenged, and, although it is largely circumstantial, we think it strongly tends to prove the guilt of the defendant. The letters against which so many objections are made constitute a great part of the incriminating evidence. That the defendant is the author of the letters was quite satisfactorily shown, and although he assumed several characters, and wrote under several names, all the letters fit together, and disclose a base purpose

they entertain, the jury should regard their statements in this matter as opinions merely, and should give them such weight, only, as they think the opinions deserve considering the experience which the experts have had. *United States v. Pendergast* (1887) 32 Fed. 198.

When two officials before whom an instrument was executed swore positively to the fact that it was executed upon the day of its date, detailing circumstances from which they were able to make this statement, the testimony of experts that the date has been altered is not sufficient to outweigh their positive statements. *Spooner v. Best* (1880) 8 Ky. L. Rep. 185.

This accords with *Card v. Moore* (1902) 68 App. Div. 327, 74 N. Y. Supp. 18. There experts were allowed to testify that a typewritten agreement, upon careful inspection and under the scrutiny of the microscope, showed that a date had been tampered with; and it was said: "The testimony of an expert, however eminent, based upon the appearance of a paper of some age, when that appearance might be due to other causes than those inferred from visual examination and microscopic scrutiny, should not prevail with us against positive testimony of the witnesses in this case, . . . so as to require at our hands a reversal."

VIII. Summary.

Besides the mere opinion of the witness that a handwriting is genuine or not, it is competent to prove that the supposed forger is clever at imitating the handwriting of others; that a chemical found in the possession of one accused of altering an instrument had the actual effect of obliterating writing when used for that purpose; but a mere experiment with chemicals, generally, is not of sufficient direct value as evidence to be admissible; a witness may be examined, however, as to such matters as a change in the handwriting of the person in question. (*Supra*, II.) And purely conjectural matters, as of the capabilities, for doing a certain thing, of the person supposed to have written the disputed writing; or as to what would have been the judgment of the witness as to the writing in other circumstances,—are not properly the subject of testimony by witnesses. (*Supra*, III.)

It is now competent to call experts to testify from the mere appearance of the writing in question that it is genuine, or is in a disguised hand; or to decipher obscurities of handwriting;

or to give their opinions as to the age of a manuscript appearing to be old. As to opinions whether two writings were executed at the same time and with the same ink, however, there is sharp contradiction. Various incidental matters, which may be considered the grounds for the opinion of the witness as to the main question of genuineness, may be gone into by the witness; such as whether erasures or writings were made before or after the paper was folded, the digging out of the paper, the stiffness of the writing, the different inks used. But some matters are held to be for the jury alone, such as whether there has been an erasure; and whether the words are crowded so as to indicate interpolation. Mere possibilities, such as whether the person in question could improve his handwriting up to a certain standard, or whether an accurate tracing could be made in a particular manner, are not properly the subject of the opinions of experts. (*Supra*, IV.)

A cross-mark intended as a signature is generally not capable of proof, like handwriting, unless there appears to the court to be some distinctive characteristic about the mark by which it may be recognized; but the true rule would seem to admit proof of a mark by a witness who swears that he knows it from some peculiarity observed by him in it. (*Supra*, V.)

It seems that press or photographic copies of manuscript are capable of proof like ordinary handwriting. (*Supra*, VI.)

As for the value of the testimony of witnesses to handwriting there is, of course, no general rule; but, compared with the evidence of eye-witnesses, mere opinion is generally of less weight, except when the eyewitness is the person charged with the writing; but generally evidence going to show similarity of the disputed writing with the general character of the handwriting is of more convincing weight than evidence to the contrary effect. (*Supra*, VII. a.)

Expert evidence to handwriting is in small favor, and is of great weight generally only as against evidence of the same kind, and without the reasons for the opinion of the witness being given, is worthless. Juries, also, will be charged that, as against the testimony of witnesses speaking of matters within their personal observation, the expert's testimony is not entitled to the same weight. (*Supra*, VII. b.)

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to gain the confidence of the young woman, and procure her to meet him in a remote place, go through the form of a marriage, and thus establish a relation necessarily illicit. The improbability of a man so advanced in years and having a large family engaging in such a scheme, and carrying it out at such risk and with so much trouble, is urged against the verdict; but, however strange and unnatural such conduct is, the proof is so convincing that we have no inclination to disturb a finding based thereon. The letters show remarkable cunning in playing the different parts which he assumed, and also great persistency in the efforts to accomplish his purpose; but there are so many of them,—39 in number,—and they are so extended, that it is impracticable to set them out, or even to summarize them, here. In connection with the letters themselves, are the admissions made by him at the time of his visit that he was the George R. Clark who had written the preceding letters, and he was fully identified as the defendant; the vindictive feeling exhibited towards a young man who was paying especial attention to Maud, including an attempt to blacken his reputation and discredit him with the Holmes family; his ill will towards Maud herself, and intimations of a coming tragedy when his plans were thwarted; his prowling about the house where Maud lived, in the nighttime, and his attempted assault upon her which was interrupted; the poisoning of the dog, so that he might go to the Holmes place without interference; the tracks such as his shoes would make which were traced from the Holmes place to his farm; the wadding of the gun found after the shooting, which corresponded with some used by the defendant; the indications, too, that the shot was fired from such a gun as he had. These facts and circumstances, together with matters not enumerated, furnish sufficient support for the verdict.

All the objections made have not been mentioned, but all have been examined, and we find nothing in them disclosing prejudicial error.

The judgment will therefore be affirmed.

All the Justices concur.

Rehearing denied.

64 L. R. A.

C. C. STOFFER *et al.*, *Pliffs. in Err.*,
v.

James S. HARLAN *et al.*

(.....Kan.....)

*A mortgagee of real property in possession of the mortgaged premises after condition broken may not be disposed without the payment of the mortgage debt, unless his possession was acquired under such circumstances that he ought not, in equity, to be permitted to retain it. One who assumes possession of the property under color of foreclosure proceedings believed by him to be valid, however defective they may be in fact, is within the protection of this rule.

(December 12, 1903.)

ERROR to the District Court for Lyon County to review a judgment in favor of defendants in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. J. G. Hutchison, for plaintiffs in error:

The alleged sale was void and passed no title, and therefore judgment should have been for the plaintiffs in error.

Gordon v. Bodwell, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906; *Taylor v. Buck*, 61 Kan. 694, 78 Am. St. Rep. 346, 60 Pac. 736; *Rice v. Smith*, 18 N. H. 369; *Freeman*, Void Judicial Sales, § 46; *Robinson v. Hall*, 33 Kan. 139, 5 Pac. 763.

The court's jurisdiction had ceased.

Freeman, Judgm. § 142; *Wright v. Leclair*, 3 Iowa, 221; *Mulvey v. Carpenter*, 78 Ill. 580; *Johnson v. Anderson*, 76 Va. 766; *Van Fleet*, Collateral Attack, § 699.

Therefore, defendants in error failed to show that they had acquired the title of plaintiffs in error, by virtue of their foreclosure proceedings, and they are compelled to rely upon their possession as being lawful under their claim that they hold a mortgage on the land and have a right to the possession until it is paid.

It is for the occupant to show that he has a right to possession.

Bedell v. Shaw, 59 N. Y. 46; *Gross v. Welwood*, 90 N. Y. 638.

The presumption is that the debt is satisfied.

*Headnote by MASON, J.

NOTE.—As to who is mortgagee in possession, and what are rights, see, in this series, *Cook v. Cooper*, 7 L. R. A. 273, and *note*.

State ex rel. Henry v. McArthur, 5 Kan. 281; *Lytle v. Cincinnati Mfg. Co.* 4 Ohio, 466; 18 Enc. Pl. & Pr. 1057; *Lambson v. Moffett*, 61 Md. 426; *Stewart v. Peterson*, 63 Pa. 230; *Von Puhl v. Rucker*, 6 Iowa, 187.

The assent, express or implied, of the mortgagor that the mortgagee may take possession under or because of his mortgage, is of the essence of a mortgagee in possession.

Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Jones, Mortg.* § 717; *Newton v. McKay*, 30 Mich. 380; *Humphrey v. Hurd*, 29 Mich. 44; *Morrow v. Morgan*, 43 Tex. 304; *Pierce v. Grimley*, 77 Mich. 273, 43 N. W. 932; *Cable v. Ellis*, 86 Ill. 525.

Defendants in error got into possession surreptitiously and by a collusive deal between them and the tenant of plaintiffs in error. This is not a lawful possession, and will not prevent plaintiffs in error from maintaining an action of ejectment for the land, although the debt had not been paid.

Forbes v. Caldurell, 39 Kan. 14, 17 Pac. 478; *Jones, Mortg.* § 715, p. 620; *Pom. Eq. Jur.* § 1190; *Ferman v. Lombard Invest. Co.* 56 Minn. 166, 57 N. W. 309; *Davenport v. Turpin*, 41 Cal. 100; 20 Am. & Eng. Enc. Law, 2d ed. p. 1004; *Cable v. Ellis*, 86 Ill. 525; *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296; *Hannay v. Thompson*, 14 Tex. 144; *Morrow v. Morgan*, 43 Tex. 304; *Newton v. McKay*, 30 Mich. 381; *Russell v. Ely*, 2 Black. 575, 17 L. ed. 258; *Gillett v. Eaton*, 6 Wis. 30; *Tallman v. Ely*, 6 Wis. 257; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82; *Bennett v. Austin*, 81 N. Y. 308; *Howell v. Leavitt*, 95 N. Y. 617; *Galloway v. Kerr* (Tex. Civ. App.) 63 S. W. 180; *Kerr v. Galloway* (Tex.) 64 S. W. 858; *Pingrey, Mortg.* § 910; *Reading v. Waterman*, 46 Mich. 107, 8 N. W. 691; *Mills v. Hamilton*, 49 Iowa, 105; *Mills v. Heaton*, 52 Iowa, 217, 2 N. W. 1112; *Howard v. La Crosse & M. R. Co.* Woolw. 57, Fed. Cas. No. 6,760; *Witherell v. Wiberg*, 4 Sawy. 232, Fed. Cas. No. 17,917; *Newell, Ejectment*, p. 113; *Boone, Mortg.* § 118.

Mr. Charles B. Graves, for defendants in error:

The order of sale was not void because the seal of the court was omitted therefrom when attacked collaterally.

Paine v. Spratley, 5 Kan. 525; *Bowman v. Cockrill*, 6 Kan. 324; *Cross v. Know*, 32 Kan. 725, 5 Pac. 32; *Dickens v. Orane*, 33 Kan. 344, 6 Pac. 630; *Pritchard v. Madren*, 31 Kan. 39, 2 Pac. 691; *Phillips v. Love*, 57 Kan. 834, 48 Pac. 142; *Watson v. Tromble*, 33 Neb. 450, 29 Am. St. Rep. 492, 50 N. W. 331; *Rorer, Judicial Sales*, § 57, pp. 30, 76; *Van Fleet, Collateral Attack*, § 66; 64 L. R. A.

Rood, Attachments, Judgments, & Executions, §§ 26, 46; *Head v. Daniels*, 38 Kan. 12, 15 Pac. 911; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Terrill v. Auchauer*, 14 Ohio, St. 80; *Williams v. Harrington*, 53 N. C. (11 Ired. L.) 616, 53 Am. Dec. 421; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 333.

Defendants are not required, at their peril, to obtain the consent of the real owners of the land, however hidden such ownership may be, to receive the equitable protection of mortgagees in possession. When a mortgagee in good faith begins the proper foreclosure proceedings to realize upon his security, and in good faith conducts the proceeding to an end, and especially where jurisdiction of the parties and of the subject-matter is obtained; and in such case the court adjudicates that the amount claimed is a first lien upon the land, and orders the land sold, and afterwards confirms the sale, and orders a deed, and the purchaser with such deed in good faith acquires possession without a violation of law or breach of the peace or the commission of a fraud,—the possession so acquired places him in a position to retain such possession, against the mortgagor, until his debt is paid, even though the proceedings in foreclosure are invalid.

Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Romig v. Gillett*, 187 U. S. 111, 47 L. ed. 97, 23 Sup. Ct. Rep. 40; *Cooke v. Cooper*, 18 Or. 142, 7 L. R. A. 273, 17 Am. St. Rep. 709, 22 Pac. 945.

Mason, J., delivered the opinion of the court:

Prior to 1889 C. C. Stouffer was the owner of a tract of land in Lyon county, subject to a mortgage to the Emporia Investment Company. It was arranged that a new mortgage, maturing January 1, 1894, should be given in satisfaction or extension of the old one. For some reason, it was agreed that, instead of Stouffer executing the new mortgage himself, the property should be conveyed to one F. R. Stevenson, who should make the mortgage, and then reconvey to Stouffer. This plan was carried out, although the formal reconveyance was not made until some time later. Stevenson's part in the transaction is of no moment, as he was merely acting for Stouffer. In April, 1889, this mortgage was bought by, and assigned to, Phineas Prouty. In 1891 Prouty died, and executors were appointed and qualified. In October, 1894, suit to foreclose the mortgage was brought by the Emporia Investment Company in the

name of the executors; service being made upon Stouffer, a nonresident, by publication. The executors afterwards ratified and adopted the act of the investment company in bringing the suit. A judgment of foreclosure was rendered, and an order of sale was issued, from which the seal of the court was omitted. Under color of this process the property was sold by the sheriff and bid in by Richard D. Harlan, one of the plaintiffs. In October, 1895, at the request of the executors, a sheriff's deed was made to James S. Harlan, who held it for the estate, acting for and under the direction of the executors. W. L. Loomis, as the tenant of Stouffer, occupied the property in 1895, and until about March 1, 1896, when Edwin Hawkins, to whom Harlan proposed to lease it for the ensuing season, at Harlan's suggestion, requested him to vacate as soon as his time as tenant expired, which he understood to be on March 1st. Loomis did vacate the property, accordingly, prior to March 1st; and after that date Hawkins entered upon it as the tenant of the executors, who thereby acquired its quiet, peaceable, and exclusive possession and control. Stouffer had no knowledge of the foreclosure proceedings until the summer of 1896. In September, 1898, he began an action against Harlan and the executors for the recovery of the possession of the property, and was defeated. He brings this proceeding to reverse the judgment.

The omission of the seal rendered the order of sale and all proceedings under it null and void. *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, 51 Pac. 906. Irrespective, therefore, of any question growing out of its being made to an apparent stranger to the proceedings upon which it was based, the sheriff's deed passed no title. The trial court held that the circumstances stated made the defendants "mortgagees in possession," and precluded the plaintiff from recovering the property without paying the mortgage debt. The question here presented is whether this ruling was correct. The expression "mortgagee in possession" has been adopted by the courts and law writers as a convenient phrase to describe the condition of a mortgagee who is in possession of mortgaged premises under such circumstances as to make the satisfaction of his lien a prerequisite to his being dispossessed, even in jurisdictions where the mortgage itself can confer no possessory right either before or after default; but the authorities are in some confusion as to what these circumstances are. It has been said that the possession must be "lawfully" acquired (*Gillett v. Eaton*, 6 Wis. 30; *Tallman v. Ely*, 6 Wis. 244); that it is sufficient that it is acquired "peaceably" (*Hen-*

ney v. Farrell, 20 Wis. 42; *Brinkman v. Jones*, 44 Wis. 498), or "without force" (*Pell v. Ulmar*, 18 N. Y. 139); that it must be taken under the mortgage, and because of it (*Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765); that it need not be under the mortgage, nor with a view thereto (*Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82); that it must be by consent of the mortgagor, express or implied (*Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765); that it is not sufficient if obtained by an arrangement with the tenant of the mortgagor after his lease had expired (*Russell v. Ely*, 2 Black, 575, 17 L. ed. 258). Many cases are reported in which possession was obtained under color of irregular or void foreclosure proceedings. In some of these, such as *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896, and *Cross v. Knox*, 32 Kan. 725, 5 Pac. 32, the possession is held sufficient upon the ground that it was taken with the express or implied consent or acquiescence of the mortgagor, or that the mortgagor had waived the right to object. But in others the fact that the mortgagee took possession in reliance upon foreclosure proceedings which he in good faith believed to be valid is made a distinct ground for according him the rights of a mortgagee in possession, apart from any question of the consent or acquiescence of the mortgagor. In *Van Dyne v. Thayer*, 14 Wend. 233, it is said: "If the mortgagee after forfeiture entered into possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there,—at least till his debt is paid." However, as possession in that case was not taken in virtue of any proceedings in court, it would seem that the words "or by means of legal proceedings" are *obiter*, or else "legal" is used merely in the sense of "lawful." In *Cooke v. Cooper*, 18 Or. 142, 7 L. R. A. 273, 17 Am. St. Rep. 709, 22 Pac. 945, the second paragraph of the syllabus, which is quoted with approval in *Kelso v. Norton*, 65 Kan. 785, 93 Am. St. Rep. 311, 70 Pac. 898, reads as follows: "If, for any cause, in the foreclosure suit, the proceeding is ineffectual to foreclose the mortgage, and the mortgagee purchases at a sale under such void proceedings, and enters into the possession under such sale, his relation to the mortgaged premises is that of a mortgagee in possession." This accurately indicates the scope of the opinion, but the argument in support of the conclusion is based almost entirely upon the authority of various New York cases in which the language used is broader than the facts under consideration required. In *Bryan v. Brasius* (Ariz.) 31 Pac. 519, in a case where pos-

session was taken under invalid foreclosure proceedings, without fraud (there being, however, no suggestion of consent of the mortgagor), it is said: "But the facts in the case disclose an indebtedness of \$2,500 to Kales from T. J. Bryan, and a mortgage to secure the same on the property in dispute; a proceeding in court, in good faith and without fraud on the part of Kales or anyone, to foreclose the mortgage (the proceeding thought to be valid and regular on its face); a sale under the decree of the court, and possession taken in pursuance thereof; and taxes paid and valuable and lasting improvements made by the purchaser and his grantees. The plaintiff brings suit by action of ejectment. He does not pay or offer to pay the mortgage debt. In this territory the action of ejectment is based on the right of possession. I think, on the very best of authority and the highest equity, the defendant must be held to be the mortgagee in possession, and subrogated to the rights of Kales under his mortgage, and entitled to remain in possession till the requirements of equity are fully met." This case was taken to the United States Supreme Court, where it was affirmed (*Bryan v. Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803, following *Bryan v. Kales*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802), but upon the authority of cases arising in jurisdictions where the mortgagee, after condition broken, has the legal estate in the mortgaged property, without any discussion as to whether the rule should be the same where the mortgage merely gives a lien. In *Romig v. Gillett*, 187 U. S. 111, 47 L. ed. 97, 23 Sup. Ct. Rep. 40, it is said: "A mortgagee who enters into possession, not forcibly, but peacefully, and under the authority of a foreclosure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage remains unpaid." But this is stated, not as a determination then reached by the court upon consideration of the matter before it, but as the effect of the opinion in *Bryan v. Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803, and cases there cited. In *Barson v. Mulligan*, 66 App. Div. 486, 73 N. Y. Supp. 262, it is said: "The only question, therefore, that can arise as to the right of a mortgagee in possession to hold the premises until the mortgage debt is paid, depends upon the method by which he obtained possession, and it is claimed that that possession must be with the assent of the mortgagor; but I can find no authority limiting the right of a mortgagee to hold property of which he is in lawful possession to a case where such possession was with the consent of the mortgagor. . . . 64 L. R. A.

What is essential to entitle a mortgagee to hold possession of the premises until his mortgage debts are paid is that his possession should have been lawfully acquired. If, under a deed which purports to convey title, a mortgagee enters into possession, although that deed is void, he is entitled to maintain possession until his mortgage debt is paid. This follows from the decisions in the cases in which a mortgagee has entered under a deed in a foreclosure proceeding, either statutory or by action of foreclosure." But it is at least doubtful whether this language is warranted by the authorities to which it refers.

In *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459, the court gave full consideration to the very question under discussion, and reached a conclusion indicated by the following extracts from the opinion: "We are of the opinion that when there is a default in the mortgage, and the mortgagee, in apparent good faith, makes a void foreclosure, and, after the end of the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings he should be treated as a mortgagee in possession, whether he takes possession with or without the consent, either express or implied, of the mortgagor. It is true that, unlike a mortgage at common law, a mortgage under our statute gives the mortgagee neither the title nor right of possession. But the courts were long ago compelled to recognize a marked difference between the character of our statutory mortgage after default, but before foreclosure, and the character of the same mortgage after an abortive foreclosure, and the year to redeem has expired. . . . Every mortgagor understands, when he executes a mortgage, that, if he defaults in the conditions to be by him performed, an attempt will be made to foreclose the mortgage. If he makes no effort to take advantage of the irregularities in an abortive foreclosure until after the year to redeem has expired, and the purchaser at the foreclosure sale has in good faith taken possession, what court will then oust such purchaser without payment of the mortgage indebtedness, even though there was no express consent of the mortgagor to such possession, and the circumstances raise no presumption of an implied consent? . . . Surely, the mortgagor cannot, in such a case, obtain possession except through an action to redeem, whether the purchaser has been in possession one day or nine years. But if the purchaser has been in possession only one day, it cannot be held that so short a period of possession is of itself sufficient evidence of the consent of the mortgagor to that possession. Then it cannot be held that the

purchaser's right to continue in such possession, taken peaceably and in good faith, after the year has expired, is based on the mortgagor's consent, express or implied, but, on the contrary, it is based on that rule of law which denies to the mortgagor in such a case any remedy but one in equity, which will compel him to do equity." This we regard as the most full and satisfactory discussion of the question upon its merits to be found in any adjudicated case.

On the other hand, in *Howell v. Leavitt*, 95 N. Y. 617, the owners of the mortgaged property were permitted to maintain ejectment against a mortgagee who had acquired possession by a writ of assistance under a void judgment. The land was owned by minors, and occupied by their tenant, who was dispossessed under the writ without their knowledge. The decision was based upon the ground that such possession was obtained by force, and was unlawful. In *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942, and in *McClory v. Ricks*, 11 N. D. 38, 88 N. W. 1042, it is held that ejectment may be maintained against a mortgagee who is in possession under a void or irregular foreclosure; but the argument presented in support of these decisions, and of others which they follow, is largely directed against the right of the mortgagee who is out of possession to bring action to be let into possession, the courts refusing to recognize any distinction between the right to demand possession and the right to hold it when it is once obtained. The same conclusion is announced in *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196, but without extended discussion, and upon the authority of a Michigan case.

To determine the true extent of the doctrine under consideration in the face of these conflicting decisions, it is well to consider its origin and reason. In an article entitled, *How Mortgagee, as Such, can Get Possession*, published in the Albany Law Journal (vol. 26, p. 528, and vol. 27, p. 6), an ingenious review of the New York cases is presented in support of the contention that the right of the mortgagee to retain possession is founded upon contract, and therefore exists only when the mortgagor agrees that the mortgagee may take possession of the mortgaged property for his better security. This view would practically do away with the doctrine altogether, since it is not necessary to invoke any peculiar rule of equity to provide for the enforcement of such an agreement. In *Howell v. Leavitt*, 95 N. Y. 617, it is suggested that the old rule, existing when a mortgage actually passed the title to the property, kept its hold upon the later opinions when the reason which led to it was gone. Mr. Pom-

eroy, in his work on Equity Jurisprudence, adopts this view of the origin of the doctrine, but adds (vol. 3, § 1189): "The courts, while retaining the doctrine as settled, have guarded against any inference from it that the mortgagee has acquired a legal estate by his possession. His right to retain possession does not depend upon an estate held by him. His possession is protected by his lien. It is certainly more simple and just that the mortgagee should be left in possession, and the mortgagor forced to redeem, than that the mortgagor should be permitted to recover the possession by an action at law, and be immediately liable to the consequences of a foreclosure suit in equity brought by the mortgagee." And in *Gillett v. Eaton*, 6 Wis. 30, it is said: "If the defendant is turned out of possession because he is in as a mere mortgagee, he will be put to the trouble and expense of foreclosing his mortgage, and perhaps put to the necessity of taking legal steps to regain possession. It is not the policy of the law to encourage such litigation. And substantial justice will be better subserved by permitting the mortgagee to retain the possession which he has lawfully acquired, until the mortgagor, or those claiming under him, shall institute proceedings for the purpose of redemption." And in *Tallman v. Ely*, 6 Wis. 244: "It would be unwise, and inequitable to permit the grantee of the mortgagor to obtain the possession, as against the mortgagee or his assigns, while the mortgage debt remains unpaid. Under such circumstances, if the grantee desired to obtain possession of the premises he could file his bill to redeem, and the court could properly aid him in obtaining possession after the encumbrance was discharged. In this way equity could be fully done between all the parties. Again, if the court should put the mortgagor or his grantee in possession of the premises without requiring him first to pay off the mortgage, it might be called upon at the next moment, in a proceeding to foreclose and sell the mortgaged premises, to turn him out and reinstate the mortgagee or his assignee. But all this unnecessary expense and fruitless litigation can be avoided, and the rights and interests of the parties most completely subserved and protected, by adhering strictly to the doctrine that, if the mortgagee or his assigns, after forfeiture, obtains possession lawfully, the mortgagor, or those claiming under him, should not recover the possession without paying the money secured by the mortgage." Substantially the same reasoning is employed in other cases, as shown by several of the quotations already made. Whatever may be the source of the rule historically, we think it is justified upon equi-

table principles by the considerations just stated, and that it should be followed, because of that fact, and be administered with reference to it; that it should be acted upon when the circumstances are such that these reasons are applicable, and only then. It is obvious that such reasons apply to all cases in which the mortgagee has actual possession of the mortgaged property, except where he has acquired it under such circumstances that it would be inequitable to permit him to assert a right under it. The expression, frequently used, that the entry must be lawful, we interpret to mean, not that it must have been effected under a formal right capable of enforcement by legal proceedings, but that it must not be through any unlawful or wrongful act, upon which the mortgagee would be estopped to found a right. The importance given to the matter of the consent or acquiescence of the mortgagor we conceive to be derived, not from the idea of its establishing a contract (since, as already suggested, if a contract for possession exists, there is no occasion to invoke the rule), but from the fact that it frees the mortgagee from any suspicion of having obtained possession by fraud or force. We conclude that the true rule is that, when the mortgagee is in possession of the mortgaged premises after condition broken, he may not be dispossessed without a payment of the mortgage debt, unless his possession was acquired under such circumstances that he ought not, in equity, to be permitted to retain it. This conclusion may not go far toward the practical solution of questions involving the application of the doctrine, but it is sufficient for the purposes of the present case, since it is clear that one who assumes possession of the mortgaged property under color of foreclosure proceedings believed by him to be valid, however defective they may be in fact, cannot be thought to have thereby estopped himself to assert the right otherwise given him to retain possession until his debt is paid. There is nothing in the facts of this case to impeach the good faith of defendants in error, or to charge them with the use of force or fraud in gaining possession, and they are within the protection of the rule as stated.

Two minor questions are also presented. The plaintiff below, in his reply, pleaded that the mortgage debt had been paid. He offered no proof under this allegation until the cause had been submitted, and the decision of the court announced. Then he asked leave to introduce evidence in support of it, but the request was denied. We cannot say that this was an abuse of discretion. It is now urged, upon the authority of *State ex rel. Henry v. McArthur*, 5 Kan. 64 L. R. A.

280, that there was a presumption that the debt was paid, arising from the fact that the judgment had become dormant. If the judgment were dormant, as contended, the situation would furnish a good illustration of a class of cases, readily to be imagined, in which the doctrine just discussed serves to prevent gross injustice. But under the authority of *Watson v. Keystone Ironworks Co.* (Kan.) 74 Pac. 269, overruling *State ex rel. Henry v. McArthur*, 5 Kan. 280, the judgment or decree, so far as it affords a remedy against the land, has not become dormant. But the judgment was not dormant when this action was begun, and, if it had afterwards become dormant, that fact could not have raised a presumption of payment for the purposes of this case.

The plaintiff, upon other considerations, did recover a part of the real property sued for. The trial court divided the costs. It is claimed that this was error; that, under the authority of *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14, plaintiff, having recovered a part of the property sued for, should have been awarded all his costs. That rule holds good in purely legal cases; but where equitable issues are tried, and the defendant prevails in part, a division of the costs is not only permissible, but has been enforced by this court. *Longworth v. Johnson*, 66 Kan. 193, 71 Pac. 259.

The judgment is affirmed.

All the Justices concur.

John T. ATKINSON *et al.*, *Pliffs. in Err.*,
v.

H. P. WOODMANSEE.

(.....Kan.....)

*1. Section 5121, Gen. Stat. 1901, being § 5 of the mechanic's lien law, and providing as follows: "And in case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed,"—permits an amendment, correcting the description of the prop-

*Headnotes by BURCH, J.

NOTE.—As to constitutionality of provision for attorneys' fees in a particular class of cases, see also, in this series, note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 586; and the later cases of *Union Cent. L. Ins. Co. v. Chowning*, 24 L. R. A. 504; *Hocking Valley Coal Co. v. Rosser*, 29 L. R. A. 386; *Vogel v. Pekoe*, 30 L. R. A. 491; *Cameron v. Chicago, M. & St. P. R. Co.* 31 L. R. A. 553; *Dell v. Marvin*, 45 L. R. A. 201; *Davidson v. Jennings*, 48 L. R. A. 340; *Gano v. Minneapolis & St. L. R. Co.* 55 L. R. A. 263; and *Missouri, K. & T. R. Co. v. Simonson*, 57 L. R. A. 765.

erty and the name of the owner, and does not thereby authorize the taking of property without due process of law.

2. Section 5125, Gen. Stat. 1901, being § 9 of the mechanic's lien law, and providing as follows: "In an action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action,"—denies to persons within the jurisdiction of this state the equal protection of the laws, and is therefore unconstitutional and void.

(December 12, 1903.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to enforce a mechanic's lien. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Joseph Johnson and J. A. Smith, for plaintiffs in error:

A claimant's lien must stand or fall with the lien on file at the expiration of the four months from the making of the improvement, and no amendment can be made as to substance after the four months have expired.

Dorman v. Crozier, 14 Kan. 224; *Long v. Froman*, 49 Kan. 360, 30 Pac. 461; *Leavenworth, N. & S. R. Co. v. Whitaker*, 42 Kan. 634, 22 Pac. 733; *Cogshall v. Spurry*, 47 Kan. 448, 28 Pac. 154; *Parsons Water Co. v. Hill*, 46 Kan. 145, 26 Pac. 412.

The statute allowing the attorney's fee imposes a penalty upon a certain class of persons, or litigants, not imposed upon other classes, and deprives them of the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 35, 38 N. W. 660; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Johnson v. Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; *Davidson v. Jennings*, 27 Colo. 187, 48 L. R. A. 340, 83 Am. St. Rep. 49, 60 Pac. 354; *Randolph v. Builders' & Painters' Supply Co.* 106 Ala. 501, 17 So. 721; *Paddock v. Missouri P. R. Co.* 155 Mo. 537, 56 S. W. 453; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Williamson v. Liverpool, L. & G. Ins. Co.* 105 64 L. R. A.

Fed. 31; Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. (Willson) p. 565, 19 S. W. 910; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680.

Messrs. Alden & McFadden and S. H. Whisman for defendant in error.

Burch, J., delivered the opinion of the court:

In an action for the foreclosure of a mechanic's lien it was discovered that the land upon which the improvement had been erected had been misdescribed, and that the owner had been misnamed in the original lien statement. The district court permitted amendments to cure these defects, and rendered judgment foreclosing the lien. This action of the court is complained of. It was, however, fully warranted by § 5121, Gen. Stat. 1901, which provides as follows: "And in case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed." The legislature could, without doubt, provide for the enforcement of a lien statement, amended as to parties and as to property, to the same extent that it could provide for the appropriation of the property by virtue of a lien in the first instance. The judgment rendered, however, included an attorney's fee of \$25, allowed upon due proof under § 5125, Gen. Stat. 1901, which reads as follows: "In any action brought by any artisan or day laborer to enforce any lien under this act, where judgment be rendered for plaintiff, the plaintiff shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action."

The Constitution of the United States is the supreme law of the land, and the judges in every state are bound thereby, anything in the Constitution or laws of their own state to the contrary notwithstanding. U. S. Const. art. 6. Section 1, art. 14, of the Amendments to that Constitution, provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The statute in question singles out property owners who are charged with receiving from artisans or day laborers labor going to the improvement of their property, by virtue of contract made by themselves or through contractors employed by them, and mulcts them in damages if they should be unsuccessful in resisting a claimed lien therefor. Under the statute such persons are subjected to a liability for attorneys' fees when owners of other classes of property, and when other classes of persons employing artisans and day laborers are not

subjected to such burden, and their contracts for labor are segregated from all other contracts and separately classified, as if they possessed some distinctive attribute calling for the imposition of special legislative penalties for their enforcement. Of course, the legislature may classify objects of legislation, and it has a wide discretion in that respect, but classifications may not be made either arbitrarily or capriciously. There must be differences in the elements and relations distinguished, producing consequences justifying difference in treatment, and these differences must be such as by the very nature of the things considered divide them into classes. Thus a statute allowing the recovery of attorneys' fees in an action against a railroad company for damages caused by its negligence in permitting the escape of fire is in the nature of a police regulation to prevent carelessness in the use of a dangerous element and the consequent destruction of property. *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602, Affirmed in 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. The business of fire insurance has likewise assumed such a peculiar and special relation to the public welfare that the legislature is authorized to provide special penalties for breaches of contracts made in its prosecution. *British America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Fidelity Mut. Life Assn. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. But the homely and highly beneficial act of building or repairing some structure upon his premises, or otherwise improving them, by any man, whether rich or poor, who possesses property, whether much or little, does not so stand out from his other ordinary and innocent employments, or so stand out from similar employments of other men, as naturally to distinguish it from them. There is absolutely nothing to indicate that such a person, or a contract for such a purpose, should be the subject of impositions not suffered by others. The duty to pay is not more vital to the welfare of the public in this case than it is between other persons and with respect to other obligations. The legislature could not have believed that claims of the character adverted to by this act were unconscionably resisted beyond all other debts, and no other legal reason is discoverable for such a hostile and discriminating law.

Under the Constitution of the state of Kansas, artisan and owner, contractor and laborer, are each one possessed of equal and inalienable rights to life, liberty, and the pursuit of happiness. They all live under the same indiscriminating sunshine, breathe the same free air, venerate the same historical past, are imbued with the same pa-

triotic ideals, and look forward to equal shares in the common blessings of a higher civilization in a brighter future. The burden of the law upon them should be as equal and impartial as the law of gravitation, and yet, in the baldest and most arbitrary manner imaginable, this act "singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection." *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 153, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255. There is, therefore, a perfectly manifest and utterly irreconcilable conflict between the statute and the Constitution. The Constitution is the direct mandate of the people themselves. The statute is an expression of the will of the legislature. Which shall this court obey?

In the first case in the first volume of the Reports of decisions made by this court, it was assumed that a statute which clearly and beyond any substantial doubt infringes the supreme law should be declared unconstitutional. The power to do so has since been exercised many times. There is no lawful or conscientious escape from its exercise in this case, and the statute in question is declared to be unconstitutional, and no warrant for the taxing of an attorney's fee as a part of the costs in the court below.

In a dissenting opinion in the case of *Re Davis*, 58 Kan. 368, 384, 49 Pac. 160, the writer discovers the following statement: "It is now too late, for any effective purpose, to deny the right of the courts to sit in judgment upon acts of the legislature. Accumulated precedent has established such right beyond the questioning of one judge, or even of many judges. If, however, it were an open inquiry, I should have no hesitation in denying the existence of the jurisdiction assumed." This language refers to the right and power of courts to adjudge statutes conflicting with the fundamental law

to be unconstitutional, since that is the only right to sit in judgment upon the acts of the legislature which has been established, and the only power of jurisdiction which courts assume to have over acts of the legislature, aside from the ordinary and unquestioned matter of interpretation. Following the announcement quoted, is this remarkable statement: "No close student of the structure, history, and philosophy of the government but will agree that the exercise of such power was not within the design of the framers of either state or Federal Constitutions. The question whether such power should be conferred by express provision was debated in the Constitutional Convention of 1787. Propositions to confer it were repeatedly brought forward, and as often put aside without decision. Finally, the one introduced by Mr. Madison was put to a vote, and received the approval of Delaware, Maryland, and Virginia only; Mr. Dickinson, during the course of the debate, epitomizing the objection to the scheme in the pithy observation that 'the judiciary of Aragon became by degrees the lawgiver.' It never thereafter, during the sessions of the Convention, became a subject of discussion. Bancroft's History of the Constitution, vol. 2, chap. 10."

Against the extravagance of this language may be opposed a statement somewhat rhetorical in form, but still of one who has been accredited a close student of the structure, history, and philosophy of government,—Rufus Choate: "I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the legislature contrary to the Constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the executive, to have vindicated it by that easy yet adamant demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stage of intoxication denies it,—this is an achievement of statesmanship (of the judiciary) of which a thousand years may not exhaust or reveal all the good." Harvard Law School Address, July, 1845.

Propositions to confer in express words the simple power to declare statutes unconstitutional were not put aside in the Federal Convention. The proposition of Madison, debated by Dickinson and defeated upon receiving the approval of Delaware, Maryland, 64 L. R. A.

and Virginia, only, was not such a proposition, and Bancroft does not so state. Bancroft's text is as follows: "A deeply seated dread of danger from hasty legislation pervaded the mind of the Convention; and Madison, Madison, and others persistently desired to vest in the Supreme Court a revisionary power over the acts of Congress, with an independent negative, or a negative in conjunction with the executive." Bancroft's History of the Constitution, p. 195, chap. 10.

Madison's motion was that "all acts, before they become laws, should be submitted both to the executive and supreme judiciary departments, that, if either of these should object, two thirds of each House—if both should object, three fourths of each House—should be necessary to overrule the objections and give to the acts the force of law." 3 Documentary History of the Const. 536.

This proposition, as all others which had preceded it, allowed the judges to pass upon the wisdom, policy, and expediency of legislative acts, and involved them in politics, parties, and all the business and circumstance of legislation. That proposition was debated and defeated. In the course of the debate upon that question Dickinson made the statement quoted, because impressed with a remark of Mercer that the judiciary ought to be separate from the legislative, and that he disapproved the doctrine that the judges, as expositors of the Constitution, should have the authority to declare a law void. 3 Documentary History Const. 537, 538. Mr. Gouverneur Morris replied to Dickinson that he could not agree that the judiciary should be bound to say that a direct violation of the Constitution was law. 3 Documentary History Const. 538. And the proceedings of the Constitutional Convention, and of the state conventions held to consider its adoption, may be searched in vain for any expression of dissent from the view of Morris, except the two just referred to.

On the other hand, on June 4th, when debating in the Federal Convention the subject of a council of revision, Elbridge Gerry "doubts whether the judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some states the judges had actually set aside laws as being against the Constitution. This was done too with general approbation. It was quite foreign from the nature of the office to make them judges of the policy of public measures." 3 Documentary History Const. 54.

On July 17th, when considering a proposition to give a congressional negation to

state laws, "Mr. Sherman thought it unnecessary, as the courts of the states would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived." 3 Documentary History Const. 351. And "Mr. Gouverneur Morris was more and more opposed to the negative. . . . A law that ought to be negatived will be set aside in the judiciary department, and, if that security should fail, may be repealed by a national law." 3 Documentary History Const. 353.

On July 21st, James Wilson renewed the proposition to associate the judiciary with the executive in the revisionary power, saying: "The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It has been said that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the judges in refusing to give them effect." 3 Documentary History Const. 390.

On the same day Luther Martin "considered the association of the judges with the executive as a dangerous innovation, as well as one which could not produce the particular advantage expected from it. A knowledge of mankind and of legislative affairs cannot be presumed to belong in a higher degree to the judges than to the legislature. And as to the constitutionality of the laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative." Documentary History Const. 395.

And on that day George Mason observed that "it had been said that if the judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of judges they would have one negative. He would reply that in this capacity they would impede in one case only—the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive, or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course. He wished the further use to be made of the judges of giving aid in preventing every improper law." 3 Documentary History Const. 396.

In the convention of North Carolina, Richardson Davies, a delegate to the Federal 64 L. R. A.

Convention, said that, "without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened. . . . And the Constitution might be violated with impunity if there were no power in the general government to correct and counteract such laws. This great object can only be safely and completely obtained by the instrumentality of the Federal judiciary." 4 Elliot's Debates, 156, 157.

In the convention of Pennsylvania, James Wilson said: "If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law." 2 Elliot's Debates, 489.

In the Virginia convention Edmund Randolph said that, if Congress wished to aggrandize themselves by oppressing the people, the judiciary must first be corrupted. And Patrick Henry spoke as follows: "The honorable gentleman did our judiciary honor in saying that they had firmness to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure your Federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary." 3 Elliot's Debates, 325.

In this convention, fifteen years before the decision in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, John Marshall spoke as follows: "Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." Magruder's Life of John Marshall, 93.

Alexander Hamilton has been esteemed to be something of a student of the structure and philosophy of this government, and as a member of the Federal Convention had some share in framing the Constitution of the United States. In order to induce the people of the United States to adopt that Constitution, he gave to the world upon June 17 and 20, 1788 the paper constituting No. 78 of *The Federalist*, in which the following discussion of this subject occurs:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American Constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do, not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will

to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." *The Federalist*, Lodge's ed. 482, 484.

Doubtless some consideration of these among other facts led Henry Hitchcock, LL. D., a learned lawyer and an accomplished scholar, to say to the students of Michigan University: "The doctrine that it is the right and duty of the courts to declare void a law repugnant to the Constitution lies at the very root of our system of government." *Const. History*, as seen in *American Law*, 77.

And in an able and exhaustive discussion of this subject, under the title *The Legislature and the Courts*, Judge Charles B. Eliott says: "But the change in the form of government from a monarchy to a republic rendered necessary a change in theory as to the location of sovereignty. The absolute authority of Parliament as sovereign was now transferred to the people, and the restraints which applied to the executive in the English system became applicable to the new government as a whole. The change in location of the sovereignty resulted in raising the judiciary to the position of a co-ordinate department of government, and the application of the established principles of the common law secured to it a controlling influence over the other departments. The interpretation of the supreme law, being a judicial act, belonged to the judiciary." 5

Political Science Quarterly, June, 1890, 229, 230.

C. Ellis Stevens, LL. D., D. C. L., in his book, "Sources of the Constitution of the United States," at page 190, says: "In deciding constitutional questions, the Supreme Court interprets the law in accordance with principles that have long governed the courts of England. For when an English judge finds conflict between an act of Parliament and a judicial decision, he sets aside the decision, as of an authority inferior to that of the act; and if two parliamentary acts conflict, the earlier is set aside as superseded by the later one—the court interpreting the law simply by determining what is law as distinguished from what is not. The range of this English usage was somewhat amplified in the colonies, owing to the fact that, instead of Parliament, the colonial courts had legislatures to deal with, which acted, in most instances, under written charters limiting their powers, as also under the general domination of the home government. The colonial judiciary did not hesitate to adjudge a local statute invalid, if its enactment could be shown to have exceeded powers conferred by charter; and the Privy Council, in the capacity of a supreme court for the colonies decided in like manner conflicts between laws. When state constitutions succeeded to the charters, the process was continued by the state courts in cases showing conflict between statutes and the new constitutions judicially interpreted. The national government, with a constitution of its own, created an element of superior law, in conflict with which not only state but national enactments of lesser authority are nullified. All that the judiciary does in England, and all that it does in the states, and in the courts of the United States, is to uphold the authority of what it decides to be the higher law, as against all lesser laws or judicial decisions. What, therefore, has been supposed to be the most unique feature of the American Supreme Court is really only another adaptation from the past, and rests upon colonial and English precedents."

For the famous *Privy Council Cases*, see Thayer's *Cases on Constitutional Law*.

Referring to the matter of precedents for the decision in the case of *Marbury v. Madison*, Andrew McFarland Davis says: "There was, however, in the records of the Superior Court of Judicature of the Massachusetts Bay, a decision rendered in 1738 and repeated in 1739, in which the court refused to enforce an order issued by His Majesty in Council, because the powers of the court derived through the charter, and the laws passed to carry the same into effect, were in the judgment of the court inadequate for that purpose. An analysis of the two cases

will disclose a certain parallelism. The Supreme Court of the United States, interpreting the Constitution, the source of its authority, declared that it could not, in the exercise of original jurisdiction, issue writs of mandamus, notwithstanding the action of Congress, because no such power was conferred upon the court by that instrument. The Superior Court of Judicature, interpreting in a similar way the Province Charter, and the laws through which they derived their powers, asserted that, notwithstanding the explicit instructions received from His Majesty in Council, they were unable to carry out the royal order, because adequate powers were not conferred upon the court." The *Case of Frost v. Leighton*, 2 American Historical Review, January 1897, 229.

From the time of the separation of the colonies from the mother country to the time of the Federal Convention, the power under discussion had been brought to public notice in seven cases arising in five states. In the case of *Holmes v. Walton* the question of constitutionality was squarely raised before the supreme court of New Jersey, November 11, 1779, and squarely decided September 7, 1780. The decision, though meeting with some opposition, was ratified by a legislature fresh from the people. Breatly, the chief justice who rendered the decision, Patterson, the attorney general, and Livingston, the governor of the state, all sat in the Federal Convention. 4 American Historical Review, 456. After referring to this case in his contribution, *Constitutional Law*, to the volume "Two Centuries Growth of American Law," Dr. Baldwin, of Yale University says: "Similar decisions followed in other states; some in those where royal charters were still regarded as in substance an expression of the fundamental law; and others where these had given place to formal constitutions emanating from the people or those who assumed to represent them. In one of these the Articles of Confederation, under which the United States were then organized, were thus upheld as of paramount authority. Jefferson was among those who, at the time, seems to have approved this doctrine. . . . The general approbation with which, as Gerry said, the position that the judiciary were clothed with power to set aside unconstitutional legislation was from the first received, was largely due to the spirit of reverence for law which has always marked the American people, but gained new strength when they began to make and administer law for themselves, in entire independence of British control."

In 19 American Law Review, 184, a critic of the power under discussion, Mr. Wm. M. Meigs, says: "But it appears that the step

had already been made, and that the doctrine was, at or before the adoption of the present Constitution, almost a recognized principle in our country. The instances already cited go far to establish this; but, when it is seen how opinions to the same effect continued to be expressed and enforced, and almost universally without serious opposition, we think there can be no doubt of it."

In 1893 appeared a volume of more than 400 pages by Brinton Coxe, of the Philadelphia bar, entitled "Judicial Power and Unconstitutional Legislation," in which he describes his work as follows: "The chief purpose of the writer is to show that the Constitution of the United States contains express texts providing for judicial competency to decide questioned legislation to be constitutional or unconstitutional, and to hold it valid or void accordingly. Subordinate to this chief purpose are four others. The first of these subordinate purposes is to show that the framers of the Constitution, according to the extant records of their debates and proceedings at Philadelphia in 1787, expressly intended to provide for the said judicial competency as to such unconstitutional legislation. The second subordinate purpose is to point out and comment upon certain texts in Federal documents older than the Constitution, which are historical antecedents of the constitutional texts concerned. The third subordinate purpose is to examine the history of the relation of judicial power to unconstitutional legislation in certain of the states before and during the Confederation, and to show that the judicial competency under discussion is an American institution older than the Constitution of the United States." Pages 1, and 2.

Mr. Austin Acott, in *The American Historical Review*, volume 4, p. 456, says of this book that it speaks with all but final authority upon its subject-matter.

In the opinion referred to, the following statement is made: "In the early days of the Republic, an assumption by the courts of the right to invalidate acts of the legislature was bitterly resented. The judges of Rhode Island and of Ohio were impeached for assuming such power, and those of Virginia resigned under a storm of censure on account of like conduct." *Re Davis*, 58 Kan. 385, 49 Pac. 165. It is true that in some instances particular decisions of courts led to factional resentment, but the statement quoted is quite misleading. The great democrat, Patrick Henry, had correctly represented the people of Virginia in the speech quoted above. The matter of public sentiment in no wise entered into the resignation of judges shown in *Cases of Judges of Court* 64 L. R. A.

of Appeals, 4 Call (Va.) 135, 150, and the true attitude of the judges themselves is shown in the following extract from the report of those cases: "On this view of the subject, the following alternatives presented themselves to the court: Either to decide those questions, or resign their offices. The latter would have been their choice, if they could have considered the questions as affecting their individual interests only; but viewing them as relating to their office, and finding themselves called by their country to sustain an important post as one of the three pillars on which the great fabric of government was erected, they judged that a resignation would subject them to the reproach of deserting their station, and betraying the sacred interests of society intrusted with them; and, on that ground, found themselves obliged to decide, however their delicacy might be wounded, or whatever temporary inconveniences might ensue, and in that decision to declare that the Constitution and the act are in opposition and cannot exist together, and that the former must control the operation of the latter. If this opinion declaring the supremacy of the Constitution needed any support, it may be found in the opinion of the legislature themselves, who have, in several instances, considered the Constitution as prescribing limits to their powers, as well as to those of the other departments of government." *Cases of Judges of Court of Appeals*, 4 Call (Va.) 142, May, 1788.

In Ohio, impeachment proceedings were brought against two of the judges, but upon the trial they were acquitted. In Kentucky an effort to remove the judges failed. In Rhode Island the judges were cited before the legislature to render reasons for their conduct, but no proceedings in impeachment were initiated. It must be remembered, however, that in the early days of the Republic an armed rabble actually shut up the courts of Massachusetts through nothing more than an ignorant and rebellious malcontentedness, and that, when the bitterness of partisan rancor in Jefferson's administration demanded a victim, the Senate of the United States impeached an insane Federal judge upon *ex parte* evidence, without a hearing, and without even an attorney to act in his behalf. These, however, are not pointed out as among the constructive constitutional movements of our country. In every state in the Union the people ultimately approved the power the judges claimed. After the discovery of wheat the American people refused to feed on acorns.

The references given above by no means exhaust the literature upon this great subject, but it seemed to the writer to be due to those who use the Kansas Reports that

at least some witnesses be called to show that the dogmatic dissenting dissertation referred to does not contain the final word upon the matter of which it treats. As late as April, 1901, Mr. Justice Brewer deemed it proper, in the case of *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, to quote again from the often-quoted language of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, as follows: "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is emphatically the province and duty of the judicial department to say what the law

is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. . . . The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."

The district court is directed to modify its judgment by striking out the sum of \$25 from the taxed costs. *The judgment as modified is affirmed.*

The costs in this court are divided.

All the Justices concur.

ALABAMA SUPREME COURT.

MOBILE TRANSPORTATION COMPANY,

Appt.,

v.

City of MOBILE.

(128 Ala. 335.)

1. The admission of a new state into the Union vests in it the title of the general government to the land under tide water as far as high-water mark within its territorial limits.
2. The grant of the fee of land under tide water is within the title of an act granting "The Riparian Rights in the River Front."
3. A governmental grant of land ad-

joining a tidal body of water will not extend below high-water mark.

4. The state does not abrogate its trust by granting to a municipality the shore of a tidal body of water within its limits.
5. A suit by a municipal corporation does not abate by the repeal of its charter and the substitution for the old corporation of a new one with substantially the same inhabitants and locality.
6. Property between high and low water mark of a tidal river, held by a municipal corporation in trust for public use, will not pass by an act placing the property of the municipality in the hands of commissioners for the payment of its debts.
7. A municipal corporation may

NOTE.—Municipal ownership of tide lands.

The general question of the title to land under water, and to the shore between high and low water mark, is fully considered in the notes to *Goff v. Cogle*, 42 L. R. A. 161, and *Waverly Water Front Improv. & Development Co. v. White*, 45 L. R. A. 227.

It is established that the state, as the primary source of title to all land within its borders, is the owner of the land under the tidal waters; 64 L. R. A.

that the title to such land is held subject to the public rights of navigation and fishery; and that, subject to such rights, the state may transfer its title to the property to private individuals for such use as may be made of it without conflicting with the rights of the public. A municipal corporation has the capacity, as one of the powers conferred upon it by its corporate existence, to take and hold title to property. Therefore the municipal corporation is entitled to the benefit of the rule permitting the state

- maintain ejectment for property between high and low water mark on a tidal river, held by it in trust for the public.
8. Title to property below high-water mark on a tidal river, held by a municipality in trust for the public, cannot be acquired by an individual by adverse possession.
9. Erroneously collecting a tax on property held by the municipality in trust for public use will not estop the municipality from asserting its title.
10. Public statutes and grants constituting plaintiff's title papers may be read in evidence in an action to recover real property.
11. Error in refusing to retax costs after rendition of a judgment is no ground for reversal of the judgment.

(December 20, 1900.)

to part with its title to land under the water, and such title may be conferred upon it. But, in considering the question whether it has in fact title in any particular case, the distinction must be preserved between the rights which it acquires as a grantee in its private capacity and those secured by conferring jurisdiction upon it in its public capacity. A municipal corporation has jurisdiction over the land within its borders, but it does not necessarily have title to such land; and the same rule will apply to the land under the water. The title to such land may be in private owners, or it may remain in the state; and at the same time the land for jurisdictional purposes may be within the limits of the municipality. The only object of conferring title to such land upon the municipality would be for its private profit or emolument, and the grant would carry a corresponding burden, the same as in case of highways, parks, and other public property owned by the municipality; so that, in order to establish title in the municipality, it must be shown to have been expressly conferred.

Therefore, the rule is that the title to tide lands is in the state, and not in the municipal subdivision in which they lie, unless they were expressly granted to such subdivision by the state authorities. *Com. v. Roxbury*, 9 Gray, 451.

The presumption will always obtain that the title is in the state or in the Crown. *Bridgewater v. Bootle-cum-Linacre Twp.* 36 L. J. Q. B. N. S. 41, L. R. 2 Q. B. 4, 15 L. T. N. S. 351, 15 Week. Rep. 169.

And the mere establishment of municipal boundaries so as to include a portion of the land under the water is not of itself sufficient to carry title to the land there situated. *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705; *Kean v. Stetson*, 5 Pick. 492; *Russ v. Boston*, 157 Mass. 60, 31 N. E. 708; *Palmer v. Hicks*, 6 Johns. 133.

The question whether the soil of the Thames at London belongs to the city or to the Crown has been a fruitful source of litigation. In *Atty. Gen. v. London*, 8 Beav. 270, 14 L. J. Ch. N. S. 305, 9 Jur. 571, the title was claimed for the Crown. And in *Re Chabot*, 17 L. J. Q. B. N. S. 336, 12 Jur. 1023, 15 Q. B. 446, which was a proceeding to prohibit the commissioners of woods and forests from entering an assessment for property required by them, it was contended that the land which was situated between high and low water mark belonged either to the Crown or to the corporation of the city of London. 64 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for Mobile County in plaintiff's favor in an action brought to recover certain land covered with tide water. *Affirmed.*

The facts are stated in the opinion.

Mr. Frederick G. Bromberg, for appellant:

The title to the act of January 31st, 1867, does not describe the subject of it, and the act is unconstitutional, since the title refers to an easement, and the body of the act to soil.

Ex parte Pollard, 40 Ala. 77; *Weaver v. Lapsley*, 43 Ala. 224; *Walker v. State*, 49 Ala. 329.

The state holds the lands under the navigable waters of the state, not absolutely,

don, between which a contest was then pending. But the question whether it belonged to the Crown or not was not decided in either case, and its status was established by compromise confirmed by statute.

In accordance with the rule that there will be no presumption of an intention to grant title to the tide land, San Francisco, being entitled by its foundation law to 4 square leagues of land, was obliged to acquire that land, on account of the narrowness of the peninsula, by extending its lines inland, because the town "could acquire no right or title to the ocean or bay." *Hart v. Burnett*, 15 Cal. 530, 544; *Payne v. Treadwell*, 16 Cal. 221.

The fact that the title is in the state is further illustrated by the holding in *Kean v. Stetson*, 5 Pick. 492, that township authorities have no power to lay out a highway between high and low water mark without express authority from the legislature.

A municipality may have title.

While, as above indicated, the presumption is that the title to the soil is not in the municipality, it is well established that such land may be a parcel of the municipality. *Ferrott v. Bryant*, 2 Young & C. Exch. 61, 6 L. J. Exch. N. S. 26; *Farnham, Waters*, § 426.

And *Rex v. Grosvenor*, 2 Starkie, 511, 20 Revised Rep. 732, assumed that the title to the soil of the River Thames was in the city of London, for the purpose of determining the authority of the city to grant permission to erect wharves between high and low water mark.

As already indicated, there is nothing to prevent the state from granting the title to the soil to the municipality. The state has the right to make the grant, and the municipality has the capacity to receive it. *Atty. Gen. v. Burridge*, 10 Price, 350, 24 Revised Rep. 705; *Coolidge v. Williams*, 4 Mass. 140.

In *Linn-Regis v. Taylor*, 3 Lev. 160, the mayor and commonalty of Linn-Regis claimed the shore by grant to them by the Crown of the manor of Linn-Regis, and this claim does not seem to have been disputed in the case.

The state of California, by the act of March 26, 1851, conveyed to the city of San Francisco the beach and water-lot property in the Bay of San Francisco. *Payne v. English*, 79 Cal. 140, 21 Pac. 952.

And in *Holladay v. Frisbie*, 15 Cal. 630, that city was held to have a legal estate for ninety-

but in trust; not alone for the people of the state of Alabama, but in trust for the people of the whole United States.

Prieve v. Wisconsin State Land & Improv. Co. 103 Wis. 537, 74 Am. St. Rep. 904, 79 N. W. 780; *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273; *Mobile v. Eslava*, 9 Port. (Ala.) 598, 33 Am. Dec. 325; *Gibson v. United States*, 166 U. S. 271, 272, 41 L. ed. 1000, 1001, 17 Sup. Ct. Rep. 578; U. S. Rev. Stat. § 5251 (U. S. Comp. Stat. 1901, p. 3522); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811.

The state also holds the shores and soil under the navigable waters of the state in trust for the owners of the lands abutting upon such waters, whose riparian rights in

such waters and such shores and soil are property rights, of which they cannot be divested without due process of law.

Illinois C. R. Co. v. Illinois, 146 U. S. 445, 446, 36 L. ed. 1040, 13 Sup. Ct. Rep. 110; *Murphy v. Montgomery*, 11 Ala. 586; *Hagan v. Campbell*, 8 Port. (Ala.) 33, 33 Am. Dec. 267; 1 Dill. Mun. Corp. 4th ed. §§ 103, 106, note 1, 107, 108; 29 Am. & Eng. Enc. Law, pp. 65, 66, 68, and note 2; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Shively v. Bowlby*, 152 U. S. 40, 38 L. ed. 346, 14 Sup. Ct. Rep. 548; *Weber v. State Harbor*, 18 Wall. 64, 65, 21 L. ed. 801, 802; *Gough v. Bell*, 22 N. J. L. 441; *Roberts v. Brooks*, 24 C. C. A. 158, 43 U. S. App. 395, 78 Fed. 414; 6 Jacob's Fisher's Digest, 9,314; 8 Jacob's Fisher's Digest,

nine years in the beach and water-lot property, the use and occupation of which was granted by the legislative act of 1851 for ninety-nine years, which is subject to sale on execution; as the proviso therein for the payment to the state of a certain per cent of money received from sale or other disposition of the property was only a covenant on the part of the city to make such payment where money is received for a sale thereof, and created no trust which affects the legal title of the city, and by the grant it was not subject to any special use (*Wheeler v. Miller*, 16 Cal. 124); so that the purchaser from the land commissioners has only the reversionary interest of the state therein, which is subject to the rights of a purchaser at such execution sale.

A statute declaring that the state doth hereby grant to a city in fee simple a defined tract of land under water places the title in the city, so that it cannot be lost or impaired by the acts or negligence of the city; and the board of riparian commissioners cannot subsequently grant the land to private owners after the municipality has complied with the conditions of the grant. *Jersey City v. American Dock & Improv. Co.* 54 N. J. L. 215, 23 Atl. 682.

Construction of grant.

It being thus settled that the title may be transferred to the municipality, the question in most cases where title to the land is claimed by the municipality is, What is the particular construction of the grant under which the title is claimed?

A grant of a town will not, even when the place in question abuts on the sea, carry foreshore, unless the granted country establish by acts of ownership or other sufficient evidence that the foreshore claimed is part of the town lands. *Atty. Gen. v. Portsmouth, Moore, Foreshore*, p. 555.

So, a grant by the state to a municipal corporation, of land bounded by the tide water, will not carry the title below high-water mark, except by the use of words so unequivocal as to leave no reasonable doubt concerning the meaning, and the use of the words "waters, water courses, ports, havens, rivers, and fishings," are not sufficient to convey the soil. *East Haven v. Hemingway*, 7 Conn. 186.

But a grant of land with certain boundaries will include the land under water within such 64 L. R. A.

boundaries. *Robins v. Ackerly*, 24 Hun, 499, Affirmed in 91 N. Y. 98.

Although water not expressly included within the bounds of the grant will not pass. *East Hampton v. Vail*, 151 N. Y. 463, 45 N. E. 1030, Affirming 71 Hun, 94, 24 N. Y. Supp. 583.

The Carteret charter to the town of Bergen, Hudson county, granted only to high-water mark on the shore line. *Gough v. Bell*, 21 N. J. L. 156.

As the grant from the governor and company to the proprietors of the town of Norwalk did not convey royalties, the title to the shores of the sea did not pass. *Church v. Meeker*, 34 Conn. 421.

A grant by the Crown to several freeholders and inhabitants of a town, of land which they bought from the Indians, confirming the purchase to certain persons named, "as patentees for and in behalf of themselves and associates, the freeholders and inhabitants of the town, their heirs, successors, and assigns" conveys to the inhabitants of the town, and not to the individuals; so that titles must be derived from the town to be valid. *Atkinson v. Bowman*, 42 Hun, 404.

The habendum clause in the Dongan patent to the freeholders of the town of Southampton, which confirmed the Andros patent, did not have the effect of vesting the title in the named grantees as tenants in common, but vested the title in the town, including the land under water, although it runs to certain named persons and their heirs forever, and, after reciting the purposes of the grant, concludes as to all lands not yet taken up or appropriated to any individual, "'to the use, benefit, and behoof of such as have been purchasers thereof, and their heirs and assigns forever' . . . in proportion to their several and respective purchases thereof made as tenants in common." *Southampton v. Mecox Bay Oyster Co.* 116 N. Y. 1, 22 N. E. 387.

Huntington bay is a harbor or haven within the meaning of the Colonial patents granting lands under water in such bay to the town of Huntington, and the title to the soil passed to the trustees of the town thereunder. *Huntington v. Lowndes*, 40 Fed. 825.

A grant within certain boundaries fixed by reference to a recorded map or plat includes all land within such boundaries, and is not confined to such land as is laid off as water lots on such map; and ejectment will therefore not

11,689; *Webb v. Demopolis*, 95 Ala. 127, 21 L. R. A. 62, 13 So. 289; *Demopolis v. Webb*, 87 Ala. 670, 6 So. 408; *Williams v. Glover*, 66 Ala. 189.

The state could not pass such an act as the act under which plaintiff claims.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 450, 452-454, 460, 36 L. ed. 1018, 1042, 1043, 1045, 13 Sup. Ct. Rep. 110; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Gibson v. United States*, 166 U. S. 271, 41 L. ed. 1000, 17 Sup. Ct. Rep. 578; *American Dook & Improv. Co. v. Public Schools*, 39 N. J. Eq. 409; *Chisolm v. Caines*, 67 Fed. 285; *Loundes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

lie by a claimant under a subsequent grant from the state land commissioners as against one claiming under the city, for a strip of land which at the time of the passage of the act was part of an open public slip within such boundaries. *Hyman v. Read*, 13 Cal. 444.

But the Mexican grant to the pueblo of San Francisco conferred no title, but merely jurisdiction over the water, and therefore it did not, by the confirmation of its grant, acquire title to the soil as against the state. *United Land Asso. v. Knight*, 85 Cal. 448, 24 Pac. 818, *Overruling People v. San Francisco*, 75 Cal. 388, 17 Pac. 522.

A grant to a municipal corporation of the tidal lands "in front of" its corporate limits will include only such lands as lie adjoining and in front thereof, and it is not intended to include lands which may happen to lie in front of a city in fact, but across a channel of navigable water and upon an opposite shore, and which might ultimately be included in another municipality. *State ex rel. Lehman v. Bridges*, 24 Wash. 363, 64 Pac. 518.

A grant to a municipal corporation of tide lands "within 2 miles thereof on either side" refers to a measurement thereof along the general direction of the shore line, a distance of 2 miles from each of the two boundary lines which extend inland from such shore line. *Ibid.*

Effect of practical interpretation or acts of ownership.

In case of obscurity in the terms of the grant the practical interpretation thereof by the parties may be such that the court will follow it. As said in *Southampton v. Mecox Bay Oyster Co.* 116 N. Y. 1, 22 N. E. 387, the practical interpretation of a patent to certain named persons of land forming a town including land under water as vesting the title in the town, and not in the grantees as tenants in common, and acquiescence therein for a long series of years, is the most important evidence in the determination of the rights existing thereunder.

A grant to a burg located on a port, of all the territory within the burg, will be construed as including the foreshore as against one owning land adjoining the shore, under a conveyance describing it as bounded by the sea, where the user of the burg has been in accordance with such ownership, it having exercised acts of ownership, and constructed buildings on different parts of the shore, without opposition from any 64 L. R. A.

The state had a right to annul the charter of Mobile, and destroy the corporation.

1 Dill. Mun. Corp. 4th ed. §§ 86-88, 91; *Cooley, Const. Lim.* 4th ed. §§ 231-233; *Mt. Pleasant v. Beckwith*, 100 U. S. 525, 526, 528, 530, 25 L. ed. 701-703; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 89, 35 L. ed. 943, 947, 12 Sup. Ct. Rep. 142.

There is no connection between the old corporation and the new, and the old corporation has no claim upon public property within the boundaries of the new.

Mt. Pleasant v. Beckwith, 100 U. S. 524, 25 L. ed. 701.

The court takes judicial notice of the charters of municipal corporations.

1 Brickell's Digest, § 15, p. 805.

of the adjoining owners. *Smart v. Dundee*, 8 Bro. P. C. 119.

So, a reservation to a town of the privilege of the shores, in an act incorporating proprietors of ditches and defining their bounds, followed by a long period of time in which the town lets out to various persons the right to take sand, gravel, and stones from the shores, as well as seaweed, will be held to include the right to take sand and gravel to repair highways if the beach will not be materially injured thereby. *Ripley v. Knight*, 123 Mass. 515.

But votes of a town granting annually to individuals the right to take shell fish from beaches within its limits for a sum to be paid to the town are no evidence of an absolute title in the town to the beaches. *Lynn v. Nahant*, 113 Mass. 433.

And mere permission by a town to the owner of the adjoining upland to extend a wharf over the flats is not sufficient to show that the title in the flats was in the town. *Boston v. Richardson*, 105 Mass. 351.

Although a town has under its charter and early grants title to land below the tide water, it will be estopped from asserting it, if the inhabitants vote and agree that a certain person may purchase it from the Indians and peaceably enjoy it, upon his requiring to know whether or not the town laid claim to it; and subsequently, upon his reading his patents to them, agreed to acquiesce in the limits and bounds thereof, which included the land to which they afterwards laid claim. *Brookhaven v. Smith*, 118 N. Y. 634, 7 L. R. A. 755, 23 N. E. 1002.

But a city is not estopped from claiming tide lands by the participation of its mayor, as a member of the state board of tide-land commissioners, in the survey by which the tide lands were excluded from the city, and in the approval of the survey by several ordinances. *United Land Asso. v. Pacific Improv. Co.* 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988.

The acts of the parties in carrying out the provisions of the legislative act are not necessarily such a practical interpretation of the grant as will be conclusive in case they plainly conflict with the terms of the act. And therefore a line indicating high-water mark on the map required by an act of legislature granting to a city certain water-lot property to be filed with the secretary of state, clearly delineating such property, is not conclusive as to the extent of such property, the boundaries of which were

The defendant, although a corporation, is under the equal protection of the laws, as if it were an individual, by virtue of the 14th Amendment to the Constitution of the United States.

Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 391, 35 L. ed. 1054, 12 Sup. Ct. Rep. 255; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Ovington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 592, 41 L. ed. 565, 17 Sup. Ct. Rep. 198; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S.

187, 31 L. ed. 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The judgment excludes the defendant from its riparian rights, viz.: The right of approach to its lands; the right to build wharves on its lands; the right to tie up vessels to its lands, and to use the approaches to its lands over said waters for the purposes of commerce.

Rice v. Ruddiman, 10 Mich. 125; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 852; *Hall v. Alford*, 114 Mich. 165, 38 L. R. A. 205, 72 N. W. 137.

The right to the natural accretions to its lands is a part of defendant's riparian rights.

Hagan v. Campbell, 8 Port. (Ala.) 33, 33 Am. Dec. 267; *Doe ex dem. Kennedy v.*

specified in the act, and as to what was the water line of the city at the date of the act; but such question is one of fact. *Cook v. Bonnet*, 4 Cal. 397.

Effect of conferring jurisdiction on the municipality.

As has been already indicated, the mere conferring upon the municipality of jurisdiction over a particular locality does not invest it with title to the soil. Therefore, the mere fact that a municipal corporation has jurisdiction over adjoining tide land does not show that it has title to such lands. *Com. v. Roxbury*, 9 Gray, 451.

And the grant of political rights and powers with a grant of islands in a tidal river does not convey a proprietorship of the soil under the water, unless such intent is plainly expressed. *De Lancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822, *Affirming* 63 Hun, 160, 17 N. Y. Supp. 681.

An act extending the bounds of the town of Flushing in Queens county, New York, over the bay and into the sound of East river, so as to include islands eastward of the main channel, was held in *Palmer v. Hicks*, 6 Johns. 133, to be merely for the purpose of jurisdiction, but did not give the town title to the land under water, or power to prohibit the catching of clams below ordinary low-water mark.

And the conclusion follows that the municipality may be given jurisdiction over property the title to which is retained by the state. Accordingly it has been held that under the New York act of 1857, settling the bulkhead lines for the port of New York, the city has authority to locate wharves upon land of the state under water, with an easement of approach in front and of access from the land, and can fill up and occupy the space between the new line and the land, and can convey its interest and easements therein. *Williams v. New York*, 105 N. Y. 419, 11 N. E. 829.

And a grant by the state to a municipal corporation of land under tide water for a particular purpose does not divest the state of its obligation to protect the public against encroachments upon such land other than those authorized by the grant. *State v. Vanderbilt*, 26 N. Y. 287.

The mere exercise by the municipal corporation of jurisdiction which has been conferred upon it will not ripen into title. Therefore, no title to a beach can be acquired by a municipal-
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ity which, under legislative authority, maintains a committee to enforce a law prohibiting cattle from running at large on said beach. *Cutts v. Hussey*, 15 Me. 237; *Atty. Gen. v. London*, 2 Macn. & G. 247, 2 Hall & T. 1, 19 L. J. Ch. N. S. 314, 14 Jur. 205.

Title is subject to rights of the public.

The private title to the Crown to land under the water was held subject to the rights of the public to navigate and fish in the waters, and, when the states succeeded to the rights of the Crown, they presumptively undertook to hold under the same limitations; and, while there is nothing to prevent their destroying the public use or conveying the property free from such use, they will not be presumed to have done so; and therefore, in order to enable the grantee to hold free from the trust, he must show that the terms of his grant expressly relieved him from it. The same rules apply in case of grants to a municipality; so that in case of a grant by the Crown such corporation will take subject to the rights of the public. *Atty. Gen. v. Burridge*, 10 Price, 350, 24 Revised Rep. 705.

And so with respect to grants by the state. *Coolidge v. Williams*, 4 Mass. 140.

Under this rule, the mere grant by the state of the freehold in the soil does not destroy the rights of the public; and therefore a grant to a town of land under a body of water navigable in fact does not pass to the government of the town the control over the public easement which the state would have were it not for the patents. *People ex rel. Howell v. Jessup*, 28 App. Div. 524, 51 N. Y. Supp. 228.

And where jurisdiction merely has been conferred upon the municipality it cannot grant any rights to individuals which will interfere with the rights of the public. It cannot lease the beaches. *New Shoreham v. Ball*, 14 R. I. 566.

And in *Galveston City Surf Bathing Co. v. Heldenheimer*, 63 Tex. 559, it is said that it seems that, if the charter of a city which borders on the seashore could be so construed as to extend the limits of the city beyond the seashore and to the open sea, the city would have no power to grant to certain persons the exclusive right to erect bath houses on the shore and surf. The right of the public to the use of the shore and surf would not be impaired by the extension of the city limits, as such extension would be jurisdictional, and not proprietary.

Jones, 11 Ala. 63; 1 Am. & Eng. Enc. Law, 2d ed. p. 469, ¶ 11; *Shively v. Bowlby*, 152 U. S. 35, 38 L. ed. 344, 14 Sup. Ct. Rep. 548; *Mobile v. Eslava*, 9 Port. (Ala.) 591, 33 Am. Dec. 325.

Lines of riparian owners in the city of Mobile may extend to the channel of the Mobile river.

Doe ex dem. Pollard v. Files, 3 Ala. 47, 2 How. 591, 11 L. ed. 391; *Hagan v. Campbell*, 8 Port. (Ala.) 33, 33 Am. Dec. 267; *Hallett v. Doe ex dem. Hunt*, 7 Ala. 905.

In ejectment plaintiff must have the right of possession as well as the fee, in order to recover.

Doe ex dem. Kennedy v. Jones, 11 Ala. 86. Time runs against a municipal corporation.

Ala. Code 1886, § 2613; *Wyatt v. Tisdale*, 97 Ala. 594, 12 So. 233.

The suit is for land within a Spanish grant in existence in 1819 when the state was admitted.

3 Am. State Papers, pp. 30, 400; *Jones v. United States*, 137 U. S. 216, 34 L. ed. 697, 11 Sup. Ct. Rep. 80.

All Spanish grants were confirmed by the treaty of 1819 with Spain.

8 U. S. Stat. at L. relating to Treaties, p. 258; Treaty with Spain, Acts 2, 8; Ala. Const. 1865, art. 1, §§ 25, 36; Ordinance August 2, 1819; Ala. Code 1876, p. 68.

A grant by the United States of land bordering on a navigable river includes the shore or bank of such river, and extends to the water line at low water.

Webb v. Demopolis, 95 Ala. 129, 21 L. R. A. 62, 13 So. 280; *Demopolis v. Webb*, 87

Ala. 670, 6 So. 408; *Williams v. Glover*, 66 Ala. 189; *Scranton v. Wheeler*, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 803.

The plaintiff having waited twenty-nine years and more before moving, in the meanwhile recognizing the title now disputed by it, by assessing and collecting taxes upon the property sued for, is estopped, in ejectment, from asserting legal title.

1 Brickell's Digest, p. 267, § 33; *Mitchell v. Robertson*, 15 Ala. 412; 7 Am. & Eng. Enc. Law, p. 19; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 77, 78, 26 L. ed. 79, 82, 83; *Drexel v. Berney*, 122 U. S. 253, 30 L. ed. 1222, 7 Sup. Ct. Rep. 1200.

Sovereign states may be barred by estoppel arising from conduct.

Indiana v. Kentucky, 136 U. S. 509, 34 L. ed. 332, 10 Sup. Ct. Rep. 1051.

Whatever the objection to the deeds, they were good in evidence, to establish color of title.

Carter v. Chevalier, 108 Ala. 563, 19 So. 798.

Messrs. Gregory L. Smith and H. T. Smith, for appellee:

The lands in question became the property of the state of Alabama by virtue of a compact under which Alabama was admitted into the Union.

Mobile v. Eslava, 9 Port. (Ala.) 603, 33 Am. Dec. 325; *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403; *Doe ex dem. Kennedy v. Beebe*, 8 Ala. 909; *Doe ex dem. Pollard v. Greit*, 8 Ala. 941; *Boulo v. New Orleans, M. & T. R. Co.* 55 Ala. 490.

Municipality may protect its title.

If the title has actually been conferred upon the municipality it holds by the same right as any private individual, and, as held in *Holladay v. Friable*, 15 Cal. 630, the land is subject to sale under execution against the municipality.

So, a city which has granted lands under water, excepting a portion reserved for street purposes, may maintain ejectment to recover such portion, since the action is not to recover an incorporeal hereditament, but the land itself with the erections upon it. *New York v. New York C. & H. R. R. Co.* 69 Hun, 324, 23 N. Y. Supp. 562.

But if the title is placed in the municipality in trust, or if jurisdiction merely is conferred upon it, it has no title with which it can part; and, therefore, execution against the municipality cannot be levied upon such land. In accordance with this rule, it has been held that land between high tide and ship channel, held by a town subject to a public trust of constructing thereon wharves, docks, and piers and other essential aids to commerce and to the traffic of a seaport town, are not subject to levy and sale under executions. *Oakland v. Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277. But *MOBILE TRANSPORTATION CO. v. MOBILE* holds that although the property is held in trust, the mu-

nicipality has sufficient title to enable it to maintain ejectment.

The question whether or not the municipality will lose its title by adverse possession also depends upon the title by which it holds the land. If it has the absolute fee simple title, and the property is not devoted to the public use, it may lose its title by adverse user. Thus, it has been held that the right of the city of San Francisco in beach and water-lot property under the beach and water-lot act of 1851, granting such property to it for the term of ninety-nine years, without the reservation to the state of any beneficial interest therein during the term, but only requiring the city to pay to the state a specified percentage of the proceeds of sales thereof if made, which it is not obliged to make, is an absolute title for the term, free from any trust, which may be extinguished by adverse possession under the statute of limitations. *San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814.

But title to the shore under tide water, which is shown to have been originally in a town, is not shown to have become vested in a private individual by the fact that he has cut thatch there and licensed others to do so. *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294.

Although in *Roe v. Strong*, 119 N. Y. 316, 23 N. E. 743, it was held that such acts might justify a presumption of a grant.

The patent of the United States government did not vest the title to the land between high-water mark and low-water mark, where the tide ebbs and flows, in the patentee, so as to shut off the right of the state to take possession of those lands, either by itself, or its proper grantees.

Mobile v. Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403; *Doe ex dem. Kennedy v. Bebee*, 8 Ala. 914; *Doe ex dem. Pollard v. Greit*, 8 Ala. 941; *Mobile v. Eslava*, 16 Pet. 240, 10 L. ed. 950; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 688, 31 L. ed. 551, 8 Sup. Ct. Rep. 643; *Doe ex dem. Hallett v. Bebee*, 13 How. 25, 14 L. ed. 35; *Shively v. Bowlby*, 152 U. S. 55, 38 L. ed. 351, 14 Sup. Ct. Rep. 548.

Following the common law, all of the authorities, except in states controlled by statutes, agree that the riparian ownership on tide waters extends only to high-water mark.

People v. Morrill, 26 Cal. 357; *More v. Massini*, 37 Cal. 432; *Wright v. Seymour*, 69 Cal. 122, 10 Pac. 323; *Long Beach Land & Water Co. v. Richardson*, 70 Cal. 209, 11 Pac. 695; *Kimball v. Macpherson*, 46 Cal. 108; *East Haven v. Hemingway*, 7 Conn. 202; *Simons v. French*, 25 Conn. 352; *Midletown v. Sage*, 8 Conn. 221; *Chapman v. Kimball*, 9 Conn. 40, 21 Am. Dec. 707; *State v. Sargent & Co.* 45 Conn. 373; *Sullivan v. Moreno*, 19 Fla. 219; *Rivas v. Solary*, 18 Fla. 126; *Day v. Day*, 22 Md. 537; *Garitee v. Baltimore*, 53 Md. 432; *Martin v. O'Brien*, 34 Miss. 22; *Arnold v. Mundy*, 6 N. J. L.

1, 10 Am. Dec. 356; *Gough v. Bell*, 21 N. J. L. 157; *Bell v. Gough*, 23 N. J. L. 624; *State, Roberts, Prosecutor, v. Jersey City*, 25 N. J. L. 525; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Wheeler v. Spinola*, 54 N. Y. 385; *East Hampton v. Kirk*, 68 N. Y. 460; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523; *Roberts v. Baumgarten*, 110 N. Y. 380, 18 N. E. 96; *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Parker v. Taylor*, 7 Or. 445; *Bailey v. Burges*, 11 R. I. 331; *Aborn v. Smith*, 12 R. I. 373; *Brown v. Goddard*, 13 R. I. 76; *Galveston v. Menard*, 23 Tex. 349; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539; *Harbor Line v. State*, 2 Wash. 531, 27 Pac. 550; *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426; *Allen v. Forrest*, 8 Wash. 702, 24 L. R. A. 606, 36 Pac. 971.

In every instance where the distinction between tidal and nontidal waters has been wholly discarded the riparian owner has been restricted to high water where the stream was navigable; and in no single instance has his title been extended where the tide ebbs and flows.

McManus v. Carmichael, 3 Iowa, 1; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 466; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Packer v. Bird*, 137 U. S. 671, 34 L. ed. 822, 11 Sup. Ct. Rep. 210.

In the absence of the expression of the contrary intention on the part of the state, it will be assumed by the court that the state intends to permit the owner of the adjoining land to use the land between low-

Merely permitting the public to use the property is not sufficient to devert the municipality of its title. No dedication to the purpose of navigation will be effected by the failure of a municipality to improve the land under tide water lying at the end of a street, so as to deprive it of its right to make such use of it as it pleases as against those claiming to use it as a dock. *Boston v. Lecraw*, 17 How. 426, 15 L. ed. 118.

The fact that a town claiming title to land under navigable water has made no lease of the fisheries there, and has allowed the lands to be enjoyed in common, does not tend to negative its right to the property, where it claims under ancient patents which may cover the place, and has made leases of lands for marine railways, docks, etc. *Robins v. Ackerly*, 91 N. Y. 98, *Affirming* 24 Hun, 499.

Effect of granting jurisdiction to municipality.

If the title to the property has been granted to the municipality the legislature cannot reclaim it. But if the grant includes merely jurisdiction over the locality the legislature may resume such jurisdiction in whole or in part, at its pleasure. Therefore, an act of the legislature authorizing the state to provide for the improvement of its tide lands by the construction of the water ways and the filling up of such lands so as to make them above high tide, al-

though the same lie within the corporate limits of a city, is not unconstitutional as in violation of a constitutional provision conferring upon municipalities the power to make local improvements by special assessment. *Mississippi Valley Trust Co. v. Hofus*, 20 Wash. 272, 55 Pac. 54.

But the jurisdiction will not be held to have been withdrawn, unless such construction is necessary. If both acts can be upheld, such a construction will be given them as to preserve the jurisdiction of the municipality. Thus, a statute establishing the grade of a portion of a municipal corporation lying below high tide on a tidal river does not supersede the power granted to the municipality to regulate and establish the grades of streets within the city. *State, Latta, Prosecutor, v. Hoboken*, 48 N. J. L. 63, 4 Atl. 655.

And if jurisdiction is exercised directly by the state the municipality will not be held responsible as in case of a private individual. Therefore, filling up flats by municipal authorities under a plan devised by the state harbor commissioners in conjunction with the state board of health is not within an act requiring compensation for the tide water displaced, and the approval of the board of harbor commissioners in case of the filling of flats by private individuals. *Atty. Gen. v. Cambridge*, 119 Mass. 518.

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water and high-water mark, which is adjacent to its other property.

Stevens v. Paterson & N. R. Co. 34 N. J. L. 546, 3 Am. Rep. 269; *Pennsylvania R. Co. v. New York & L. B. R. Co.* 23 N. J. Eq. 159.

Whatever title to these lands was obtained subsequent to the admission of the state into the Union was obtained from the state, and not from the United States.

Barney v. Keokuk, 94 U. S. 324-338, 24 L. ed. 224, 227, 228; *Shively v. Bowlby*, 152 U. S. 55, 38 L. ed. 351, 14 Sup. Ct. Rep. 548; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 544, 3 Am. Rep. 269.

The state may grant to any individual the right to wharf out upon the shores of another's land without compensation to the latter. This is no violation of the riparian owner's rights.

Martin v. O'Brien, 34 Miss. 22; *Ravenwood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539; *Harbor Line v. State*, 2 Wash. 531, 27 Pac. 550.

The right to wharf out rests upon passive or implied license merely. The state may regulate it, or even prohibit it.

Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 262, 24 Am. Rep. 399; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539; *Harbor Line v. State*, 2 Wash. 531, 27 Pac. 550; *State v. Sargent & Co.* 45 Conn. 358; *Musser v. Hershey*, 42 Iowa, 361; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Stewart v. Fitch*, 31 N. J. L. 18; *Keyport & M. P. S. B. Co. v. Farmers' Transp. Co.* 18 N. J. Eq. 511; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The state can grant the shore even to a private concern; and a grant by statute is effective to operate such a transfer.

Goodlet v. Smithson, 5 Port. (Ala.) 245, 30 Am. Dec. 561; *Wright v. Swan*, 6 Port. (Ala.) 84; *Swann v. Lindsey*, 70 Ala. 517; *Shively v. Bowlby*, 152 U. S. 46, 47, 38 L. ed. 348, 349, 14 Sup. Ct. Rep. 548; *Goodtitle ex dem. Pollard v. Kibbe*, 9 How. 478, 13 L. ed. 223; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Hardin v. Jordan*, 140 U. S. 381, 382, 35 L. ed. 433, 11 Sup. Ct. Rep. 808, 838; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 690, 31 L. ed. 552, 8 Sup. Ct. Rep. 643; *State, Roberts, Prosecutor, v. Jersey City*, 25 N. J. L. 525; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 466.

The state may grant a right of way to a railroad to construct its road between high and low water mark, and the fact that this interferes with the riparian owner's access to the water does not give him a right of action.

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Gould v. Hudson River R. Co. 6 N. Y. 522.

The state has power to make an absolute grant of tide or submerged lands.

Eldridge v. Cowell, 4 Cal. 87; *Ward v. Mulford*, 32 Cal. 366; *Chapin v. Bourne*, 8 Cal. 295; *Upham v. Hosking*, 62 Cal. 250; *East Haven v. Hemingway*, 7 Conn. 198; *Gough v. Bell*, 21 N. J. L. 157; *State, Roberts, Prosecutor, v. Jersey City*, 25 N. J. L. 525; *State, Morris Canal & Bkg. Co., Prosecutors, v. Brown*, 27 N. J. L. 14; *State, Coles, Prosecutor, v. Platt*, 24 N. J. L. 108; *Keyport & M. P. S. B. Co. v. Farmers' Transp. Co.* 18 N. J. Eq. 511; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 528; *Williams v. New York*, 105 N. Y. 420, 11 N. E. 829; *Galveston v. Menard*, 23 Tex. 349; *McCreedy v. Com.* 27 Gratt. 985; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539; *Morse v. O'Connell*, 7 Wash. 119, 34 Pac. 426; *Wisconsin River Improv. Co. v. Lyons*, 30 Wis. 65; *Martin v. O'Brien*, 34 Miss. 22; *Hagan v. Campbell*, 8 Port. (Ala.) 25, 33 Am. Dec. 267.

The present city of Mobile, comprising, as it does, the same people and the same territory, is the successor of the former city, and entitled to the possession of its property.

Mobile v. Watson, 116 U. S. 301, 29 L. ed. 625, 6 Sup. Ct. Rep. 398; *Dill. Mun. Corp. § 172; Milner v. Pensacola*, 2 Woods, 632, Fed. Cas. No. 9,619; *Broughton v. Pensacola*, 93 U. S. 269, 23 L. ed. 897; *O'Connor v. Memphis*, 6 Lea, 730; *Amy v. Selma*, 77 Ala. 124.

If the plaintiff has title it may recover.

Hoboken v. Pennsylvania R. Co. 124 U. S. 658, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403, 9 How. 471, 13 L. ed. 220; *Doe ex dem. Pollard v. Greitt*, 8 Ala. 932; *Doe ex dem. Kennedy v. Bebee*, 8 Ala. 909; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

When the municipal corporation acts as the representative of sovereignty, the statute of limitations cannot be invoked against it.

Webb v. Demopolis, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Reed v. Birmingham*, 92 Ala. 339, 9 So. 163; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653; *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514; *Burbank v. Fay*, 65 N. Y. 57; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818; *Smith v. State*, 23 N. J. L. 727; *Marsalis v. Garrison* (Tex.) 27 S. W. 932; *Olive v. State*, 86 Ala. 94, 4 L. R. A. 33, 5 So. 653; *Miller v. State*, 38 Ala. 604.

Wharf property, when owned by a city, is of a public nature.

Meriwether v. Garrett, 102 U. S. 501, 26 L. ed. 200; *Klein v. New Orleans*, 99 U. S. 150, 151, 25 L. ed. 431; *Hitchcock v. Galveston Wharf Co.* 50 Fed. 269; *Hart v. Burnett*, 15 Cal. 530; *Mobile v. Moog*, 53 Ala. 568.

An equitable estoppel cannot avail the defendant in an action of ejectment.

Hawkins v. Ross, 100 Ala. 463, 14 So. 278; *McLeod v. Bishop*, 110 Ala. 640, 20 So. 130; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

The claimant's title is founded upon the report of the commissioner and act of Congress confirmatory thereof, and not upon any Spanish grant.

Doe ex dem. Chastang v. Dill, 19 Ala. 421; *Hall v. Doe ex dem. Root*, 19 Ala. 378; *Menard v. Massey*, 8 How. 308, 12 L. ed. 1090; *Chastang v. Armstrong*, 20 Ala. 609; *Garcia v. Lee*, 12 Pet. 511, 9 L. ed. 1176; *Pollard v. Files*, 2 How. 602, 11 L. ed. 395.

The riparian owner takes no title to the land below his property line, except by accretions.

Lewis, Em. Dom. § 78; Gould, *Waters*, § 167; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Hagan v. Campbell*, 8 Port. (Ala.) 11, 33 Am. Dec. 267; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Pennsylvania R. Co. v. New York & L. B. R. Co.* 23 N. J. Eq. 159; *Coburn v. Ames*, 52 Cal. 398, 28 Am. Rep. 643; *Dana v. Jackson Street Wharf Co.* 31 Cal. 118, 89 Am. Dec. 164.

Tyson, J., delivered the opinion of the court:

The present case is an action of ejectment in Code form, by the city of Mobile, to recover of the appellant certain real estate described in the complaint, constituting the shore or part of Mobile river below high-water mark. The plaintiff's title was derived from the state of Alabama, through and by the act of the legislature approved January 31, 1867, entitled "An Act Granting to the City of Mobile the Riparian Rights in the River Front" (Acts 1866-67, p. 307), supplemented by the acts of February 18, 1895, and of December 5, 1896; the latter being amendatory of the former, and confirming and vesting all rights theretofore vested in any municipal corporation of Mobile in the city of Mobile. If the act of 1867 was operative, it is evident that the legal title to the shore of the river below high-water mark, as described in the act, under the rule of the common law, became vested in the city of Mobile. Though the property belonged to the United States before the admission of the state into the Union, by the compact under and by which Alabama became a state the title to all lands not reserved to the United States became the property of the 64 L. R. A.

state of Alabama; it being well settled that there was no reservation, and could be none, in the shores and beds of navigable streams, since such reservation would conflict with the fundamental law of organization, under which new states are entitled to be on an equal footing with the original states, as well as with the Constitution, restricting the municipal jurisdiction of the United States to the particular cases enumerated therein. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 689, 27 L. ed. 447, 2 Sup. Ct. Rep. 185; *Huse v. Glover*, 119 U. S. 546, 30 L. ed. 489, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Improv. Co.* 123 U. S. 296, 31 L. ed. 152, 8 Sup. Ct. Rep. 113; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 9, 31 L. ed. 632, 8 Sup. Ct. Rep. 811; *Shiveley v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The chief important question is whether the act of 1867 is a valid law. The appellant insists that it is void because its title does not sufficiently describe the purpose of the body of the act. The Constitution of 1865, under which this law was enacted, required that "each law should embrace but one subject which shall be described in the title." Const. 1865, art. 4, § 2. The title is, "An Act Granting to the City of Mobile the Riparian Rights in the River Front" (Acts 1866-67, p. 307), while the body grants the fee. The objection is that "riparian rights" could not comprehend the fee, but only easements therein, distinct from absolute ownership. The object of this provision of the Constitution was to prevent surprise and fraud, in passing laws under misleading titles. It should not, therefore, be construed so as to defeat, by too technical an application, legislation not clearly within the evil aimed at. If the title of an act is single, and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied. In such case the generality of a title, not defining the particulars of the proposed legislation, would be more apt to excite general attention than otherwise, since the general words would give warning that everything within their limits might be affected, and thus draw the attention of the whole body of legislators, while narrower words would only interest those concerned with the matters specially named. It is therefore held that the generality of the title is no objection if it may comprehend the particulars of the body of the act, and that the act must be upheld if the subject may be comprehended in the title. *Adler v. State*, 55 Ala. 21; *Ballentyne v. Wickersham*, 75 Ala. 536; *Quartlebaum v. State*, 79 Ala. 1;

Edwards v. Williamson, 70 Ala. 145; 23 Am. & Eng. Enc. Law, pp. 229-235. In this case the body of the act grants the fee in the *locus in quo*; the title, "riparian rights." The question is, May not "rights" comprehend absolute rights of property, to wit, a fee, and may not "riparian" be taken as a mere localizing term to "rights?" The first definition of the word "riparian" in the Century Dictionary is "pertaining to or situated on the bank of a river." We think the fair and reasonable meaning of the title is to grant rights (property) which are riparian; that is, situated on or along the banks (*ripa*) of the river. No great precision and nicety of language is necessary in such case. It is sufficient if the common and ordinary mind would understand from the title the subject in reference to which a particular law is proposed. We therefore hold the act in question free from the objection interposed to it.

The next question is whether the patent from the United States in 1836 to the persons under whom defendant claimed, to the land adjoining the shore sued for, extended to low-water mark, and, if so, affected the previous title to the state to the land below high-water mark. We must decide both these questions in the negative. It is true, the first point was decided otherwise in the case of *Webb v. Demopolis*, 95 Ala. 126, 21 L. R. A. 62, 13 So. 289, and in one or two other cases relating to the shore line of streams above the ebb and flow of tide water. But these cases in no wise conflict with the common-law rule, so often approved by this court and other jurisdictions,—that, on streams where the tide ebbs and flows, grants of adjoining lands only extend to the ordinary high-tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in *Webb v. Demopolis* to disturb this rule of property, supported by a vast array of authorities, without making reference to them. At common law the adjoining owner of the shore would, in the *Case of Webb*, have acquired title to the center of the stream; but the decision restricted the rule, on account of the actual navigability of the stream, to the line of low water. This cannot be a reason for enlarging the common-law rule as to tide-water shores, which restricted the rights of adjoining owners to the line of high tide. *Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325, 16 Pet. 240, 10 L. ed. 950; *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403, 9 How. 471, 13 L. ed. 220; *Doe ex dem. Kennedy v. Bebee*, 8 Ala. 914; *Doe ex dem. Pollard v. Greit*, 8 Ala. 941; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 688, 31 L. ed. 551, 8 Sup. Ct. Rep. 64 L. R. A.

643; *Doe ex dem. Hallett v. Beebe*, 13 How. 25, 14 L. ed. 35; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, and the numerous authorities cited in brief of appellee's counsel.

But, if the first point was decided otherwise, it cannot affect this case, because the title of the United States to the shore in question, to the line of ordinary high tide, became vested in the state on and by its admission as a state, and could not be affected by any subsequent grant of the United States, if there had been such. *Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325, 16 Pet. 240, 10 L. ed. 950; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403, 9 How. 471, 13 L. ed. 220; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

It is next insisted that the state could not grant the fee to the city of Mobile, and thereby deplete itself of the trust under which the land was held. This court has decided that a deed by a trustee in violation of his trust nevertheless conveys the legal title, and is valid in a court of law. *Robinson v. Pierce*, 118 Ala. 273, 45 L. R. A. 66, 72 Am. St. Rep. 160, 24 So. 984. But the grant in this case was not in fraud of the trust. On the contrary, it was made for the purpose of making it effective for the public good. The shores of tide water in all the states are held in fee by the states, subject only to the reservation and stipulation that such streams should forever be and remain public highways, with the right in Congress to regulate commerce thereon. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Martin v. Waddell*, 16 Pet. 410, 10 L. ed. 1012; 4 Notes U. S. Rep. 185 *et seq.*, 412 *et seq.* And it cannot be doubted that the state may convey the fee in such shore, subject, of course, to the paramount rights of the United States respecting navigation, and particularly so when the conveyance is in furtherance of the public interests. *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 360, 42 L. ed. 502, 18 Sup. Ct. Rep. 157; *Packer v. Bird*, 137 U. S. 671, 11 Sup. Ct. Rep. 210, 34 L. ed. 822; *Hagan v. Campbell*, 8 Port. (Ala.) 25, 33 Am. Dec. 267; *Williams v. New York*, 105 N. Y. 433, 11 N. E. 829; *Langdon v. New York*, 93 N. Y. 129.

It is next insisted that the municipal corporation of Mobile was dissolved after the institution of this suit, and that the suit cannot be further entertained. The modern doctrine is that the identity of a municipal corporation is not changed by the repeal of its charter, and the substitution of a new municipal organization for substantially the same inhabitants and locality. When there is an alteration of a name, it may be con-

venient and proper for the pleadings to trace the change; but when the new organization bears the same name as the old, and the courts take judicial notice of the laws effecting the change, it is unnecessary to make any averment or obtain any order respecting the further prosecution of pending suits. Any authoritative appearance or step taken in the cause is the act of the new organization, which comes in, not by revivor, as in the case of representatives on the death of natural persons, but as the same party metamorphosed only in the external habiliments of organization and powers wrought by the new enactment. 1 Dill. Mun. Corp. § 172, note; *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *Broughton v. Pensacola*, 93 U. S. 270, 23 L. ed. 898; *Milner v. Pensacola*, 2 Woods, 632, Fed. Cas. No. 9,619; *Girard v. Philadelphia*, 7 Wall. 1, 19 L. ed. 53. It is manifest from a reading of the act of February 11, 1879 (Acts 1878-79, p. 381), that only such property as was possessed by the city of Mobile that was subject to the payment of its debts passed by the terms of the act to the commissioners as trustees for the bondholders. This property was trust property, and therefore was not subject to the debts of the city, and was not affected by the act.

It is further insisted that ejectment will not lie for the recovery of the premises. There is nothing in this contention. No matter what the trust may be, the trustee or holder of the legal title may recover the possession from one who ousts him or claims to hold adversely. He may do this even against a *cestui que trust*. Without this right, he might be unable to perform his duties. And it is of no consequence that the land, or a portion of it, is servient to the right of the flow of water over it, or of navigation thereon. *Newell, Ejectment*, chap. 2, §§ 20-22; *Hoboken v. Pennsylvania R. Co.* 124 U. S. 658, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325.

The defendant offered evidence of adverse possession of the lands in controversy since the grant to the city of Mobile in 1867, which was rejected. There was no error in this, since there can be no limitation against a municipal corporation as to property held for the public. Dill. Mun. Corp. § 675; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289; *Olive v. State*, 86 Ala. 94, 4 L. R. A. 33, 5 So. 653; *Miller v. State*, 38 Ala. 604. The presumption is that the property is public, and, indeed, the words of the grant make it such in this case. The wrong or error of collecting tax on public property, 64 L. R. A.

on the same principle, can create no estoppel against the assertion of the legal title, if it could have any effect on the right to such property. *Hawkins v. Ross*, 100 Ala. 463, 14 So. 278; *McLeod v. Bishop*, 110 Ala. 640, 20 So. 130; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13. The plaintiff showed by the evidence introduced a valid legal title to the land sued for, unaffected by limitation or an estoppel of any character.

The defendant offered no evidence of title or possession which could have any operation to defeat the plaintiff's right of recovery. The supposed Spanish grant to so operate was never complete, and, besides, there was no proof of such a grant. The grant in 1836 by the United States cannot be construed to cover the land below high-water mark along the shore, and, if it could, would be ineffective, because the title was divested out of the United States and vested in the state of Alabama on the admission of the state into the Union. The case of *Goodtitle ex dem. Pollard v. Kibbe*, 1 Ala. 403, is decisive of this point against the appellant. The title vested in the United States on the acquirement of the territory from France, and passed irrevocably to the state on its admission, and could not be affected by any subsequent act of the United States. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565. The possession by the defendant after the grant to the city in 1867 could not be adverse, so as to put in operation the statute of limitations, so as to entitle the defendant to compensation for improvements. And as the plaintiff's declaration was good, and its paper title perfect, and no evidence was admitted or rejected which could legitimately affect the plaintiff's right to recover the shore land sued for, below the high tide, there could be no error prejudicial to the appellant.

The defendant, however, insists that its third charge, limiting the plaintiff's right to recover the lands "covered by the description in the complaint," which is not now below high-water mark, should have been given. The argument is that the description in the complaint takes the western line far inland; that is, west of the high-water line. We do not find this is the fact. The description distinctly limits the western line southwardly "along the high-water mark," which would necessarily limit the line to the high tide. Besides, the charge limits the recovery to the present high-tide line, which might be different from what it was when the grant was made or the suit commenced. There was no error, therefore, in the refusal of this charge.

Nor was there any error in the court's allowing public statutes and grants to be read in evidence, when they constituted the title

papers of the party. They constitute facts in the case, and are evidence, in the strictest sense, which must go to the jury. It is the proper practice to read them to the jury, as was done in *Mobile v. Eslava*. It is always allowable to prove any fact which the court knows judicially. And certainly no injury can possibly result where it is permitted to be done.

The authority of the attorney to bring the suit and represent the plaintiff was sufficiently shown. *Williams v. Johnson*, (21 L. R. A. 848, note, 112 N. C. 424, 34 Am. St. Rep. 513, 17 S. E. 496); *Tullock v. Cunningham*, 1 Cow. 256; *Pisley v. Butts*, 2 Cow. 421; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237.

After the rendition of the judgment the defendant made a motion to retax the costs in respect to fees of certain witnesses subpoenaed by the plaintiff. This motion was denied, and its refusal is here insisted upon

as error. It may be conceded for the purposes of this appeal that the court committed an error in refusing to retax the costs, and yet this will not work a reversal of the judgment. The error, if committed, in no wise involves any ruling of the court upon the trial, but was subsequent to the rendition of the judgment, and cannot be said to have induced its rendition, or to have otherwise infected it. We must therefore decline to consider it further. *Mobile & K. C. R. Co. v. Owen*, 121 Ala. 505, 25 So. 612.

We have not deemed it necessary to notice in detail the many assignments of error, since the principles announced by us involve the adjudication of all of them against the appellant.

There is no error in the record, and the judgment is affirmed.

Affirmed by Supreme Court of United States January 5, 1903.

KANSAS SUPREME COURT.

KANSAS CITY-LEAVENWORTH RAILROAD COMPANY, *Plff. in Err.*,

v.

Margaret GALLAGHER.

(.....Kan.....)

*1. In the absence of evidence to the contrary, a jury may infer from a universal instinct of self-preservation that a person about to cross an electric street railway track both looked and listened before venturing to do so.

2. It is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties of sight and hearing, and in other respects to take ordinary precautions to avoid collision with the cars. If he does look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fails to look and listen, he will be charged with the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. If, in view of his distance from the car, the rate of speed of its approach, and all other circumstances of the event, a reasonably prudent man would

accept the hazard and undertake to cross, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury.

(February 6, 1904.)

ERROR to the District Court for Leavenworth County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her husband. *Affirmed*.

The facts are stated in the opinion.

Messrs. Atwood & Hooper, for plaintiff in error:

A traveler on a city street, who is about to cross the track of an electric street car company, must exercise his faculties of sight and hearing, and, under special circumstances, must use other careful and prudent means to ascertain whether a car is approaching.

Burns v. Metropolitan Street R. Co. 66 Kan. 188, 71 Pac. 244; *Schulte v. New Orleans City & L. R. Co.* 44 La. Ann. 509, 10 So. 811; *Doherty v. Detroit Citizens' Street R. Co.* 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *Sheets v. Connolly Street R. Co.* 54 N. J. L. 518, 24 Atl. 483; *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525; *McGee v. Consolidated*

*Headnotes by BURCH, J.

NOTE.—As to measure of care required of person in crossing street-car track, see also, in this series, *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126; *Carson v. Federal Street & P. Valley R. Co.* 15 L. R. A. 257; *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 448; *Newark Pass. R. Co. v. Bloch*, 22 L. R. A. 374; *McGee v. Consolidated Street R. Co.* 26 L. R. A. 300; *Cincinnati Street R. Co. v. Snell*, 32 L. R. A. 276; *Consolidated Traction Co. v. Scott*, 33 L. R. A.

R. A. 122; *Baltimore Traction Co. v. Helms*, 36 L. R. A. 215; *Johnson v. St. Paul City R. Co.* 36 L. R. A. 586; *Evansville Street R. Co. v. Gentry*, 37 L. R. A. 378; *Hoelzel v. Crescent City R. Co.* 38 L. R. A. 708; *Tesch v. Milwaukee Electric R. & Light Co.* 53 L. R. A. 618; *Roberts v. Spokane Street R. Co.* 54 L. R. A. 184; and *Keenan v. Union Traction Co.* 58 L. R. A. 217.

Street R. Co. 102 Mich. 107, 26 L. R. A. 300, 47 Am. St. Rep. 507, 60 N. W. 293; *Smith v. City & Suburban R. Co.* 29 Or. 539, 46 Pac. 136, 780; *Carson v. Federal Street & P. Valley R. Co.* 147 Pa. 219, 15 L. R. A. 257, 30 Am. St. Rep. 727, 23 Atl. 369; *Metropolitan Street R. Co. v. Arnold* (Kan.) 72 Pac. 857.

The employees of the company, in adopting the usual and ordinary methods of giving warning to persons or vehicles upon the track, and especially persons who are in possession of all their faculties and in a position to instantly get out of the way of a car, are performing their whole duty, because it can be presumed by them that such a person will heed such warning immediately, and get out of the way of the approaching car.

St. Louis & S. F. R. Co. v. Karns, 66 Kan. 802, 72 Pac. 234; *Schulte v. New Orleans City & L. R. Co.* 44 La. Ann. 509, 10 So. 811; *Carson v. Federal Street & P. Valley R. Co.* 147 Pa. 219, 15 L. R. A. 257, 30 Am. St. Rep. 727, 23 Atl. 369; *Sheets v. Connolly Street R. Co.* 54 N. J. L. 518, 24 Atl. 483; *McGee v. Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300, 47 Am. St. Rep. 507, 60 N. W. 293; *Burns v. Metropolitan Street R. Co.* 66 Kan. 188, 71 Pac. 244; *Henderson v. Detroit Citizens' Street R. Co.* 116 Mich. 368, 74 N. W. 525; *Doherty v. Detroit Citizens' Street R. Co.* 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; *Smith v. City & Suburban R. Co.* 29 Or. 539, 46 Pac. 136, 780; *Pinder v. Brooklyn Heights R. Co.* 173 N. Y. 519, 66 N. E. 405.

It was Gallagher's duty, before going upon or across the track, to use ordinary precaution to avoid a collision with the car; and it was his duty to look and listen for a car; and if he went upon the track without so doing, or remained thereon for any length of time without looking or listening, he was guilty of negligence.

Robards v. Indianapolis Street R. Co. (Ind. App.) 67 N. E. 953; *Everett v. Los Angeles Consol. Electric R. Co.* 115 Cal. 105, 34 L. R. A. 350, 43 Pac. 207, 46 Pac. 889.

Messrs. John T. O'Keefe and Benjamin F. Endres, for defendant in error:

A reviewing court ought not to disturb the verdict of the jury upon the question of contributory negligence, and adjudge the existence thereof, unless the evidence of the facts and circumstances is so clear and uncontradicted that no other reasonable deduction can be drawn therefrom.

St. Louis & S. F. R. Co. v. French, 56 Kan. 584, 44 Pac. 12; *Atchison, T. & S. F. R. Co. v. Conlon*, 9 Kan. App. 116, 57 Pac. 1063; *Atchison, T. & S. F. R. Co. v. Aderhold*, 58 Kan. 298, 49 Pac. 83; *Missouri P. 64 L. R. A.*

R. Co. v. Moffatt, 56 Kan. 668, 44 Pac. 607; *Dewald v. Kansas City, Ft. S. & G. R. Co.* 44 Kan. 586, 24 Pac. 1101.

Gallagher had a right to depend upon the operators of the car giving him a reasonable time to leave and push his cart off of the track after they had rung the bell. No bell was rung; no warning given.

Little v. Street R. Co. 78 Mich. 205, 44 N. W. 137; *Smith v. Union Trunk Line Co.* 18 Wash. 351, 45 L. R. A. 169, 51 Pac. 400; *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197; 32 L. R. A. 276, 43 N. E. 207.

Where the evidence of the plaintiff shows actionable negligence on the part of the company, and the question of contributory negligence of the plaintiff depends upon a variety of circumstances from which different conclusions may be reached as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions.

Brooks v. Lincoln Street R. Co. 22 Neb. 816, 36 N. W. 529; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179, 28 Pac. 829; *Rascher v. East Detroit & G. P. R. Co.* 90 Mich. 413, 30 Am. St. Rep. 447, 51 N. W. 463; *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334; *Benjamin v. Holyoke Street R. Co.* 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Chicago City R. Co. v. Robinson*, 127 Ill. 9, 4 L. R. A. 126, 11 Am. St. Rep. 87, 18 N. E. 772; *Traver v. Spokane Street R. Co.* 25 Wash. 225, 65 Pac. 284; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374, 27 Atl. 1067; *Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 40 L. R. A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216, 26 S. W. 455; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920; *North Jersey Street R. Co. v. Schwartz*, 66 N. J. 437, 49 Atl. 683; *Bass v. Norfolk R. & Light Co.* 100 Va. 1, 40 S. E. 100; *Lawler v. Hartford Street R. Co.* 72 Conn. 74, 43 Atl. 545; *Lake Roland Elev. R. Co. v. McKewen*, 80 Md. 593, 31 Atl. 797; *Thoresen v. LaCrosse City R. Co.* 87 Wis. 597, 41 Am. St. Rep. 64, 58 N. W. 1051; *Mock v. Los Angeles Traction Co.* 139 Cal. 616, 73 Pac. 455; 7 Am. & Eng. Enc. Law, 2d ed. p. 429; *Penny v. Rochester R. Co.* 7 App. Div. 595, 40 N. Y. Supp. 172.

Gallagher's failure to look was not the proximate cause of his injury and death.

Lawler v. Hartford Street R. Co. 72 Conn. 74, 43 Atl. 548; *Consolidated Traction Co. v. Glynn*, 59 N. J. L. 432, 37 Atl. 66; *Downey v. Pittsburg, A. & M. Traction Co.*

161 Pa. 131, 28 Atl. 1019; *Patterson v. Townsend*, 91 Iowa, 725, Appx., 59 N. W. 205; *Pittsburg Electric R. Co. v. Kelly*, 57 Kan. 514, 46 Pac. 945.

The conduct of the company and its employees, under the circumstances, was such as to amount to wilfulness or wantonness.

Kansas P. R. Co. v. Whipple, 39 Kan. 541, 18 Pac. 730; 1 Bishop, Crim. Law, 20; Cooley, Torts, 674; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 892, 44 N. E. 551; *Pacific R. Co. v. Houts*, 12 Kan. 332; 1 Thomp. Neg. 124, § 1222; *Thompson v. Salt Lake Rapid Transit Co.* 16 Utah, 281, 40 L. R. A. 172, 67 Am. St. Rep. 621, 52 Pac. 92; *Roberts v. Spokane Street R. Co.* 23 Wash. 325, 54 L. R. A. 184, 63 Pac. 506; *Turnbull v. New Orleans & C. R. Co.* 57 C. C. A. 151, 120 Fed. 783; *Metropolitan Street R. Co. v. Arnold* (Kan.) 72 Pac. 857; Nellis, Street Surface Roads, § 24, p. 349; *Missouri P. R. Co. v. Moffatt*, 60 Kan. 118, 72 Am. St. Rep. 343, 55 Pac. 837; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 667; *Consolidated City & C. P. R. Co. v. Carlson*, 58 Kan. 64, 48 Pac. 635; *Shea v. St. Paul City R. Co.* 50 Minn. 395, 52 N. W. 902; *Citizens' Street R. Co. v. Albright*, 14 Ind. App. 433, 42 N. E. 238, 1028; *Hays v. Tacoma R. & Power Co.* 106 Fed. 49; *Robbins v. Springfield Street R. Co.* 165 Mass. 30, 42 N. E. 334.

Where the appearances indicate that a person upon the track is in such a condition as to be either insensible of his danger or unable to avoid it, those in charge of the train must use all available means to stop.

Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 543, 40 Pac. 997; *Cleveland, O. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 98, 39 C. C. A. 568, 99 Fed. 369; *Bedell v. Detroit, Y. & A. A. R. Co.* (Mich.) 9 Det. L. N. 479, 92 N. W. 349; *Baltimore Traction Co. v. Appel*, 80 Md. 603, 31 Atl. 964; *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L. R. A. 238, 74 Pac. 15; *Citizens' Street R. Co. v. Steen*, 42 Ark. 321; *West Chicago Street R. Co. v. Camp*, 46 Ill. App. 503; *Baltimore Traction Co. v. Wallace*, 77 Md. 435, 26 Atl. 518; *North Baltimore Pass. R. Co. v. Arnreich*, 78 Md. 589, 28 Atl. 809; *Little v. Superior Rapid Transit R. Co.* 38 Wis. 402, 60 N. W. 705; *Bunyan v. Citizens' R. Co.* 127 Mo. 12, 29 S. W. 842; *Thatcher v. Central Traction Co.* 166 Pa. 66, 45 Am. St. Rep. 645, 30 Atl. 1048; *Houston City Street R. Co. v. Woodlock* (Tex. Civ. App.) 29 S. W. 817.

He who has the last clear opportunity of avoiding the accident by exercising proper care must do so.

Moore v. St. Louis Transit Co. (Mo. App.) 75 S. W. 699; 7 Am. & Eng. Enc. 64 L. R. A.

Law, 2d ed. p. 437; *Klockenbrink v. St. Louis & M. River R. Co.* 172 Mo. 678, 72 S. W. 900; *Esrey v. Southern P. Co.* 103 Cal. 541, 37 Pac. 500; *Lee v. Market Street R. Co.* 135 Cal. 293, 67 Pac. 765; 1 Thomp. Neg. 2d ed. §§ 239, 240, 245; *Shearm. & Redf. Neg.* 5th ed. § 99; *Tully v. Pennsylvania, W. & B. R. Co.* 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019.

Bureh, J., delivered the opinion of the court:

A street sweeper of a city street, while engaged in the performance of his duties, at night, was run down and killed by an electric street railway car. The car was running at a speed of from 20 to 25 miles per hour, while the rate allowed by the ordinances of the city was but 12 miles per hour. The track was "sweaty," and because of its slippery condition a moving car was difficult to control. The conductor and motorman in charge of the car discovered the employee of the city when 100 feet distant from him. He was then upon the track between its rails, and in the act of walking across it. The car conductor shouted to him, but the bell was not sounded or other warning given. Two railway engines were standing a short distance beyond the place of accident, one of which was taking water and the other noisily emitting steam, while the wind blew from the direction of the engines toward the pedestrian and the car. When the man was observed the motoneer set the brakes, which locked the car wheels, but not so quickly as if the brakes had been in good repair. The proper method of overcoming the momentum of the car would have been to apply sand to the track, but the apparatus for the use of sand was out of repair, and that expedient was not adopted at all. The car was properly lighted, and some street lights were burning in the vicinity, and, if it had been properly equipped, operated, and controlled, the car could have been stopped within a distance less than that intervening between the man and the car when he was discovered to be upon the track. The deceased was struck by the corner of the car on the side of the track toward which he was walking, and by force of the collision his body was thrown still farther away from the track. He was in good health and had good eyesight and good hearing. He was familiar with the track and the manner and mode of running cars upon it along the street in question, and knew about how often cars passed the place of injury. He had an unobstructed view of the railway track for 610 feet in the direction from which the car came. There was nothing to prevent his seeing the car as it approached him if he had looked, and,

if he had heard or heeded the shouting of the conductor, he then had time to leave the track and avoid the collision, and had the ability to do so. But there is nothing to show either that he did or did not look for an approaching car, or that he did or did not see or hear the one which struck him. Under these circumstances, was the deceased guilty of such contributory negligence that his widow may not recover from the company operating the car the damages occasioned by his death?

The defendant company argues the case as if the deceased man either looked and listened for the approaching car or did not do so; that he was negligent if he failed to take so much precaution for his own welfare; that he must be held to have noted the proximity of the car if he did look and listen; and that a reasonably prudent man, after looking and listening, would have avoided a collision. It is true that a traveler upon a city street, who is about to cross the track of an electric street railway company, should exercise his faculties of sight and hearing, and in other respects take ordinary precautions to avoid collision with the cars. If he does look and listen, he will be held to an apprehension of that which should have been seen and heard, and, if he fails to look and listen, he will be charged with the same liability in case of disaster as if he had done so. These principles meet the tests both of reason and of practical application to the affairs of men. *Burns v. Metropolitan Street R. Co.* 66 Kan. 188, 71 Pac. 244. But a jury may infer ordinary care and diligence on the part of an injured person from the love of life, the instinct of self-preservation, and the known disposition of men to avoid injury. *Devald v. Kansas City, Ft. S. & G. R. Co.* 44 Kan. 586, 24 Pac. 1101. And, in the absence of evidence to the contrary, it will be presumed that a person about to cross a railroad track both looked and listened before venturing to do so. *Chicago, R. I. & P. R. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993. "There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked, and listened. The law was so declared in *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 366, 41 L. ed. 186, 192, 16 Sup. Ct. Rep. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation,—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have 64 L. R. A.

surer foundation than that expressed in the instruction objected to." *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137.

Since the evidence in this case gives no account of the street sweeper on the night of the fatality until he was suddenly seen in a place of peril on the railway track, with the enginery of death bearing swiftly down upon him, these presumptions should be indulged in his favor, and the case determined as if he had chosen his gait in crossing the track with reference to an observation of his surroundings. Conceding, then, that the traveler looked for whatever was to be seen and listened for whatever was to be heard, and duly apprehended the report of his senses, still he cannot be summarily condemned. A man may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. Hundreds of people do so every day, and yet satisfy every demand for care and caution which the law imposes upon them. The requirement of the law that a man shall look and listen means no more than that he shall observe and estimate with reasonable accuracy his distance from the car and the speed of its oncoming. He is then to make a calculation and comparison of the time it will take the car to come and the time it will take to cross the track, and if, under the same circumstances, a reasonably prudent person would attempt to cross at a given rate of speed, he will not be negligent in doing so. It is true that a reasonably prudent man may be mistaken or be deceived, but, if so, and if his conclusion from the facts as they appear to him be erroneous, and an injury result, he is nevertheless guiltless of contributory negligence, for the law does not measure human conduct in such cases by any higher standard of care than that which such a man would exercise; and whether or not a prudent man would accept the hazard is generally a question of fact for the jury. "It is consistent with the facts proved that Lawler saw the approaching car, and without negligence on his part failed to observe from his position the unusual speed at which it was running, so that his conclusion that he could safely cross was not an unreasonable one. Clearly, it is not negligence in law for one to cross a street railway track in front of an approaching car which he has seen, and which does not appear to him to be dangerously near, and which would not have been so in fact had it been running at its ordinary rate of speed. Whether one who has observed an approaching street car should have also apprehended that it was approaching at such a speed as to reach him before he could cross the

track, is generally a question of fact to be determined upon the circumstances of each particular case." *Lawler v. Hartford Street R. Co.* 72 Conn. 74, 82, 43 Atl. 545. "He who puts himself in the way of runaway horses who have escaped from the driver's control must know that he is taking a risk. But a jury may well say that he who crosses in front of a trolley car provided with a motorman may assume that it is furnished with the means of stopping or reducing speed. Then there was a question for the jury in this case whether a prudent man, upon such an assumption might not judge it safe to cross in front of a trolley car 300 feet away, although coming at great and illegal speed. Upon the assumption of the existence of means to reduce speed and to stop, and of a servant employed to make use of such means, it would be absurd to say that one was bound to refrain from crossing for fear the servant would not make use of the means." *Consolidated Traction Co. v. Lamberton*, 59 N. J. L. 297, 299, 36 Atl. 100. "It would be palpable negligence for the driver of a wagon or carriage to recklessly drive upon a crossing in a race with an approaching car. In all such cases it should be held that the driver of the vehicle takes his chances of a collision, and he ought to have no remedy if an accident occurs. But no principle of law or common sense requires that the driver of a vehicle should stop his team, and await the passing of an approaching car, if he discovers the car on the line at such a distance as that, in the exercise of reasonable care and prudence, he may safely proceed on his way, and cross the track. Much is said in argument about the question whether the rule requiring a person about to cross the track to stop and look and listen for an approaching car, and whether the rule applicable to a railroad operated by trains and steam locomotives, should apply to an electric railroad. That question is not in this case. There is no claim that plaintiff did not see the approaching car. He saw it when it was 300 feet away from the crossing. The question is, Did he use proper care and caution in determining whether he could safely cross the track? That was a fair question, under the evidence, for the jury to determine." *Patterson v. Townsend*, 91 Iowa, 725, 726, Appx., 59 N. W. 205. See also *Schmidt v. Burlington, C. R. & N. R. Co.* 75 Iowa, 606, 39 N. W. 916; *Gratiot v. Missouri P. R. Co.* 116 Mo. 450, 16 L. R. A. 189, 21 S. W. 1094; 2 Thomp. Neg. § 1450.

What, then, was the situation of the street sweeper in this case? The car was hurtling through space at a rate of speed far in ex-

cess of that allowed by the city law. An observation of it would not have indicated peril, and would not have dictated haste in crossing, unless this high and dangerous rate of speed were appreciated. The sweeper had the right to rely upon a compliance with the law on the part of the company, and to believe the speed of the car to be within 12 miles per hour, and under the control of the motoneer. The mingling lights and shadows of the night necessarily rendered vision inaccurate and uncertain. The man was not bound to regard a shout as a street-car signal, and other sounds were opposed to the noise of the flying car. Under these circumstances an unexpected and unlawful acceleration of speed might well deceive a reasonably prudent and careful man, and delude him into danger; and, if he were cognizant of the true rapidity of the car's motion, he might nevertheless feel secure that it would be reduced to the lawful rate by a vigilant motorman in command of efficient appliances in good repair, before it could overtake him. So considered, the facts already narrated, which seem especially to militate against a belief in the carelessness of the deceased, are not irreconcilable with a liability on the part of the company. In the light of such facts different minds might arrive at different conclusions as to what might, under all the circumstances, have been done without blame. The question, therefore, is not one of law, but is one of fact, and the general verdict against the company is conclusive.

Some complaint is made of instructions given and refused at the trial. Under the view of the case taken above, the instruction given relating to reciprocal rights upon the streets could not have been prejudicial. In the next instruction given the allusion to the safety of passengers occurs in a recital of duties evidently taken from the city ordinance granting the defendant the right to use the streets, and could not have misled the jury; and the objection that this instruction permitted a recovery if the defendant "negligently failed and neglected in any manner to care for the safety of the life and personal safety of the plaintiff's intestate" ignores the succeeding words "as alleged." The subject-matter of two of the instructions refused, referred to in the defendant's brief, was covered by instructions given, and the third conflicts with the views set forth above.

Since no material error appears to have been committed by the District Court, its judgment is affirmed.

All the Justices concur.

TEXAS SUPREME COURT.

MARYLAND CASUALTY COMPANY, *Piff.*
in *Err.*,

v.

Sallie M. HUDGINS.

(.....Tex.....)

1. A specification in an answer to a petition for recovery on a policy insuring against accident one who came to his death by eating spoiled oysters, the facts as to which are set out in the petition, that, if the death was so caused, it was because the oysters contained ptomaine poison, which would bring the death within one exception in the policy, does not preclude reliance upon another exception from liability in case of death from things voluntarily taken, where the allegations of the answer and petition together are sufficient to raise that defense.

2. Death caused by accidentally eating spoiled oysters is within a clause in an accident insurance policy providing that the policy does not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed.

(November 16, 1903.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Bowie County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. Baker, Botts, Baker, & Lovett and J. S. McEachin, for plaintiff in error:

The court of civil appeals erred in holding that the voluntary act of eating an unsound oyster, not known to be so, falls within the terms of an accident policy insuring against death resulting from "external, violent, and accidental means," and excluding "injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled."

Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 485, 65 N. W. 635; *Foster v. Fidelity & C. Co.* 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; *Travelers' Ins. Co. v. Myers*, 62 Ohio St.

529, 49 L. R. A. 760, 57 N. E. 458; *Western Commercial Travelers' Assn. v. Smith*, 40 L. R. A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; *Woodmen Accl. Assn. v. Pratt*, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777, 87 N. W. 546; *Scheiderer v. Travelers' Ins. Co.* 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47; *O'Reilly v. Guardian Mut. L. Ins. Co.* 60 N. Y. 169, 19 Am. Rep. 151; *Peabody v. Satterlee*, 166 N. Y. 174, 52 L. R. A. 956, 59 N. E. 818; *McGlothter v. Provident Mut. Accl. Co.* 32 C. C. A. 318, 60 U. S. App. 705, 89 Fed. 685; *Pollock v. United States Mut. Accl. Assn.* 102 Pa. 234, 48 Am. Rep. 204; *Westmoreland v. Preferred Accl. Ins. Co.* 75 Fed. 245.

Messrs. Sheppard, Jones, & Sheppard for defendant in error.

Brown, J., delivered the opinion of the court:

On October 6, 1900, the Maryland Casualty Company, a foreign corporation doing business in Texas on a permit from the state, issued and delivered to William T. Hudgins a policy of accident insurance which contained these stipulations: "The Maryland Casualty Company, Baltimore, Md., hereinafter called the company, does hereby insure Wm. T. Hudgins, of Texarkana, in the county of Bowie, and state of Texas, hereinafter called the assured, by occupation a lawyer, classified by the company as 'A Spl.' for the term of twelve months, beginning on the 6th day of October, 1900, at twelve o'clock noon, and ending on the 6th day of October, 1901, noon, standard time, in the amount of five thousand dollars, principal sum, and \$25 weekly indemnity against bodily injuries, sustained through external violent, and accidental means, as follows: 1st. If death shall result from any such injury independent of all other causes within ninety days from the happening of the accident causing such injury, the company will pay the principal sum above specified to Mrs. Sallie N. Hudgins, wife of the assured, if surviving, otherwise to the legal representatives of the assured. . . . This insurance does not cover . . . injuries fatal or otherwise, resulting from poi-

NOTE.—As to effect of provision in policy exempting company from liability for death caused by poison or anything taken or absorbed, see also, in this series, *Mennelley v. Employers' Liability Assur. Corp.* 31 L. R. A. 686; *Fidelity & C. Co. v. Waterman*, 32 L. R. A. 654; and *Kasten v. Interstate Casualty Co.* 40 L. R. A. 651.

As to what constitutes an accident within the meaning of a provision in a life insurance policy, see *note* to *Fidelity & C. Co. v. Johnson*, 64 L. R. A.

30 L. R. A. 206; also *Modern Woodmen Accl. Assn. v. Shryock*, 39 L. R. A. 826; *Kasten v. Interstate Casualty Co.* 40 L. R. A. 651; *Western Commercial Travelers' Assn. v. Smith*, 40 L. R. A. 653; *Feder v. Iowa State Travelling Men's Assn.* 43 L. R. A. 693; *Smith v. Aetna L. Ins. Co.* 56 L. R. A. 271; *Preferred Accl. Ins. Co. v. Robinson*, 61 L. R. A. 145; *Fetter v. Fidelity & C. Co.* 61 L. R. A. 459; and *Horsfall v. Pacific Mut. L. Ins. Co.* 63 L. R. A. 425.

son or anything accidentally or otherwise taken, administered, absorbed, or inhaled."

Mrs. Sallie N. Hudgins, the beneficiary in the said policy, instituted suit in the district court of Bowie county, and by appropriate allegations set up the making and delivering of the policy, her right to maintain the suit, and the death of William T. Hudgins, alleging the facts in connection with the said death, and the causes which brought it about, as follows: "That while said policy was in full force and effect, according to the face and reading thereof, to wit, on October 28, 1900, the said Wm. T. Hudgins did receive a bodily injury through external, violent, accidental means, from which, independently of all other causes, the said Wm. T. Hudgins died on November 1, 1900; that the nature and character of said accident to the said Wm. T. Hudgins, and the injury arising therefrom and causing his death, were as follows: That on October 28, 1900, the said Wm. T. Hudgins ordered, among other things, for his dinner, some raw oysters; that some of said oysters were unsound and spoiled; that the said Wm. T. Hudgins accidentally ate one or two of said oysters, and soon thereafter discovered that they were unsound and spoiled; that at the time he ate them he did not know that they were unsound and spoiled; that had he known that said oysters were unsound and spoiled before he ate them he would not have eaten them; that as soon as he detected their unsound and spoiled condition he quit eating them; that a few hours after he had eaten said unsound and spoiled oysters his stomach began to cramp him, and pains seized him in his bowels and stomach; that he became sick at his stomach, vomited, and passed bloody mucus actions from his bowels; that said unsound and spoiled oysters had passed into his intestines, and inflamed his bowels to such an extent that they were obstructed and prevented from performing the functions essential to the maintenance and sustenance of life; that he steadily and rapidly grew worse, until he died on November 1, 1900, from the effects of eating said unsound and spoiled oysters accidentally, and from the effects of said unsound and spoiled oysters lodging in his intestines accidentally, the one or both of said accidents being the proximate cause of his death."

Defendant answered by a general demurrer, by special exceptions, and a general denial, and specially pleaded as follows: "And for further answer defendant says that said policy contains a stipulation that said policy does not cover injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled, and that, if said un-

sound or spoiled oysters caused the death of said Wm. T. Hudgins, it was because said spoiled oysters contained ptomaine poison, and that therefore defendant is not liable, and plaintiff ought not to recover, and of this it puts itself upon the country." The evidence established the allegations of the petition as to the manner of Hudgins' death, but the facts need not be repeated.

Upon a trial before a jury, after the evidence was introduced, the defendant in the court below filed the following demurrer to the evidence and motion for instruction: "Now comes the defendant, by Webber & Webber and Dan T. Leary, its attorneys, and says the evidence offered herein and introduced by the plaintiff fails to show any right for plaintiff to recover herein, and defendant demurs to the evidence of plaintiff, and says the same is not sufficient to entitle plaintiff to a judgment. Wherefore the defendant prays that the court instruct the jury to return a verdict in favor of the defendant." The court refused the request to instruct the jury to find for the defendant, and proceeded with the trial, submitting the issues to the jury, and verdict was rendered for the plaintiff for the amount of the policy, with interest thereon, which judgment was by the court of civil appeals affirmed.

The court of civil appeals held that the answer specially set up that the deceased died from ptomaine poison, and under such answer the defense that the oysters were voluntarily taken into the stomach, and that death ensued therefrom, was not admissible. The answer of the defendant set up the clause excepting from liability death or injury arising from poison, or anything taken, etc., and alleged that, if the oysters taken or swallowed by the deceased caused his death, then it was because the said oysters contained "ptomaine poison." The word "because" marks the means by which death was produced, and not the reason why the defendant is not liable; but the answer continues, "and therefore the defendant is not liable," etc., which refers to all of the facts set up in the answer as constituting a defense to the plaintiff's claim. Plaintiff's petition contains specific allegations of the facts attending the eating of the oysters by deceased, and the manner in which it is claimed the oysters produced the death of Hudgins. The facts alleged in the petition, taken in connection with the answer of defendant, were sufficient to present the whole defense claimed by the defendant. It is a well-established rule of pleading in our court that facts alleged by one party need not be pleaded by the other. *Lyon v. Logan*, 68 Tex. 525, 2 Am. St. Rep. 511, 5 S. W. 72; *Gaston v. Wright*, 83 Tex. 286, 18 S. W. 576.

The court erred in refusing to sustain the defense that the injury was excepted from the obligation of the contract presented under the following assignment of error: "The court erred in overruling defendant's demurrer to plaintiff's evidence, and in refusing to sustain and grant defendant's motion herein to instruct the jury in this case to return a verdict in favor of the defendant." The policy sued upon contracted to indemnify William T. Hudgins against bodily injuries sustained "through external, violent, and accidental means," but the policy did not propose to indemnify against the consequence of all accidents. Much argument has been indulged in by the counsel for defendant in error as well as the learned judge who wrote the opinion of the court of civil appeals to establish that the means by which Hudgins lost his life was accidental. In the view we take of the case it is unnecessary to discuss that question, for, granting that it comes within the terms of the policy as being "external, violent, and accidental," yet it is just the character of accident which is specifically excepted from the obligation by this language: "This insurance does not cover . . . injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled." The word "take" means to eat as food, to swallow. Webster's Dict., word *take*, 2d ¶ 6. The true meaning of the policy will be shown by reading its different clauses which bear upon this question in connection, thus: "The Maryland Casualty Company . . . does hereby insure William T. Hudgins . . . for the term of twelve months . . . against bodily injuries sustained through external, violent, and accidental means. . . . This insurance does not cover injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken. . . . But it is understood that this policy covers the assured, according to the terms hereof, in the event of his injury from . . . choking in swallowing." The last clause quoted was introduced to qualify the excepting clause; the words "choking in swallowing" can refer to no word in the qualified clause except "taken," and serves to define the meaning of that word.

It is true that the policy should be construed in that manner which is most favorable to the assured, and, if the language of the contract is fairly susceptible of any construction that would make the insurer responsible for the loss, it would be the duty of the court to place such construction upon it; but the courts cannot undertake to make a new contract, in disregard of the plain and unambiguous language used by the par-

ties. The plain meaning of this language is that the company excepts from its liability all injuries which may arise from whatever thing of any kind or character, poisonous or not, that Hudgins might voluntarily and consciously take into his stomach,—that is, to swallow as food or drink,—and any other meaning attributed to the exception would be in disregard of the plain language, and would give to the policy a force and effect never intended by the parties.

There is no doubt that the oysters, whether poisonous or not, and whether taken accidentally or not, were consciously and voluntarily swallowed by Hudgins, and, this being the case, it comes strictly and clearly within the terms of the excepting clause, and there can be no liability under that contract for the injury which resulted in his death. *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Kasten v. Interstate Casualty Co.* 99 Wis. 73, 40 L. R. A. 651, 74 N. W. 534; *Early v. Standard Life & Acci. Ins. Co.* 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500; *Pollock v. United States Mut. Acci. Asso.* 102 Pa. 234, 48 Am. Rep. 204; *McGlothter v. Provident Mut. Acci. Co.* 32 C. C. A. 318, 60 U. S. App. 705, 89 Fed. 685; *Westmoreland v. Preferred Acci. Ins. Co.* 75 Fed. 244; *Bayless v. Travelers' Ins. Co.* 14 Blatchf. 143, Fed. Cas. No. 1,138; *Cole v. Accident Ins. Co.* 61 L. T. N. S. 227.

In *Pollock v. United States Mut. Acci. Asso.*, *supra*, the supreme court of Pennsylvania said: "To remove all doubt as to the liability of the association to the plaintiff in this case, the certificate further declares the benefits under it shall not extend to any death or disability which may have been caused 'by the taking of poison.' It is not necessary that the poison be taken with an intent to produce death, in order to defeat a claim flowing from the right of membership. If the poison be innocently taken, and without any knowledge of the injurious effect which it was likely to produce, and did produce, so far as the person taking it is concerned, the effect may be said to be accidental. If we go a step further, and admit in such case that the 'means' are accidental, yet it is one of the accidental means expressly excepted from the protective power of the certificate."

In the case of *Westmoreland v. Preferred Acci. Asso.* *supra*, there was the same exception in the policy as that under consideration. In that case the party died from inhaling chloroform, which produced death. The chloroform was properly administered by a physician, and it was claimed that, while the administering of the chloroform was intentional, the effect was accidental, and therefore within the terms of the policy.

Judge Newman used this language: "How could there be a case that comes more clearly within the language of this exception, in the sense in which it must have been used? It need not necessarily, it seems to me, be malpractice or carelessness on the part of the physician or surgeon; but certainly, to come within this exception, the medical or surgical treatment must be the proximate cause of death. If this is not true of this case, it seems difficult to imagine a case to which the exception would apply. So that, considering the right to recover of the company under the general terms of the policy, or under either of the exceptions just referred to, I am clear that there is no liability." The death of Hudgins in this case was caused by swallowing unsound oysters, and, whether it was "accidental or otherwise," it is strictly within the exception contained in the policy.

Many cases have been cited to show that inhaling of gas from which death followed must be voluntary, to bring it within the terms of this exception; but, granting the full force of those authorities, they do not support the claim of defendant in error, because there is no doubt from the evidence that the oysters were voluntarily taken into the stomach of Hudgins.

Miller v. Fidelity & C. Co. 97 Fed. 836, is more nearly analogous to the case now before us in its facts than any other that has been cited by appellees; but we do not regard it as sound in its doctrine as applied to the facts before that court, and it certainly does not bear upon the question now before us. The main question discussed by the court in that case was whether the injury resulted from external, violent, and accidental means, but neither of the questions are 64 L. R. A.

involved in the decision of this case. The case of *Healey v. Mutual Acci. Assn.* 133 Ill. 556, 9 L. R. A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, is somewhat similar in its facts to this, but the question discussed and decided in that case was the same as in the preceding case.

It is claimed that, while the eating of the oysters was not accidental, the eating of spoiled oysters was accidental because Hudgins did not intend to eat unsound oysters,—the accident consists in the state of the thing swallowed. This is a shadowy distinction, but, admitting it to be sound, it does not take the case out of the exception; for the spoiled oysters was a thing, it was "taken," from which the injury resulted, which brings the case under the exception, and takes it out of the obligation of the contract.

We are of opinion that the undisputed evidence in this case shows that the death of William T. Hudgins was caused by means embraced within the exception from liability contained in the contract of insurance, and that no cause of action was or can be shown against the plaintiff in error upon that contract. The district court erred in not instructing the jury to find a verdict for the defendant below, and the court of civil appeals erred in affirming that judgment.

It is therefore ordered that the judgments of the District Court and of the Court of Civil Appeals be reversed, and judgment be here entered; that Sallie N. Hudgins take nothing by her suit; that the Maryland Casualty Company go hence without day, and recover of Sallie N. Hudgins all costs in all of the courts.

TENNESSEE SUPREME COURT.

Martin SNIDER, Trustee, etc., for Standard Oil Company of Cleveland, Ohio, *Appt.*,
v.

J. C. YATES *et al.*

(.....Tenn.....)

A chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority by the courts of another state, to which the chattels are removed, over local attaching creditors who had no actual notice of it.

(February 15, 1904.)

APPEAL by plaintiff from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Hickman County in defendants' favor in a suit brought to enjoin interference with certain mortgaged chattels under attachments and

executions in favor of creditors of the mortgagor. *Affirmed.*

The facts are stated in the opinion.

Mr. W. B. Leech, for appellant:

A valid mortgage of chattels situated in another state, which was made and registered in that state, will, in the absence of some settled rule of public policy forbidding it, be enforced by the courts of this state, when the mortgaged property comes within their jurisdiction, to the same extent as a domestic mortgage.

Hughes v. Abston, 105 Tenn. 69, 58 S. W. 296; *Bank of Louisville v. Hill*, 99 Tenn. 45, 41 S. W. 349.

The rights of such a mortgagee will be protected against purchasers, as well as attaching and execution creditors.

Langworthy v. Little, 12 Cush. 109; *Barber v. Stacy*, 25 Miss. 471; *Ames Iron*

NOTE—Conflict of laws as to chattel mortgages.

- I. As a contract *inter partes*, 353.
- II. As a lien or right prior to claims of third persons.
 - a. Effect of removal of property to another jurisdiction after execution of mortgage.
 1. Necessity of change of possession, 355.
 2. Necessity of refile or rerecording in state to which property removed, 356.
 - b. When property located in another state at time of execution of mortgage.
 1. Necessity of filing, or recording, or change of possession in state where located, 361.
 2. Oath as to consideration, 363.
 - c. Necessity of complying with law of domicile, and of place where mortgage executed, 363.
 - d. Judgment in attachment as *res judicata* against mortgagee, 366.
- III. As between *lex loci contractus* and *lex domicilii*, 366.
 - I. As a contract *inter partes*.

Chief Justice Marshall, in *Harrison v. Sterry*, 5 Cranch, 289, 3 L. ed. 104, distinguishes between the validity of a contract creating a lien and the priority of the lien over the rights of third persons, as follows: "The law of the place where a contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause."

The principle embodied in the first part of the foregoing proposition (with which alone this subdivision is concerned) has been expressly applied to chattel mortgages viewed as contracts *inter partes*. Thus:

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The validity of a chattel mortgage *inter partes* is to be determined by the law of the state where it was executed, and where the parties were, at the time, domiciled, notwithstanding the subsequent removal of the property to another state. *Ramsey v. Glenn*, 33 Kan. 271, 6 Pac. 265.

Not only does the *lex loci contractus* govern as to the substantive rights of the immediate parties, but also as to the rights of third persons so far as they depend upon the validity, construction, or effect of the instrument itself; that is, so far as their rights depend upon, and are measured by, the rights of the immediate parties. Thus:

A chattel mortgage, valid in Iowa where it was executed, where the mortgagor resided at the time of its execution, and where the mortgaged property was then situated, will be regarded as valid also in Missouri, to which the property is subsequently removed by the mortgagor, though contested by a third person. *Brown v. Koenig*, 99 Mo. App. 653, 74 S. W. 407. The party contesting the mortgage in this case did not have any right or claim superior to that of the mortgagor.

So, a description of property in a chattel mortgage, sufficient under the laws of the state where it was made and registered and where the property was then situated, will be held sufficient in Tennessee, even as against a commission merchant in that state who is sued for the conversion of the property, although it might be inadequate in a domestic mortgage. *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296.

Whether the equitable interest of a mortgagor in a chattel mortgage may itself be made the subject of a second mortgage after default has been made under the first mortgage and the mortgagee has taken possession thereunder, is to be determined by the law of the state where the mortgagor was domiciled, the mortgages were executed, and the property was then situated, notwithstanding that the mortgagee in the first mortgage is a resident of another state, and is garnished in the latter state by a creditor seeking to reach the surplus above the

Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; *Feurt v. Rowell*, 62 Mo. 524; *Craig v. Williams*, 90 Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Hall v. Pillow*, 31 Ark. 32; *Smith v. McLean*, 24 Iowa, 322; *Cobb v. Buswell*, 37 Vt. 337; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62, notes; *Lally v. Holland*, 1 Swan, 401.

The lien of a mortgage on chattels duly recorded, as required by the law of the state where they are located, follows the property when it is taken into another state, either with or without the consent of the mortgagee, and is not destroyed by a local statute merely prescribing how such mortgages shall be executed and recorded.

Shapard v. Hynes, 52 L. R. A. 675, 45

C. C. A. 271, 104 Fed. 449; *Hornthall v. Burwell*, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556, 13 S. E. 721; *Smith v. McLean*, 24 Iowa, 322; *Handley v. Harris*, 48 Kan. 606, 17 L. R. A. 703, 30 Am. St. Rep. 322, 29 Pac. 1145; *National Bank of Commerce v. Morris*, 114 Mo. 255, 19 L. R. A. 463, 35 Am. St. Rep. 754, 21 S. W. 511; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Langworthy v. Little*, 12 Cush. 169; *Whitney v. Heywood*, 6 Cush. 82; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Feurt v. Rowell*, 62 Mo. 524; *Cool v. Roche*, 20 Neb. 550, 31 N. W. 367; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Offutt v. Flag*, 10 N. H. 46; *Lathe v. Schoff*, 60 N. H. 34; *Barrows v. Turner*, 50 Me. 127; *Hall v. Pillow*, 31 Ark.

amount of the first mortgage. *Beckham v. Tootle*, 19 Mo. App. 506.

The respective rights of a chattel mortgagee, and of a purchaser from the mortgagor, under a chattel mortgage executed in Texas, are to be determined by the Texas statute, which provides that a sale of the property under execution against the mortgagor carries the right of possession with the equity of redemption. *Roach v. St. Louis Type Foundry*, 21 Mo. App. 118. The property was in Texas at the time the mortgage was executed and at the time of its purchase under the execution sale, and was subsequently removed to Missouri.

A chattel mortgage, made in Nebraska by parties domiciled there upon property there situated, is subject to the law of that state, and that law will be applied thereto by a court of Iowa. *Fisher v. Friedman*, 47 Iowa, 443. This was an action in Iowa by the mortgagee for conversion against one who purchased a part of the mortgaged property in Nebraska with knowledge of the mortgage. So far as appears, the property was never in Iowa.

In *Aultman & T. Machinery Co. v. Kennedy*, 114 Iowa, 444, 86 Am. St. Rep. 373, 87 N. W. 435, while it was held that the law of the state where the property was located at the time the mortgage was executed, rather than the law of the state where the mortgagor was domiciled and the mortgage executed, governed as to the necessity of filing, and that the failure to file in either state did not defeat the mortgage as against an attaching creditor with notice, it not having that effect according to the *lex rei sitæ*, though it would according to the *lex loci contractus et domicili*,—it was conceded that, so far as the effect of the mortgage, even as against third persons, depended upon its validity as between the parties, it would be governed by the law of the place where the mortgage was executed as the *lex loci contractus*.

So, in *Whitman v. Conner*, 8 Jones & S. 339, while the question as to the necessity of filing the mortgage was referred to the *lex rei sitæ*, the question as to the validity of the mortgage, even as against third persons, so far as it depended upon usury, was referred to the law of the place where the contract was executed and where the obligation secured was payable. And the same position is taken in the recent case of *Trower Bros. Co. v. Hamilton* (Mo.) 77 S. W. 1081.

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The rule above stated, however, applies only to matters of substantive law; matters of remedy are, of course, governed by the law of the forum. Thus:

The liability to the mortgagor of a mortgagee who takes possession of and sells, or otherwise disposes of, the property after its removal to Kansas, is governed by the law of Kansas, rather than by the law of the state where the mortgage was executed, and in which the property was situated at the time of its execution. *Denny v. Faulkner*, 22 Kan. 89. This is on the ground that the matter pertains to the remedy.

In referring the question as to the validity of the contract creating the lien, as distinguished from the question of priority, to the law of the place where the contract is made, Chief Justice Marshall probably intended to eliminate only the *lex rei sitæ* as such, and not to exclude the law of the place of performance of the contract with respect to those elements of the contract which are within the control of the parties, and which, the circumstances indicate, the parties intended to refer to that law. In other words, he probably only intended to refer that question to the general principles governing personal contracts, which sometimes, and in certain respects, apply the *lex loci contractus*, and sometimes, and in other respects, apply the *lex loci solutionis*. Assuming that the mortgage is executed in the state in which the property is then situated, that state would ordinarily, and in the absence of an express designation of another place of performance, be both the *locus contractus* and *locus solutionis* of the contract, although the property was subsequently removed to another state. The fact that the property was in another state at the time the mortgage was executed will probably not, as a rule, be regarded as sufficient to locate the *locus solutionis* in that state, though it is apparent that it might, under some circumstances, have that effect; in which event, the construction and essential, as distinguished from the formal, validity of the contract would, under the principles applicable to personal contracts generally, be referred to the law of that state,—not as the *lex rei sitæ*, but as the *lex loci solutionis*. Again, even regarding the instrument in its aspect as an executed contract, the question of its effect, even as between the parties, may be referred to the law of the state where the property is situated, upon the ground that it is to operate there. Thus:

32; *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Ballard v. Winter*, 39 Conn. 179; *Jones, Chat. Mortg.* 4th ed. § 260.

The general rule is, that a chattel mortgage which is valid under the laws of the state where it is executed, both as between the immediate parties thereto and as against third persons, will be so held by the court of a sister state to which the property may be removed.

3 Am. & Eng. Enc. Law, p. 190; *Offutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 86; *Bigelow v. Hartford Bridge Co.* 14 Conn. 583, 36 Am. Dec. 502; *Langworthy v. Little*, 12 Cush. 109; *Rhode Island Central Bank v. Danforth*, 14 Gray, 123; *Tyler v. Strang*, 21 Barb. 198; *Nichols v. Mase*, 25 Hun, 640; *Whitman v. Con-*

ner, 8 Jones & S. 339; *Martin v. Hill*, 12 Barb. 631; *Edgerly v. Bush*, 81 N. Y. 199; *Wilson v. Carson*, 12 Md. 54; *Ryan v. Clanton*, 3 Strobb. L. 411; *Barker v. Stacy*, 25 Miss. 471; *Beall v. Williamson*, 14 Ala. 55; *Hall v. Pillow*, 31 Ark. 32; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Arnold v. Potter*, 22 Iowa, 194; *Smith v. McLean*, 24 Iowa, 332; *Sims v. McKee*, 25 Iowa, 341; *Feurt v. Rowell*, 62 Mo. 524.

Messrs. J. A. Bates and John A. Pitts, for appellees:

The laws of Illinois as to registration and the authentication of instruments for regis-

Where an instrument was executed in Louisiana in the common-law form of a mortgage; to wit, a sale with an equity of redemption upon paying a certain debt; and was intended to operate on slaves in Arkansas,—it was valid only as a mortgage, and could not be regarded in Louisiana as an instrument translatif of property. *Frelson v. Tiner*, 6 La. Ann. 18.

II. As a lien or right prior to claims of third persons.

a. Effect of removal of property to another jurisdiction after execution of mortgage.

1. Necessity of change of possession.

See I., *supra*, as to distinction between validity of contract creating a lien and the priority of the lien.

Most of the states have statutes which substitute filing or recording the mortgage in lieu of a change of possession thereunder, as a condition of its validity against third persons. In some of the states, however, there are, or at least at the time of the decisions were, no such statutes, and an actual change of possession was, therefore, necessary according to the laws of those states. The question then arises, whether a third person dealing with the property in possession of the mortgagor after its removal to such state will be affected by the filing or recording in the state from which the property was removed. As this question presents a somewhat different aspect than that which is presented when the statutes of both states provide for filing or recording, it is discussed separately in this subdivision, the other question being left for the next subdivision.

The rule of law in Connecticut, which requires a change of possession to accompany a mortgage of personal property in order to protect the mortgagee against creditors of the mortgagor, is not a mere rule of evidence, but of positive law, and does not, as such, apply to property which was mortgaged while in Massachusetts, by a resident of that state to another resident thereof, and was subsequently, without the knowledge or consent of the mortgagee, taken into Connecticut, and there seized under attachment against the mortgagor. *Ballard v. Winter*, 39 Conn. 179.

The same rule was adopted in Vermont, whose local law required a change of possession in 64 L. R. A.

order to protect the mortgagee against purchasers from, and creditors of, the mortgagor. Thus:

A chattel mortgage duly executed and recorded in another state, between residents of that state, upon property then in that state, will protect the property from attachment by the creditors of the mortgagor, residents of Vermont, after its removal to Vermont, notwithstanding the local rule of policy established in Vermont requiring a complete change of possession in order to exempt the property from attachment. *Jones v. Taylor*, 30 Vt. 42, *Overruling Skiff v. Solace*, 23 Vt. 279.

Notwithstanding that the mortgagee knew of, and consented to, such removal. *Cobb v. Buswell*, 37 Vt. 337.

The doctrine of the foregoing cases was applied in *Norris v. Sowles*, 57 Vt. 360, as against a subsequent mortgagee in Vermont.

The title acquired by the foreclosure of a chattel mortgage in Massachusetts is not lost by the fact that the mortgagor subsequently wrongfully brought the property into Vermont, and sold the same to a bona fide purchaser who had no notice of the mortgage. *Taylor v. Boardman*, 25 Vt. 581.

In *Woodward v. Gates*, 9 Vt. 358 (where it was held that a chattel mortgage, which was executed in New Hampshire upon property then in that state, and was placed upon the record in that state, was not valid as against a creditor of the mortgagor who attached the property after its removal to Vermont), the decision was put upon the ground that, the mortgagor not being a resident of New Hampshire, the record in that state was unavailing, even according to its law. The judge writing the opinion intimated that, even if the mortgagor had been a resident of New Hampshire, the record in that state would not have been availing in Vermont; but this intimation is contrary to the subsequent decisions in Vermont above referred to.

So, *Martin v. Hill*, 12 Barb. 631, upheld the validity of a chattel mortgage executed and duly recorded in New York, upon property then in that state, between residents of that state, in an action by the mortgagee against an officer who seized it under execution while in Vermont in possession of the mortgagor, notwithstanding that, by the law of Vermont, a mortgage of personal property, unaccompanied by possession, is fraudulent and void as against creditors.

The law of Canada, by which a chattel mort-

tration cannot have force in Tennessee in displacing our own laws on that subject.

In the application of the doctrine of comity a distinction is to be kept in mind, which is sometimes overlooked by the judges, between the rights, obligations, or duties of the parties to a foreign contract, as between themselves, and the question of priorities growing out of such contract and the effect of it upon third persons, who were never subject to the foreign state or country, and cannot be presumed to have any notice or knowledge of its laws.

Harrison v. Sterry, 5 Cranch, 299, 3 L. ed. 107; *Le Prince v. Guillemot*, 1 Rich. Eq. 213; *Underwriters' Wrecking Co. v. The Katie*, 3 Woods, 186, Fed. Cas. No. 14,342; *Donald v. Hewitt*, 33 Ala. 545, 73 Am. Dec.

431; *Oswell v. Skipper*, 6 Fla. 583; *Lee v. His Creditors*, 2 La. Ann. 604; *Corbett v. Littlefield*, 84 Mich. 35, 11 L. R. A. 95, 22 Am. St. Rep. 684, 47 N. W. 581; *Saunders v. Williams*, 5 N. H. 215; *Hall v. Harris*, 11 Tex. 310.

An application of this distinction to this case is decisive of it.

The doctrine of comity rests primarily, if not entirely, upon the assumption that parties to a foreign contract have voluntarily subjected themselves and their rights to the sovereignty and jurisdiction of the state or country where the contract was made; and, because they have done so, and thereby incurred obligations lawful and enforceable there, the courts of the state of the forum will, when such parties are implead-

gaged cannot reclaim the property from a bona fide purchaser from the mortgagor without refunding the purchase price, will not be applied in an action for conversion in New York by a chattel mortgagee against a subsequent purchaser, where the mortgage was executed in New York, where both parties were domiciled, and where the property was then situated, although the property was subsequently taken to Canada, and there purchased by the defendant in good faith. *Edgerly v. Bush*, 81 N. Y. 199.

A deed of trust covering railroad cars, even if they are to be regarded as personal property, being presumably valid by the law of Michigan where executed, will be enforced in Illinois where the cars are subsequently found, as against an attaching creditor in that state, without a change of possession. *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399.

And upon the same ground, it was held in *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525, that the law of Missouri, under which the possession of the property by the mortgagor after the maturity of the debt is not, *per se*, fraudulent as to creditors of the mortgagor, but may be shown to be bona fide, governed a chattel mortgage made in that state by a resident thereof, upon property at the time in that state, but subsequently taken by the mortgagor to Illinois and seized there under an attachment by a bona fide creditor after the maturity of the debt; notwithstanding that, by the law of Illinois, the retention of possession after maturity would render the mortgage void as against creditors.

A rule, prevailing in the state where a chattel mortgage is executed, and where the property was then situated, by which such a mortgage, without delivery of possession to the mortgagee, is conclusively, and as a matter of law, fraudulent, will be applied in favor of a creditor of the mortgagor who subsequently attaches the property after it is brought into another state, by the law of which such a mortgage is but prima facie fraudulent, and may be proved to be honest and fair. *Henderson v. Thayer*, 5 Ohio Dec. Reprint, 115. The decision is upon the ground that such rule is a rule of substantive law, and not a rule of remedy merely.

It was held in *Runyon v. Groshon*, 12 N. J. Eq. 86, at a time when, by the law of New Jersey, the retention of possession by the mortgagor was merely prima facie evidence of fraud, 64 L. R. A.

that a chattel mortgage, executed in that state between parties there domiciled, upon property at the time in New York, prevailed over the title of one who, in good faith, purchased the property in New York from the mortgagor, notwithstanding that the mortgage had not been filed in the latter state as required by the laws of that state. This was an action by the mortgagee against the vendee to foreclose the mortgage. The decision rests upon the ground that the courts of New Jersey would apply their own law to the situation. It was conceded that, if the property had remained in New York, and the suit had been brought in that state, the law of New York would have been applied.

In Pennsylvania, however, where the law requires a change of possession in order to protect the mortgagee against bona fide purchasers without notice, and does not provide for filing or recording chattel mortgages in lieu of a change of possession, it is held that the filing or recording of the mortgage in another state, where it was executed and where the mortgagor was domiciled, pursuant to the laws of that state, does not protect the mortgagee against a bona fide purchaser of the property from the mortgagor after it was brought into Pennsylvania. *MacCabe v. Blymyre*, 9 Phila. 615; *Armitage v. Spahn*, 4 Pa. Dist. R. 270; *State Bank v. Carr*, 15 Pa. Super. Ct. 246.

2. Necessity of refileing or rerecording in state to which property removed.

Assuming that the mortgaged chattels remain in the possession of the mortgagor, but that the mortgage has been duly filed or recorded in the manner required by the law of the mortgagor's domicile, where the mortgage was executed and the property then situated, the question arises whether that filing or recording will protect the mortgagee after the removal of the property to another state, without a refileing or rerecording under the law of the latter state. It is to be observed, in the first place, that this is a matter entirely within the power of the legislature of the state to which the property is removed. When, as in *Armitage-Herschell Co. v. Muscogee Real Estate Co.* (Ga.) 46 S. E. 634, it appears that a law has been enacted expressly requiring the filing or recording of such mortgages upon property subsequently brought into the state, that law is, of course, conclusive, and there is no occasion or op-

ed before them, out of courtesy to such foreign state, expound and enforce the contract according to the laws of the country where it was made.

1 Beach, Modern Law of Contracts, § 584; 2 Parsons, Contr. pp. 568 *et seq.*; *Bank of Louisville v. Hill*, 99 Tenn. 42, 41 S. W. 349; *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296; *Lally v. Holland*, 1 Swan, 401.

Wilkes, J., delivered the opinion of the court:

This case presents a contest between a mortgagee and attaching creditors of one Meixsell with respect to certain mules and sawmill machinery. The attaching creditors established their right to priority before

portunity for invoking general principles upon the subject. Such an occasion or opportunity, however, is presented when the statute of the state to which the property is removed provides generally for the filing or recording of chattel mortgages, but does not specifically or in terms refer to mortgages executed by nonresidents out of the state upon property subsequently brought into the state. In such cases, according to the great weight of authority, though there is some conflict, refiling or rerecording is not necessary in order to protect the mortgagee against bona fide purchasers or encumbrancers of the property after its removal and while in possession of the mortgagor,—at least when the mortgagee did not know of, or consent to, the removal of the property. *Shapard v. Hynes*, 52 L. R. A. 675, 45 C. C. A. 271, 104 Fed. 449, which stated the rule, expressly said that it applies whether the removal was with or without the mortgagee's consent; and the following cases, which also support the rule, do not qualify it by any condition as to the mortgagee's consent: *Gosline v. Dunbar*, 32 N. B. 325; *Hall v. Pillow*, 31 Ark. 32; *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Smith v. McLean*, 24 Iowa, 322; *Simms v. McKee*, 25 Iowa, 341; *Aultman & T. Machinery Co. v. Kennedy*, 114 Iowa, 444, 86 Am. St. Rep. 373, 87 N. W. 435; *Ord Nat. Bank v. Massey*, 48 Kan. 762, 17 L. R. A. 127, 30 Pac. 124; *Langworthy v. Little*, 12 Cush. 109; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 864; *Hundley v. Mount*, 8 Smedes & M. 387; *Barker v. Stacy*, 25 Miss. 471; *Davis v. Williams*, 73 Miss. 708, 19 So. 352; *Lafayette County Bank v. Metcalf*, 29 Mo. App. 384; *Smith v. Hutchings*, 30 Mo. 380; *Feurt v. Rowell*, 62 Mo. 524; *Ofutt v. Flagg*, 10 N. H. 46; *Ferguson v. Clifford*, 37 N. H. 87; *Cushman v. Luther*, 58 N. H. 562; *Parr v. Brady*, 87 N. J. L. 201; *Nichols v. Mase*, 94 N. Y. 160; *Hornthall v. Burwell*, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556, 13 S. E. 721; *Wilson v. Rustad*, 7 N. D. 330, 66 Am. St. Rep. 649, 75 N. W. 260; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla. 353, 60 Pac. 249; *Bank of Louisville v. Hill*, 99 Tenn. 42, 41 S. W. 349; *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296; *Craig v. Williams*, 90 Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899.

Bank of Louisville v. Hill, 99 Tenn. 42, 41 S. W. 349, and *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296, also seem to support the foregoing

the chancellor, and his decree has been affirmed by the court of chancery appeals.

The facts found by the court of chancery appeals, so far as necessary to be stated, are that Meixsell executed a chattel mortgage to Snider upon the mules and machinery in question. It was acknowledged before Stricklin, a justice of the peace of Saline county, Illinois, and was recorded by John B. Lee in volume 5 of Chattel Mortgages of said county. John B. Lee, in his certificate, recites that he is clerk of the circuit court and *ex officio* recorder for said county and state, and that the mortgage was duly recorded. It was afterwards recorded without any further probate or certificate in the register's office of Hickman county, Tennessee, to which place the mortgagor

doctrine, but the effect of these decisions is limited, by the opinion in *SNIDER v. YATES*, to cases not involving the rights of subsequent purchasers or attaching creditors in good faith without notice of the mortgage.

The rule established by the foregoing cases has been applied to a different class of cases, involving, however, the same principles.

Thus, an antenuptial contract, recorded in the state where it was made, and where the property was then situated, is sufficient to protect the rights of the parties as against third persons upon the removal of the property to another state. *DeLane v. Moore*, 14 How. 253, 14 L. ed. 409.

And a similar decision was made in *Bank of United States v. Lee*, 13 Pet. 107, 10 L. ed. 81, with reference to a deed of trust of personal property made by a husband for the benefit of his wife.

So, personal property removed from Mississippi to Louisiana, and there transferred by a husband to his wife by bill of sale, is not subject to the debts of the husband upon their removal to Mississippi, although the bill of sale is not recorded in the latter state, and although the parties to the bill were at all times domiciled in Mississippi. *Davis v. Williams*, 73 Miss. 708, 19 So. 352.

The right of a wife under a deed of trust executed in Tennessee conveying a slave to the husband for her use is not defeated, as against the creditors of the husband, by the omission to record the deed in Texas after the removal of the domicile and the slave to that state. *Parks v. Willard*, 1 Tex. 350, 46 Am. Dec. 100.

The provision of the Alabama statute, requiring a transfer of a remainder interest in personal property after the expiration of a life estate to be recorded in order to protect the remainderman against the creditors of, or purchasers from, the life tenant who remains in possession, does not apply to a transfer made in another state where the property was then situated, although the property is subsequently removed to Alabama. *Catterlin v. Hardy*, 10 Ala. 511; *Adams v. Broughton*, 13 Ala. 731, 748; *Lyde v. Taylor*, 17 Ala. 270; *Turner v. Fenner*, 19 Ala. 355.

See also note to *Succession of Welsh*, *post*, —, where the same principle is applied to contracts of sale with reservation of title.

The rule was applied in *Langworthy v. Little*, 12 Cush. 109, and *Craig v. Williams*, 90

brought the property after the mortgage had been registered in Illinois, and where he engaged in the stave manufacturing business. The mules and machinery were levied upon by attachments and executions at the instance of local creditors of Meixsell after the registration of the instrument in Hickman county. An original bill was then filed enjoining further proceedings by the creditors, and it was amended so as to make it a replevin suit under which plaintiff retained possession of the property, giving bond. It was afterward sold and it is agreed that the proceeds are sufficient to satisfy the claims of the creditors if they are entitled to recover as against the trustee.

The sole question presented to this court

is whether the complainant's rights under these mortgages are superior to those of the attaching or levying creditors. All other questions are eliminated.

The rights of complainant depend entirely upon the validity and effect of the mortgage executed in Illinois and its registration in that state. Without passing upon the sufficiency of the pleadings in this case, we are of opinion that complainant is not entitled to priority over the attaching creditors. The subject of the probate of instruments and their registration, and the effect of such registration as to third persons, is governed purely by local statutes, and is a matter entirely unknown to the common law. The statute laws of a state have of themselves no extraterritorial force,

Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899, though the mortgagor was, at the time of the execution of the mortgage, domiciled in the state to which the property was subsequently removed, which was also the forum.

It will be observed that the cases next cited support the rule, with the qualification that the mortgagee did not consent to the removal.

A chattel mortgage executed in New York upon personal property in that state, which is afterwards removed to Illinois without the consent of the mortgagee, is valid in the latter state so long as it remains valid in New York, and, as such, is enforceable against judgment creditors of the mortgagor who levied upon it; and the result is not changed by the fact that the mortgagee consented to the removal of the property to Wisconsin. *Armitage-Herschell Co. v. Potter*, 93 Ill. App. 602.

Where a chattel mortgage is given upon property which, at the time, was in the state of the mortgagor's domicile, and the mortgage was duly recorded according to the law of that state, the subsequent removal of the property to Ohio without the consent of the mortgagee, and before default, does not require the mortgage to be recorded in Ohio in order to protect the mortgagee as against a subsequent purchaser in good faith from the mortgagor. *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62. The facts that there was no lack of diligence on the part of the plaintiff, and that the sale by the mortgagor was made on the day the mortgage debt became due, are alluded to, but do not necessarily limit the decision.

In *Anderson v. Doak*, 32 N. C. (10 Ired. L.) 295, it was held that a deed of trust of a slave, executed in Virginia by a resident of that state while the slave was there, being proved and registered according to the law of that state, and otherwise valid by that law, the slave, who subsequently ran away and came to North Carolina, was not subject to attachment in that state for a debt of the grantor in the trust deed.

A chattel mortgage, duly recorded in the state where made, and where the property was then situated, so as to constitute notice according to the laws of that state, is, by comity, good in another state to which the property is taken, in violation of the agreement, and sold, even as against an innocent purchaser for value, unless this rule is against the policy of the laws of the latter state. *National Bank of Commerce v. Morris*, 114 Mo. 255, 19 L. R. A. 463, 35 Am. St. 64 L. R. A.

Rep. 754, 21 S. W. 511. The mortgage was executed in Kansas, and the property subsequently removed to Illinois and there sold. The court cited *Mumford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525, to show that such rule was not contrary to the policy of Illinois.

Where personal property has been mortgaged and left in possession of the mortgagor, and the mortgage is duly recorded, a subsequent removal of the mortgagor, with the property, to another state does not make a new record of the mortgage necessary in the latter state in order to protect the mortgagee as against a subsequent purchaser from the mortgagor without actual notice of the mortgage. *Handley v. Harris*, 48 Kan. 606, 17 L. R. A. 703, 30 Am. St. Rep. 322, 29 Pac. 1145. It appeared in this case that the mortgagee knew of the removal of the property to Kansas, and permitted it to remain there for several months without claiming the same; and it was urged that his conduct in that respect constituted such laches as prevented him from recovering the property from an innocent purchaser for value, but this contention was rejected.

The lien of a chattel mortgage, duly registered in the state where the mortgage was executed and the property was then situated, will prevail against a subsequent purchaser without notice after the removal of the property to Texas, although the first mortgage was not registered in the latter state, where the removal was without the consent of the mortgagee, and sufficient time had not elapsed between the removal and the sale to enable him to give notice by registration in the latter state. *Blythe v. Crump Bros.* 28 Tex. Civ. App. 327, 66 S. W. 885.

In *Greene v. Bentley*, 52 C. C. A. 60, 114 Fed. 112, a chattel mortgage was executed in Texas upon property then in that state, the law of which requires the mortgagee to record the mortgage in any county into which the property may be removed. The property was taken by the mortgagor into Louisiana (where chattel mortgages are unknown), and was kept there for a number of years, and, finally, long after the mortgage had become due, sold to a bona fide purchaser under attachment against the mortgagor; subsequently, the mortgagor, still having possession of the property, but as the representative of the purchaser, surreptitiously brought it back into Texas, and turned it over to the mortgagee in discharge of the mortgage debt. It

and whatever effect they have in foreign states they have by virtue of the laws of such state, or under the doctrine of the comity of states.

The court of chancery appeals rightly held that the statutes of Tennessee do not provide for the registration in this state of the mortgage in question, and that its registration could not operate as notice to the creditors of the mortgagor.

This leaves the complainant to stand alone upon the doctrine of comity. This is the doctrine under which contracts made, rights acquired, and obligations incurred in one country, and in accordance with its laws, are recognized and enforced by the courts of another country.

In *Harrison v. Sterry*, 5 Cranch, 299, 3 L.

was held, in an action brought in the Federal court sitting in Texas, that the mortgagee had lost his lien as against the subsequent purchaser, notwithstanding that he could not have made a valid record of the lien in Louisiana, by his failure to exercise due diligence otherwise to give notice of his lien. It appeared in this case that the purchaser acquired his title through attachment proceedings instituted against the mortgagor in Louisiana; and the court intimated that, if it were necessary to go to that extent, it would hold, upon the authority of *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, irrespective of the negligence of the mortgagee, that the lien of the mortgage was extinguished by the attachment proceedings, as that would be the effect of such proceedings according to the law of Louisiana, which does not recognize chattel mortgages, even when executed out of the state upon property brought into the state.

Assuming that the local statute with reference to filing or recording chattel mortgages makes no distinction between subsequent bona fide purchasers and creditors without notice, there is no ground for making any distinction between them in applying the rule dispensing with the necessity of refiling or rerecording in the state to which the property is removed, in the absence of a statute of the latter, expressly requiring the same. The local statute may, however, distinguish between such parties, and in that case the distinction may modify the effect of the rule.

Thus, it was held in *Beall v. Williamson*, 14 Ala. 55, that the registration, in Alabama, of a chattel mortgage, executed and recorded in another state where the property was then situated, was not necessary in order to protect the mortgagee against a subsequent bona fide purchaser from the mortgagor after the removal of the property to Alabama, since the Alabama act, requiring a mortgage on property that may be removed into the state from another state to be recorded within twelve months, makes the property, if the encumbrance is not recorded, liable to the debts of the person in possession, but is silent as to purchasers.

So, in Mississippi, where the local statute provides that mortgages and deeds of trust take effect and are valid as to all persons from the date of their delivery to the registrar of deeds, it was held, in *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149, that the failure to register in that state a deed of trust executed in another

ed. 107, it is said by the court, speaking through Chief Justice Marshall: "The law of the place where a contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause.

That was a case of bankruptcy involving property belonging to a firm residing in England, upon which the United States, as a creditor, claimed priority under the rule of comity as against British creditors claiming under a trust assignment in the nature of a mortgage made in England upon

state, upon slaves subsequently brought into Mississippi, would not defeat the rights of the *cestuis que trust* as against creditors of the trustee, but would as against a subsequent bona fide purchaser from the latter. The court said that *Palmer v. Cross*, 1 Smedes & M. 48 (involving a deed executed in another state settling personal property on a married woman, which was seized by the husband's creditors after being brought into Mississippi); *Prewett v. Dobbs*, 13 Smedes & M. 431 (involving a chattel mortgage executed in another state upon property subsequently brought into Mississippi, and seized under process against the mortgagor); and *Presley v. Rodgers*, 24 Miss. 520 (involving a deed of trust executed in another state upon a slave subsequently brought into Mississippi, and seized under process against the owner of the equitable estate),—were only authority as against creditors, and not as against bona fide purchasers. While the cases referred to involved merely the rights of creditors, and not of bona fide purchasers, they do not refer to any distinction between the two classes; and the last case expressly said that the failure to record the deed of trust in Mississippi after the removal of the property thereto did not impair its validity, "even as against bona fide purchasers and creditors without notice of its existence." In *Barker v. Stacy*, 25 Miss. 471, also, where it was held that the failure to register a chattel mortgage executed in another state upon property subsequently brought into Mississippi did not defeat it as against the mortgagor's creditors, the court seems to have assumed that there was no distinction in this respect between bona fide purchasers and creditors. Perhaps the court in *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149, merely meant to assert the distinction with reference to cases which, like the instant case, involved the rights of one who purchased in good faith from a trustee having the legal title, as well as possession.

It will be observed that the general principle dispensing with refiling or rerecording in accordance with the local law of the state to which the property is removed, unless such local law expressly covers such a case, is also supported by the following cases, in which the principle had been modified by statute.

A chattel mortgage upon property at the time in Florida, which was executed and recorded as required by the laws of that state, is superior to an attachment levied after the removal of the

a cargo of the ship *Semiramis*, and certain debts owing by parties in South Carolina; and the claim of priority of the United States was sustained.

This distinction has been recognized and enforced in many cases, and is well settled.

In *Le Prince v. Guillemot*, 1 Rich. Eq. 213, it was held that a marriage settlement constituting a lien in France was valid here, but that such lien gave no priority over American creditors.

In *Underwriters' Wrecking Co. v. The Katie*, 3 Woods, 186, Fed. Cas. No. 14,342, the mortgage on the vessel in the home port was given priority over previous liens acquired in foreign jurisdiction.

In *Donald v. Hewitt*, 33 Ala. 545, 73 Am.

Dec. 431, a lien of a local attaching creditor was preferred to a previous mortgage lien in another state.

In *Crowell v. Skipper*, 6 Fla. 583, it was held that, although a contract is to be construed according to the *lex loci contractus*, the property rights under it are subject to the regulations of the country into which the property affected may be brought.

In *Lee v. His Creditors*, 2 La. Ann. 604, a foreign lienholder was held to have acquired no priority in local insolvency proceedings.

In *Corbett v. Littlefield*, 84 Mich. 35, 11 L. R. A. 95, 22 Am. St. Rep. 684, 47 N. W. 581, a subsequent attaching creditor was given priority over a prior chattel mortgage.

property to Alabama and before it was recorded in the latter state, where it was so recorded within four months from the time of the removal into the state, as required by the Alabama Code with respect to mortgages on property removed to the state. *Johnson v. Hughes*, 89 Ala. 588, 8 So. 147.

A chattel mortgage duly executed and recorded in Alabama by a resident of that state, upon property then situated in that state, will prevail against an attachment of the property after its removal to Georgia, but before the expiration of the six months in which a foreign mortgage is required to be recorded in the latter state, although, at the time of the attachment, the mortgage had not been recorded in the latter state. *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655.

So, where a mortgage on personal property was regularly made and recorded in another state, where the property was at the time, and the property was subsequently brought into Georgia and sold to a bona fide purchaser, without notice of the mortgage, before the expiration of the time allowed by the Georgia Code for recording in that state mortgages on property brought into the state, his title will not prevail against the title acquired under a foreclosure of the mortgage which took place before the expiration of the time allowed for recording the mortgage, although the same was not recorded in the state until after foreclosure. *Hubbard v. Andrews*, 76 Ga. 177.

In *Garner v. Wright*, 52 Ark. 385, 6 L. R. A. 715, 12 S. W. 785, where a mortgage was executed in the Indian territory between parties there resident, upon property there located, and was subsequently seized in Arkansas under an attachment against the mortgagor, who had borrowed the property from the mortgagee, who had taken possession of it upon the execution of the mortgage and had it in his general custody,—the court assumed that the relative rights of the mortgagee and attaching creditor would be determined by the law of Indian territory if it were proved, but, in the absence of proof of such law, the court administered the law of Arkansas.

The general rule which upholds the mortgage when duly filed as required by the law of the place where it was executed and the property was then situated, as against subsequent purchasers or lienors of the property in good faith, without notice, though not effectively filed or recorded in the latter state, has been denied 64 L. R. A.

by a number of cases, besides *SNIDER v. YATES*.

Thus, a lien created by a chattel mortgage executed in another state upon property then situated there will not prevail as against rights acquired by a third person without notice, after removal of the property to Louisiana. *Miles v. Oden*, 8 Mart. N. S. 214, 19 Am. Dec. 177.

A mortgage executed on a slave out of Louisiana has no effect upon the slave when subsequently brought into Louisiana, except from the time it is duly registered in the latter state. *Frelson v. Tiner*, 6 La. Ann. 18.

A purchaser of personal property in Louisiana is not affected by a mortgage thereon, executed out of the state before the removal of the property to the state, unless the mortgage be recorded in Louisiana. *Verdier v. Leprete*, 4 La. 41; *Zollkoffer v. Briggs*, 19 La. 521; *Tillman v. Drake*, 4 La. Ann. 16.

As a chattel mortgage is unknown to the law of Louisiana, such a mortgage, executed in another state, cannot be enforced in Louisiana after the removal of the property to that state and its attachment for a debt of the mortgagor. *Delop v. Windsor*, 26 La. Ann. 185. In this case the mortgagees contended that, by the laws of Mississippi, where the mortgage was executed, the legal title vested in them by virtue of the mortgage; but it was held that this position was contrary to their judicial admissions in the petition of intervention, and therefore could not be permitted.

A chattel mortgage executed in Canada by a resident of Canada, and properly put upon record there as required by the Canadian law, does not protect the mortgagee as against an execution creditor of the mortgagor who levies upon the property after its removal to Michigan. *Montgomery v. Wight*, 8 Mich. 143. The decision is upon the general ground that the laws for recording chattel mortgages have no extra-territorial force, and nothing is said about the mortgagee's knowledge of, or consent to, the removal of the property.

The doctrine of the foregoing cases was applied in *Boydson v. Goodrich*, 49 Mich. 65, 12 N. W. 913, and *Corbett v. Littlefield*, 84 Mich. 30, 11 L. R. A. 95, 22 Am. St. Rep. 681, 47 N. W. 581, although it expressly appeared that the property was brought into Michigan without the mortgagee's knowledge or consent.

A chattel mortgage on horses, given in Canada by the owner of a half interest in them, and filed by the mortgagee, who takes possession

In *Saunders v. Williams*, 5 N. H. 215, a subsequent attachment was given priority over a previous assignment in insolvency.

The same doctrine has been held in a large number of cases, and we think that it is a better doctrine, and not in conflict with any of our adjudications, and not passed on in any of them because not involved, but is in perfect harmony with our statutes and policy on the subject of registration. There are decisions, however, holding a contrary doctrine.

Under our statutes a chattel mortgage is equally good between the parties, whether registered or not. The sole purpose and effect of registration are to effectuate notice of it to third persons. The only constructive notice which can bar a creditor is

that which the statute causes to flow from a proper registration or noting, although a purchaser may be barred by actual notice. This is the effect of our statutes in respect to chattel mortgages executed within our state, and foreign statutes and the doctrine of comity cannot give any greater or more enlarged effect.

A chattel mortgage executed in another state will be expounded and enforced by the laws of this state upon proper averments and proof of the laws of the state where made, just as if it had been made here; but a different doctrine applies where it is attempted to go further, and affect third persons, especially the creditors of the mortgagor, with constructive legal notice of the mortgagee's rights.

of and puts the horses in the care of the keeper of a hotel at a race track to hold possession for him, gives such mortgagee a better right to such interest in the horses after they have been taken without his consent from the custodian and shipped to Michigan by the owners of the other half interest in the horses, who did not know of his mortgage, than the latter can assert under another chattel mortgage from the same mortgagor, which they took in Michigan before the horses went to Canada, and recorded after their return. *Vining v. Millar*, 109 Mich. 206, 32 L. R. A. 442, 67 N. W. 126.

There is no statute in Pennsylvania providing for the filing and recording of chattel mortgages in lieu of a change of possession, though there is a statute of that state permitting a railroad company to mortgage its rolling stock and other personal property, and retain the use and possession of the same without impairing the lien, provided that the mortgage is recorded in every county in which the property is situated. It has been held that such a mortgage, executed in New York by a New York corporation, upon cars then in that state, did not protect the mortgagee against attachment creditors of the mortgagor who seized the cars while in Pennsylvania, the mortgage having been recorded in New York, but not in Pennsylvania. *Buffalo Coal Co. v. Rochester & State Line R. Co.* 8 W. N. C. 126. See also Pennsylvania cases cited in II. b, *supra*.

The effect of the registration of a deed of trust upon personal property in the state where the deed was executed, and where the property then was, cannot be extended beyond the territorial limits of that state. *Crosby v. Huston*, 1 Tex. 203.

In *Rosenbaum v. Dawes*, 77 Ill. App. 295, the court said that the rule, based on interstate comity, that the constructive notice of a chattel mortgage, resulting from its record in the state of its execution, is also constructive notice to the citizens of other states to which the property may be removed, should not be extended by the courts of the latter state to the detriment of its citizens.

The point, however, was not authoritatively decided, either by the appellate court, or by the supreme court affirming the decision below (179 Ill. 112, 53 N. E. 585); and see *Armitage-Herschell Co. v. Potter*, 93 Ill. App. 602, *supra*.

Neither *Wolf v. Shannon*, 50 Ill. App. 396, which declares that the rights of the mort-

gagees of chattels mortgaged in another state and brought into Illinois are not determined entirely by the law of the latter state if the laws of the former will not contravene the criminal laws of Illinois, or sanction vice or immorality; nor *Farmers' & M. Bank v. Arnold*, 58 Ill. App. 349, declaring that the rights of parties claiming under a chattel mortgage are governed by the law of the state in which it was made,—is exactly in point on the question discussed in this subdivision; for, in the former case, the party who was garnished by the mortgagor's creditor was a pledgee of the mortgagee with respect to the mortgaged chattels and their proceeds; and in the latter case the rights of the party claiming adversely to the mortgagee were based upon a transaction in Missouri where the mortgage was executed.

A cotton factor and commission merchant of New Orleans, who has made advances to a planter of Mississippi, and has received and sold for the account of the latter certain cotton in New Orleans, is not answerable to the holder of a trust deed, duly recorded in Mississippi, upon the cotton, where he did not know of the shipment until the goods had been received in New Orleans, nor of the lien until after the goods had been sold. *Hernandez v. Aaron*, 73 Miss. 434, 16 So. 910.

b. When property located in another state at time of execution of mortgage.

1. Necessity of filing, or recording, or change of possession in state where located.

Notwithstanding the general principle, so frequently stated by the courts, that personal property has no situs of its own, but follows the person of the owner, it is established by the weight of authority that the filing or recording of a chattel mortgage according to the laws of the domicile of the mortgagor, where the mortgage was executed, will not protect the mortgagee against bona fide purchasers or creditors without notice in another state in which the property was located at the time of the execution of the mortgage, unless refiled or rerecorded in the latter state pursuant to its laws, even if such laws are general and do not specifically designate mortgages executed under such circumstances. *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 100; *Re Soldiers' Business Messenger & Dispatch Co.* 3 Ben. 204, Fed.

When parties to a foreign contract are impleaded in the courts of this state, this court will expound and enforce the contract according to the laws of the country where it was made, if such laws are properly pleaded and proved; but it will not, in a question of priority, set aside its own statutes and rules to the prejudice of its own citizens.

We are satisfied that the Court of Chancery Appeals has reached the correct result, and its decree is affirmed.

A petition for rehearing having been filed, the following response was handed down on February 27, 1904:

Upon petition to rehear it is strongly urged that the holding in this case is op-

posed to previous adjudications of this court; and we are cited to the cases of *Eaves v. Gillespie*, 1 Swan, 128; *Lally v. Holland*, 1 Swan, 401; *Bank of Louisville v. Hill*, 99 Tenn. 42, 41 S. W. 349; *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296,—as holding the contrary doctrine.

The case of *Eaves v. Gillespie*, 1 Swan, 128, is not at all in point. It was simply held in that case that a parol gift of a slave in a state that has no statute requiring such gift to be by deed or writing will have the effect to transfer the legal title to the donee. In that case the gift of the slave was made in South Carolina, and delivery was also made there, and title vested by the *lex loci* before the slave was removed to Tennessee. This being so, the

Cas. 13,163; *Hardaway v. Semmes*, 38 Ala. 657; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *McFadden v. Blocker*, 2 Ind. Terr. 260, 58 L. R. A. 878, 48 S. W. 1043; *Aultman & T. Machinery Co. v. Kennedy*, 114 Iowa, 444, 86 Am. St. Rep. 373, 87 N. W. 435; *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186; *Clark v. Tarbell*, 58 N. H. 88; *Keller v. Paine*, 107 N. Y. 83, 13 N. E. 635; *Whitman v. Conner*, 8 Jones & S. 339.

Smead v. Chandler (Ark.) 76 S. W. 1066, also held that filing in the state in which the property was situated at the time the mortgage was executed was necessary, although the mortgage was executed and the mortgagor resided in another state. In Arkansas, however, the statute expressly provides that, if the mortgagor be a nonresident of the state, the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed.

Ballard v. Great Western Min. & Mfg. Co. 39 W. Va. 394, 19 S. E. 510, also, held that the lien of an attachment levied in West Virginia upon personal property had priority over a claim under a deed of trust which had never been recorded in the county where the property was situated, but which had been recorded in another state. It does not appear where the property was at the time the mortgage was executed.

In some of the foregoing cases the local statute provided that the mortgage should be filed or recorded in the county in which the property was located. It is, of course, perfectly feasible to comply with such a statute, though the mortgagor be a nonresident, and the mortgage be executed out of the state. In some of them, however, the statute provided for filing or recording in the county in which the mortgagor resides. It was, nevertheless, held in those cases that the filing or recording in the other state was not sufficient, and that, since compliance with the local statute as to filing or recording was impossible owing to the nonresidence of the mortgagor, a change of possession was necessary in order to protect the mortgagee against subsequent bona fide purchasers and creditors without notice.

Thus, in *McFadden v. Blocker* it was held that a chattel mortgage executed and recorded in Texas upon property at the time in Indian territory was not valid as against a subsequent attachment of the property while in possession of the mortgagor in Indian territory, notwithstanding that the statute in force in Indian ter-

ritory required the mortgages to be recorded at the mortgagor's place of residence, and did not provide for the case where the property was situated within the state, but the mortgagor resided out of the state.

Arkansas City Bank v. Cassidy, 71 Mo. App. 186 held that the Missouri statute, providing that a chattel mortgage shall not be valid as against third persons, unless possession of the property is taken and retained by the mortgagee, or unless the mortgage is recorded in the county in which the mortgagor resides, applies to a chattel mortgage on property situated within the state, executed by a nonresident in another state; and, since it is impossible to comply with the requirement as to recording, it is necessary to take possession of the property in such a case in order to protect the mortgagee as against third persons.

So, *Golden v. Cockrill*, 1 Kan. 259, 81 Am. Dec. 510, held that the registration in Missouri, pursuant to its laws, of a chattel mortgage executed between residents of that state upon property at the time in Kansas, did not obviate the necessity of a change of possession, as required by the law of Kansas, in order to protect the mortgagee against a subsequent attachment by a creditor of the mortgagor, there being at the time the mortgage was executed no provision in the Kansas statute for registration of mortgages in lieu of a change of possession. The statute subsequently enacted upon the subject, and which was in force at the time of the decision, expressly provided that mortgages of property belonging to nonresidents should be recorded in the county where the property was.

In *Smead v. Chandler* (Ark.) 76 S. W. 1066, the rule stated at the beginning of the subdivision was applied to a mortgage covering an indebtedness due from a resident of Arkansas, the court holding that the situs of the debt, for the purposes of the statute with reference to the filing of mortgages, was in the state where the debtor resided and did business, and where he might be sued.

In *Green v. Van Buskirk and Keller v. Paine*, the rule was applied, notwithstanding that the attaching creditor who attacked the mortgage was a resident of the state in which the mortgagor was domiciled and the mortgage was executed; and the other cases above cited do not refer to any distinction based on the residence of the party attacking the mortgage. *Rhode Island Central Bank v. Danforth*, 14 Gray, 123

fact that gifts of slaves were required in Tennessee to be evidenced by deed or writing could not divest or disturb that title which already vested. But the proof in that case did not show that the gift, being to a married woman, was to her sole and separate use, and the husband was entitled to the slave *jure mariti*, and, having sold her to an innocent purchaser with no notice of the separate estate, the court refused to execute any implied or secret trust in favor of the wife as against such purchaser. The case in no sense involved the effect of our registration laws.

In the case of *Lally v. Holland* there was a defective registration of a deed, and the court held that it would not be constructive notice, and, there being no actual notice,

however, made such a distinction, holding that a mortgage of personal property then in Massachusetts, made in another state between two citizens of that state, and executed and recorded according to the laws thereof, was valid, without delivery of the property or recording of the mortgage in Massachusetts, as against a subsequent attachment in the latter state by a citizen of the state in which the mortgage was executed. The court intimated that the rule would be different if the attaching creditor were a resident of Massachusetts.

Lally v. Holland, 1 Swan, 309, upon the principle that personal property, subject to very few exceptions, is governed by the law of the owner's domicile, held that a chattel mortgage executed and recorded in Mississippi by a person domiciled in that state, upon property at the time in Tennessee, was valid as against a subsequent bona fide purchaser from the mortgagor in that state, though it had not been recorded in the latter state, and there had been no delivery of possession to the mortgagee. This decision, however, is against the great weight of authority, which, as already shown, holds that the *lex rei sitæ* prevails over the *lex domicilii et loci contractus* with respect to filing, or recording, or taking possession.

It should be remarked that *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, *supra*, is, strictly speaking, *obiter* upon the point to which it is above cited. The actual decision in that case was that the courts of New York were bound, under the full faith and credit provision of the Federal Constitution, to hold the lien of a chattel mortgage, executed in New York by a person domiciled in that state upon property at the time in Illinois, inferior to the title acquired by another resident of New York under attachment proceedings instituted by him in Illinois. It appearing that, according to the decisions in the latter state, such title would be superior to the mortgage, the latter never having been filed in Illinois, though it had been in New York. The decision of the supreme court must, therefore, have been the same, even if it had been of the opinion that the position of the Illinois courts, as to the necessity of filing the mortgage in Illinois, was erroneous. The court, however, after discussing the jurisdictional and constitutional questions, said: "We do not propose to discuss the question how far the transfer of personal property lawfully in the owner's domicile will be respected in the courts of the

a bona fide innocent purchaser would take the property free from any claim under an instrument with the defective registration. This is really an authority for the view laid down in the original opinion. In *Bank of Louisville v. Hill*, 99 Tenn. 42 *et seq.* 41 S. W. 349, cotton was covered by a trust deed made in Arkansas. It was shipped to Memphis, and sold to Hill, Fontaine, & Co. in payment of a pre-existing debt for advancements made upon an agreement to ship the cotton to Hill, Fontaine, & Co. The Arkansas deed of trust was not registered in Tennessee, and Hill, Fontaine, & Co. had no actual notice of it. It was held that a chattel mortgage good in a foreign state would be upheld and enforced in this state when the property was subsequently brought

country where the property is located, and a different rule of transfer prevails. It is a vexed question on which learned courts have differed; but, after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the state where the property is located has prescribed a different rule of transfer from that of the state where the owner lives."

Perhaps the court merely meant to assert the right of the courts of Illinois to extend the statute with reference to filing chattel mortgages to a mortgage executed out of the state by a non-resident of the state upon property at the time within the state, without expressing an independent opinion upon the question whether a statute which is general in its terms should be so applied.

2. Oath as to consideration.

The form of the oath with reference to the purpose for which a chattel mortgage is given, prescribed by the laws of the state where the property is situated, governs, although the mortgage is executed in another state. *Sherman v. Estey Organ Co.* 69 Vt. 355, 38 Atl. 70.

The provision of the Maryland Code, that no mortgage of personal property shall be valid, except as between parties thereto, unless the affidavit of the mortgagor be indorsed thereon that the consideration is true and bona fide, applies to a mortgage executed between parties in Delaware upon personal property in Maryland; and such mortgage, though recorded in Maryland as required by the Code, is not valid as against a subsequent attaching creditor, unless such an affidavit is indorsed. *Pleasanton v. Johnson*, 91 Md. 873, 47 Atl. 1025.

c. Necessity of complying with law of domicile, and of place where mortgage executed.

By the converse of the general rule established in 11. a, 1 and 2, *supra*, dispensing with the necessity of a change of possession or re-filing or rerecording after the removal of the property to another state, it would seem that the law of the state where the mortgagor was domiciled, the mortgage was executed, and the mortgaged property was then situated, with respect to the necessity of a change of possession or of filing or recording, must be complied with

into this state, and the rights of such vendee or mortgagee will be protected against purchasers as well as attaching and execution creditors; citing quite a number of cases.

But this protection to purchasers and creditors will be given only when it is not contrary to some settled public policy declared by statute or otherwise, or, as stated on page 46, 99 Tenn., and page 350, 41 S. W.: "A party who obtains a good title to movable property absolute or qualified by the laws of another state, where it is then located, will be entitled 'to maintain and enforce' it . . . in the foreign forum against both creditors and purchasers ac-

quiring rights subsequent to its removal, subject alone to the qualification or limitation that there is no statute or settled public policy contrary thereto." But it was held that Hill, Fontaine, & Co. could not hold the proceeds of the cotton sold by them, first, because they claimed to hold it for an antecedent debt; and, second, because they had sufficient information to put them on inquiry which would have disclosed to them the prior rights of the Arkansas parties. They could not, therefore, be classed as innocent purchasers, and entitled to protection as such.

The case of *Hughes v. Abston*, 105 Tenn. 70, 58 S. W. 296, simply approves and fol-

lows the removal of the property. *Richardson v. Shelby*, 3 Okla. 68, 41 Pac. 378.

But, in *Gookin v. Graham*, 5 Humph. 484, it was held that a deed of trust executed in Alabama upon personal property then situated in that state, by a resident of that state, was good without registration in Alabama, as against one who purchased the property from the owner after he had deceitfully, and without the consent of the trustee, removed it to Tennessee. The decision is upon the ground that the Alabama statute with reference to registration was designed to protect creditors and subsequent purchasers in that state, and not in the state of Tennessee. It was also held in this case that, as the property was taken into Tennessee by the deceitful and fraudulent misconduct of the grantor in the deed, without the knowledge or consent of the trustee, or any of the *cestui que trust*, the want of registration of the deed in that state could not avail the purchaser.

So, a deed of trust of personal property situated at the time in Virginia, executed in that state, by a person domiciled in Tennessee, being valid, both by the law of Virginia and Tennessee as between the parties, without registration, is valid, as against a subsequent purchaser or encumbrancer after the removal of the property to Tennessee, if it was duly registered in Tennessee, notwithstanding that it was never registered in Virginia, as would have been necessary to have upheld its validity as against subsequent creditors if the property had remained in that state. *Galt v. Dibrell*, 10 Yerg. 153.

And a statute of the state where a transfer of personal property between a husband and wife was made, which renders such a transfer void as to creditors and purchasers unless recorded, has no operation after the removal of the parties and property to Mississippi. *Walker v. Marshall*, 70 Miss. 283, 12 So. 211.

In *Cronan v. Fox*, 50 N. J. L. 417, 14 Atl. 119, a resident of Maryland entered into an arrangement in that state with a creditor, which was in effect a chattel mortgage of property then in that state. There was, however, no acknowledgment, or record, or change of possession while the property was in Maryland sufficient to protect the mortgagee, according to the laws of that state, against the mortgagor's creditors. The property was subsequently shipped to Pennsylvania in the name of the mortgagor, and was seized under attachment by one of his creditors after the mortgagee had taken possession thereof. It was held that the mortgage prevailed over the attachment. The court took the broad position that the liability of the property to be

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lows the case of *Bank of Louisville v. Hill*, and limits the rule, as is done in the latter case, to instances when the result would not be contrary to sound public policy, declared by statute or otherwise.

That was a case simply when a factor had sold cotton covered by a foreign mortgage, and it did not appear whether the factor still held the proceeds or had paid them over to the mortgagor. There were no rights of creditors or purchasers involved, but simply a question whether the proceeds should be held as those of the mortgagor.

While the language used in these cases is somewhat broad in defining the rights of

purchasers and creditors, yet when limited to cases when sound public policy is contravened, and where no statutes are involved, they are in no way applied to the present view, which we consider the rule most in accord with sound public policy and the spirit and object of our registration laws.

Counsel has cited quite a number of cases holding a doctrine different to this, but, as before stated, we think this the better doctrine, and not contrary to our previous adjudications when properly applied and limited.

The petition to rehear is dismissed.

seized and sold under attachment must be determined by the law of the state where the property is found. In this connection, the court said: "The rule that the title to movable property is to be judged of, and determined by, the *lex rei sitæ* (which is not without exceptions), has prominent application and adoption where personal property is seized under process issued from the courts of the state where the property is. In such cases the liability of the property to be seized and sold under such a writ must be determined by the law of that state, notwithstanding the domicile of all the claimants be in another state." This language would seem to indicate that, in the view of the court, the liability of the property to attachment should have been determined by the law of Pennsylvania, even if it had still been in possession of the mortgagor. Upon that hypothesis, however, the property would, so far as anything to the contrary appears, have been liable to seizure, even according to the law of Pennsylvania; and it will be observed that, as a matter of fact, the property was in possession of the mortgagee at the time of the seizure, which fact, so far as anything to the contrary appears, would have cured the failure to file the mortgage, either according to the law of Maryland, where the mortgage was executed, or the law of Pennsylvania, where the property was seized, or the law of New Jersey, where the question arose.

In *City Bank v. Easton Boot & Shoe Co.* 187 Pa. 30, 40 Atl. 1026, it was held that the title to a quantity of leather purchased under an executory contract passed to the purchaser as soon as it was appropriated to the fulfillment of the contract and delivered to the carrier in New York consigned to the purchaser in Pennsylvania, and that the purchaser, therefore, took the property free from a chattel mortgage thereon, of which he had notice for the first time while the goods were in transit. There was no conflict of laws involved in this case, since the mortgage, which was not filed or recorded in New York, was not valid as against the purchaser, either under the law of New York or Pennsylvania, assuming that the title had passed before he received notice thereof.

By the converse of the rule established in II. b. 1, *supra*, which requires a delivery of possession or a filing or recording in, and pursuant to the laws of, the state where the property is situated when the mortgage is executed in one state by a person domiciled therein upon property at the time located in another state, it

would seem that failure to comply with the law of the former state in this respect would not defeat the mortgage as against a subsequent purchaser or creditor in the latter if the law of the latter was complied with, and assuming that the mortgage by the law of the former was valid as between the parties. And this position has been expressly taken. Thus, in *Aultman & T. Machinery Co. v. Kennedy*, 114 Iowa, 444, 86 Am. St. Rep. 373, 87 N. W. 435, it was held that the failure to record the mortgage in the state where it was executed and the mortgagor was domiciled, as required by the laws of that state to protect it against attachment creditors, with or without actual notice, did not defeat the mortgage as against an attaching creditor with actual notice, where it did not have such effect according to the law of the place where the property was situated at the time the mortgage was executed and at the time of the attachment. This decision, however, was expressly upon the assumption that the failure to record did not, even by law of the state where the mortgage was executed, invalidate the same as between the parties thereto. In other words, the court held that the exception, with reference to the necessity and effect of filing or recording as against third persons, to the general principle that personal property is governed by the law of the owner's domicile, may operate, not merely to invalidate, as against third persons, a mortgage that would be valid as to them by the *lex loci contractus et domicili*, but not by the *lex rei sitæ*, but also to validate as against third persons, a mortgage that would be invalid as to them by the *lex loci contractus et domicili*, but not by the *lex rei sitæ*. That is undoubtedly the correct view to take of the exception, although it must be remembered, as pointed out in this case, that the effect of the mortgage, even as against a third person, may depend upon the validity of the mortgage as an instrument *inter partes*, and to that extent will be determined by the *lex loci contractus*,—at least unless the circumstances are such that, under the general principles applicable to personal contracts generally, the law of the place where the property is situated may be applied, not as the *lex rei sitæ*, but as the *lex loci solutionis* of the contract. The position taken in the above case is supported by *Fishburne v. Kunhardt*, 2 Speers L. 558, holding that it was unnecessary to file a mortgage in Alabama, where the same was executed, the property being at the time in South Carolina where the mortgagor was domiciled; and by *Pyeatt v. Powell*, 2 C. C. A. 367, 10 U. S. App.

200, 51 Fed. 551, holding that a chattel mortgage of property in the Indian territory, by a resident there, though executed in Kansas, is not affected by the Kansas laws requiring filing and registration. It will be observed that in the last two cases, however, the mortgagor was not domiciled in the state where the mortgage was executed, but in the state where the property was situated.

d. Judgment in attachment as res judicata against mortgagee.

See also *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, II. b. 1, *supra*, and *Greene v. Bentley*, 52 C. C. A. 60, 114 Fed. 112, II. a, 2, *supra*.

In *Hornthall v. Burwell*, 109 N. C. 10, 18 L. R. A. 740, 26 Am. St. Rep. 556, 13 S. E. 721, the property was seized and sold under attachment after its removal to Virginia; and the purchasers at the attachment sale contended that they were protected by the judgment in the attachment suit; but it was held that that judgment, not being *in rem* in the sense that it bound persons, not parties, was not binding upon the mortgagee. The court distinguished the case from *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, upon the ground that, by reason of the law of Illinois (the situs of the property involved in that case at the time the mortgage was executed), which subordinated the lien of the unfilled mortgage to the rights of subsequent bona fide purchaser or creditor, the attachment proceeding operated to defeat the lien of the mortgage, as against the title acquired under the attachment proceedings; whereas, in the case at bar the lien of the mortgage, even after the removal of the property to Virginia and the failure to file the mortgage there, remained superior to the rights of subsequent bona fide purchasers and creditors; and, hence, the attachment proceedings did not affect the mortgage.

III. As between lex loci contractus and lex domicilii.

In most of the cases cited in this note the mortgagor was domiciled in the state where the mortgage was executed so that there was no conflict between the *lex domicilii* and *lex loci contractus*. That seems to have been true of all the cases cited in subdivision I.; and while, in a few of the cases cited in II. a, 2 (see *Langworthy v. Little*, 12 Cush. 109, and *Craig v. Williams*, 90 Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899), the mortgagor was domiciled in a state other than that in which the mortgage was

executed and the property was then situated, there was no opportunity in those cases, or in the cases cited in II. b. 1, to decide between the *lex domicilii* and *lex loci contractus*, as such, since those cases, or at least the great majority of them, applied the *lex rei sitæ* to the matters in question, i. e., the law of the place where the property was situated at the time the mortgage was executed; and in this respect, and to this extent, they create an exception to the general principle that personal property has no situs of its own, but follows the person of the owner. The two cases last referred to, therefore, are to be regarded as applying the *lex rei sitæ* rather than the *lex loci contractus*, as opposed to the *lex domicilii*, although in these cases it happened that the *locus* of the contract and the situs of the property were the same. So, in the following case it will be observed that it was the *lex rei sitæ*, and not the *lex loci contractus* as such, that was applied, though they were the same in this case, and were both opposed to the *lex domicilii*.

A mortgage of personal property situated in New Hampshire, executed in that state and recorded, as required by its laws, was valid as against the creditors of the mortgagor without change of possession, notwithstanding that, according to the law of the mortgagor's domicile, a chattel mortgage is invalid as against creditors of the mortgagor if he retains possession of the property. *Lathe v. Schoff*, 60 N. H. 34.

But, notwithstanding the general statement, frequently repeated by the courts, that personal property has its situs at the domicile of the owner, the *lex loci contractus* will, in case of a conflict, doubtless prevail over the *lex domicilii*, in respect of those matters affecting chattel mortgages that are not governed by the *lex rei sitæ* as such. The *lex domicilii* governs with respect to the disposition of personal property by will, or by operation of law, as distinguished from the voluntary act of the parties, except so far as the property may be subject to the *lex rei sitæ*; but the *lex loci contractus* generally governs with respect to voluntary transfers *inter vivos*. Thus, in *Alcock v. Smith* [1892] 1 Ch. 238, 61 L. J. Ch. N. S. 461, 66 L. T. N. S. 126, it is expressly stated that the validity of a transfer of personal chattels—meaning a voluntary transfer *inter vivos*—depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place. To the same effect are *Bulkeley v. Honold*, 19 How. 390, 15 L. ed. 663; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796; and other cases not dealing specifically with chattel mortgages. G. H. P.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois *ex rel.* M. T. MOLONEY, *Appt.*,
v.

PULLMAN'S PALACE CAR COMPANY.
(175 Ill. 125.)

1. Demurrer to a special traverse ad-

mits the truth of the statements made in the plea, and raises the question of the sufficiency of the matters stated in the inducements to the plea to constitute a valid defense.

2. Incidental or implied powers of a corporation exist only to enable it to carry out the express powers granted.—that is, to accomplish the purpose of its ex-

NOTE.—The more important cases which have been decided within the last few years upon the question of the implied powers of private or 64 L. R. A.

quasi public corporations have been reserved from publication with a view to their publication in connection with a note upon that subject.

istence,—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes.

3. The ownership of an office building near the business center of a city, by a manufacturing corporation, does not exceed its incidental powers merely because the building is larger than its needs for present use, and a part of it is therefore rented, if it is probable that the whole building will be needed for its own business in the future.
4. The ownership, by a manufacturing corporation, of a town or city of more than 2,000 houses, with streets, alleys, sewer system, dwellings, tenement houses, churches, hotel, schools, theater, and business buildings, no one of which is occupied by any other than a tenant of the corporation, is contrary to public policy, and in excess of the implied powers of the corporation.
5. The ownership of a sewerage system, and of a sewerage farm on which vegetables are raised for sale, is not within the implied powers of a corporation because of the necessity of sewerage for a town owed by it, when the ownership of such town is in excess of its powers.
6. Whiskies, wines, beers, and other malt and intoxicating liquors are included in the "supplies" which the charter of a corporation engaged in manufacturing and selling or using cars authorizes it to furnish to travelers on them.
7. It is a matter of common knowledge that places for the accommodation and entertainment of travelers, such as hotels and taverns, steamboats and ocean vessels which carry passengers, almost universally sell to their guests and patrons whiskies, wines, and liquors, and that such things are regarded by a portion of the traveling public, and by those who transport and entertain them, as part of the "supplies" for travelers.
8. Vacant land may be held by a corporation when necessary for use in its business in the near future.
9. Vacant lots kept for future dwellings cannot be owned by a corporation in the exercise of its implied powers, when they constitute part of a tract on which the corporation has built a town in excess of its powers.
10. A sale of surplus steam by a corporation is not in excess of its powers when the steam is generated in the course of its business by boilers larger than are needed for its present uses, but which are bought in anticipation of probable future necessities.
11. A corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter, or necessarily implied from it.
12. The right of the state to restrain usurpation of power by a corporation which is clearly antagonistic to good public policy is not defeated by any imputation of laches, or upon the ground that acquiescence is to be inferred from the failure to invoke the aid of the courts at an early day.
13. The report of a legislative committee, that the property of a corporation is properly taxed, does not amount to a concession on the part of the state that the corporation had a right to acquire the title to the property.

(Craig, Wilkin, and Cartwright, JJ., dissent.)

(October 24, 1898.)

A PPEAL by relator from a judgment of the Circuit Court for Cook County in favor of defendant in a quo warranto proceeding to forfeit defendant's charter for alleged usurpation of power not granted to it. *Reversed.*

The facts are stated in the opinions.

Messrs. Maurice T. Moloney, Attorney General, **T. J. Scofield**, **M. L. Newell**, **Samuel Richardson**, and **George E. Bacon**, for appellant:

The defendant was "obliged," either to disclaim, in which case the people were at once entitled to judgment, or to justify, in which case it was their duty to set out their title specifically.

Carrico v. People, 123 Ill. 198, 14 N. E. 66; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 199.

It could not justify by its charter alone. It must show a grant for all the powers which it attempts to exercise.

Mix v. Ross, 57 Ill. 125.

The information filed herein is in accordance with the precedents established in the state of Illinois.

People v. Mobley, 2 Ill. 215; *Cheshire v. People*, 116 Ill. 493, 6 N. E. 486; *North & South Rolling Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

A corporation is an artificial body of men, composed of divers constituent members, *ad instar corpus humani*, the ligaments of which body politic are the franchises and liberties thereof which bind and unite all its members together, and in which the whole frame and essence of the corporation consists.

Bacon, Abr. Corporation, A; 1 *Waterman, Corp.* p. 2.

A corporation is a grant, from the sovereign authority, of certain rights, usually

The gathering of the authorities upon that question has, however, shown that the question involves such a large part of the case law upon the general subject of corporations that the printing of it will require so much space and the preparation of it so much time, that we are

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compelled to publish this collection of cases here for their intrinsic value, and to delay the publication of any annotation upon the subject to such time and in such convenient subdivisions as circumstances may suggest.

termed liberties or franchises, to individuals, who are thereby created into an artificial being, and endowed with certain liberties and privileges.

Bank of Augusta v. Earle, 13 Pet. 595 10 L. ed. 311; *Pieroe v. Emery*, 32 N. H. 507; *People ex rel. Atty Gen. v. Utica Ins. Co.* 15 Johns. 387, 8 Am. Dec. 243; *People v. Geneva College*, 5 Wend. 212.

An artificial being, invisible, intangible, and existing only in contemplation of law, it possesses only those powers which the charter of its creation confers upon it, either expressly or as incidental to its very existence.

Dartmouth College v. Woodward, 4 Wheat. 636, 4 L. ed. 659.

A franchise is a royal privilege, or branch of the King's prerogative, subsisting in the hands of the subject, and, being derived from the Crown, must arise from the King's grant.

2 Bl. Com. 17.

Corporate franchises in the American states emanate from the government, or sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals of a body politic.

Chicago City R. Co. v. People, 73 Ill. 547; *Board of Trade v. People*, 91 Ill. 82; *Ang. & A. Priv. Corp.* §§ 4, 337; *Bank of Augusta v. Earle*, 13 Pet. 579, 10 L. ed. 303; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 575.

The danger to the community which might arise out of the usurpation of unlawful powers as franchises by corporations was fully appreciated by the framers of the Constitution. Especial provisions were inserted in the Constitution limiting and restricting the exercise of the power of the legislature in the creation of corporations; and the Constitution imposed special restraints upon railroad corporations, and enjoined upon the legislature to pass laws to correct and prevent abuses of the powers which were deemed necessary to be conferred upon corporations.

Chicago & W. I. R. Co. v. Dunbar, 95 Ill. 577.

A corporation can only exercise such powers as may be conferred upon it by the legislative body creating it, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable it to carry out the express powers granted.

Betts v. Menard, Breese (Ill.) 10, Appx.; *Kinzie v. Chicago*, 3 Ill. 187, 33 Am. Dec. 64 L. R. A.

443; *Fitch v. Pinckard*, 5 Ill. 79; *Jacksonville v. McConnel*, 12 Ill. 140; *Petersburg v. Mappin*, 14 Ill. 194, 56 Am. Dec. 501; *Petersburg v. Metzker*, 21 Ill. 205; *Illinois Conference Female College v. Cooper*, 25 Ill. 148; *Caldwell v. Alton*, 33 Ill. 418, 75 Am. Dec. 282; *Miz v. Ross*, 57 Ill. 125; *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 644; *Webster v. People*, 98 Ill. 347; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 546, 2 Am. St. Rep. 124, 13 N. E. 169; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 283, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

In construing any charter or act of incorporation the rule is, that it shall be construed most strongly against the corporation, and in favor of the state.

Mobile & O. R. Co. v. Franks, 41 Miss. 511; *Mills v. St. Clair County*, 7 Ill. 197; *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *St. Clair County Turnp. Co. v. People*, 82 Ill. 174; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 199; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *Christ Church v. Philadelphia County*, 24 How. 301, 16 L. ed. 604; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 23 L. ed. 814; *Providence Bank v. Billings*, 4 Pet. 515, 7 L. ed. 939; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Sutherland*, Stat. Constr. § 378; *Binghamton Bridge*, 3 Wall. 51, 18 L. ed. 137; *United States v. Arredondo*, 6 Pet. 738, 8 L. ed. 564; *State, Vail, Prosecutor, v. Bentley*, 23 N. J. L. 532; *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 13 N. J. Eq. 94; *Oom. v. Rosbury*, 9 Gray, 451; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. Rep. 874; *Currier v. Marietta & C. R. Co.* 11 Ohio St. 228; *Allegheny v. Ohio & P. R. Co.* 26 Pa. 355; *Miners' Bank v. United States*, 1 G. Greene, 553; *Macon v. Macon & W. R. Co.* 7 Ga. 221; *Talmadge v. North American Coal & Transp. Co.* 3 Head, 337; *Brennan v. Bradshaw*, 53 Tex. 330; *Inferior Court Justices v. Griffin & W. P. Pl. Road Co.* 9 Ga. 475; *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319; *Gaines v. Coates*, 51 Miss. 335.

It has always been the policy of this state to prohibit corporations from owning any more land than was necessary for the purpose of their creation.

Carroll v. East St. Louis, 67 Ill. 571, 16 Am. Rep. 632.

No matter from what point of view this subject is considered, the appellee has no implied power to own the real estate, im-

proved or otherwise, held, farmed, and rented by it, nor to exercise the other powers usurped by it.

State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield, 23 N. J. L. 512, 57 Am. Dec. 409; *Lehigh Coal & Nav. Co. v. Northampton County*, 8 Watts & S. 334; *Railroad Co. v. Berks County*, 6 Pa. 70; *Worcester v. Western R. Corp.* 4 Met. 564; *State, New Jersey R. & Transp. Co., Prosecutors, v. Newark*, 26 N. J. L. 520; *Pacific R. Co. v. Seely*, 45 Mo. 220, 100 Am. Dec. 369; *Case v. Kelly*, 133 U. S. 26, 33 L. ed. 515, 10 Sup. Ct. Rep. 216; *State v. Flavell*, 24 N. J. L. 382; *Cook v. State*, 33 N. J. L. 479; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 185, 13 L. ed. 97; *Coleman v. San Rafael Turnp. Road Co.* 49 Cal. 518; *Re Swigert*, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469; *Illinois C. R. Co. v. People*, 119 Ill. 140, 6 N. E. 451.

For every power exercised by appellee it must show authority, either in express words or by an implication equally as strong.

Chicago, B. & Q. R. Co. v. Wilson, 17 Ill. 125.

Messrs. **John S. Runnells and William Barry**, for appellee:

Appellee's charter provides that it may be lawful for the company hereby incorporated to purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of its business, and it may have power to sell and convey the same.

The company is invested with the right to the exercise of a certain discretion in respect of its holdings of real estate which, but for the presence of the word "deem," it would not have enjoyed.

Barry v. Merchants' Exchange Co. 1 Sandf. Ch. 289.

Corporations have not only the powers expressly granted, but those which are necessarily implied.

1 Spelling, Priv. Corp. §§ 68, 73, 75; Green's Brice, *Ultra Vires*, pp. 66, 71, 73, 75, 87, 91; *Curtis v. Leavitt*, 15 N. Y. 9; *Union Bank v. Jacobs*, 6 Humph. 525; *Railroad Co. v. Berks County*, 6 Pa. 70; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. 33, 75 Am. Dec. 574; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 541; *Brown v. Winnisimmet Co.* 11 Allen, 326; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537; *Crawford v. Longstreet*, 43 N. J. L. 327; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; 2 Cook, Stock & Stockholders & Corp. Law, 3d ed. § 681.

In defining the implied powers of corporations

it is usually said that they are such as are necessary to carry into effect the powers expressly granted.

Those who seek to limit grants of power by the state assume to interpret "necessary" as meaning indispensable. That no such narrow interpretation is admissible is evident both from the reason of the thing and from the construction put upon the term by the best judicial minds.

M'Culloch v. Maryland, 4 Wheat. 413, 4 L. ed. 603; *Curtis v. Leavitt*, 15 N. Y. 9; *State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537; *Crawford v. Longstreet*, 43 N. J. L. 327; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; *Clark v. Farrington*, 11 Wis. 321.

In harmony with this latitude of construction given to the word "necessary," the courts have been equally liberal in sustaining the broad interpretation we claim for implied powers generally.

Union Bank v. Jacobs, 6 Humph. 525; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. 33, 75 Am. Dec. 574; *Dana v. Bank of United States*, 5 Watts & S. 243; *Wood, Railway Law*, § 169; *Kesselslaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Thompson v. Waters*, 25 Mich. 227, 12 Am. Rep. 243; 2 Cook, Stock & Stockholders & Corp. Law, 3d ed. § 681; 1 Spelling, Priv. Corp. § 75.

A manufacturing company may hold real estate, not only sufficient for its manufactory, but also to provide, when necessary, accommodations for its employees.

Norwich v. Norfolk R. Co. 4 El. & Bl. 415, 3 C. L. Rep. 519, 24 L. J. Q. B. N. S. 105, 1 Jur. N. S. 344; *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675, 4 L. T. N. S. 619, 9 Week. Rep. 806; *State v. Boston, C. & M. R. Co.* 25 Vt. 433; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Vermont C. R. Co. v. Burlington*, 28 Vt. 193; *State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield*, 23 N. J. L. 513; *Lehigh Coal & Nav. Co. v. Northampton County*, 8 Watts & S. 336; *Railroad Co. v. Berks County*, 6 Pa. 70; *Searight v. Payne*, 6 Lea, 283; *Watts's Appeal*, 78 Pa. 370; *State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537; *Crawford v. Longstreet*, 43 N. J. L. 327; *Brown v. Winnisimmet Co.* 11 Allen, 326.

A broad distinction is made between a corporation acquiring land or other property incidental to its business, or necessarily connected with it, or in furtherance of it, and a corporation acquiring land, or making an investment, for a purpose foreign to that for which it was incorporated. In the latter case a corporation would be diverting its funds and resources from the object for which they were acquired.

Blunt v. Walker, 11 Wis. 349, 78 Am. Dec. 709; *Fulton v. Sterling Land & Invest. Co.* 47 Kan. 621, 28 Pac. 720; *Texas & St. L. R. Co. v. Robards*, 60 Tex. 546, 48 Am. Rep. 268; *Chicago, B. & Q. R. Co. v. Wilson*, 17 Ill. 123; *Locey Coal Mines v. Chicago, W. & V. Coal Co.* 131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 393, 22 U. S. App. 267, 62 Fed. 335; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413, 2 Sap. Ct. Rep. 221; *Branch v. Jesup*, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. Rep. 495; *Smead v. Indianapolis, P. & O. R. Co.* 11 Ind. 104; *Low v. California P. R. Co.* 52 Cal. 53, 28 Am. Rep. 629; *Vandall v. South San Francisco Dock Co.* 40 Cal. 83; *Ft. Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; *Moss v. Averell*, 10 N. Y. 449; *Moss v. Rosie Lead Min. Co.* 5 Hill, 137; *Green's Brice, Ultra Vires*, 87; *Lyde v. Eastern Bengal R. Co.* 30 Beav. 10; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Stevens v. Pratt*, 101 Ill. 206; *Lafond v. Deems*, 81 N. Y. 508; *Re London & C. Co.* L. R. 5 Eq. 561, 37 L. J. Ch. N. S. 393, 18 L. T. N. S. 103, 16 Week. Rep. 577; *French v. Quincy*, 3 Allen, 9; *Worcester v. Western R. Corp.* 4 Met. 564; *Barry v. Merchants' Exchange Co.* 1 Sandf. Ch. 229; *New York & H. R. Co. v. Kip*, 46 N. Y. 553, 7 Am. Rep. 385; *Simpson v. Westminster Palace Hotel Co.* 8 H. L. Cas. 711, 6 Jur. N. S. 985, 2 L. T. N. S. 707.

The ownership of stock in another corporation engaged in business properly within the scope of the charter of the corporation is not prohibited by law. It might be one of the wisest methods of carrying out the purposes of its incorporation.

Hill v. Nisbet, 100 Ind. 341; *Booth v. Robinson*, 55 Md. 419; *Re Barned's Bkg. Co.* L. R. 3 Ch. 105, 37 L. J. Ch. N. S. 81, 17 L. T. N. S. 269, 16 Week. Rep. 193; *Royal Bank's Case*, L. R. 4 Ch. 257; *Watts's Appeal*, 78 Pa. 370; *Green's Brice, Ultra Vires*, 95; *Ang. & A. Priv. Corp.* § 158; *Ryan v. Leavenworth, A. & N. W. R. Co.* 21 Kan. 365; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 393, 22 U. S. App. 267, 62 Fed. 335; *Franklin Co. v. Leiciston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9; *Richelieu Hotel Co. v. International Military Encampment*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798.

The people have acquiesced in and waived the acts of appellee now complained of.

King v. Daues, 1 W. Bl. 634; *King v. Lathrop*, 1 W. Bl. 470; *Rex v. Stephens*, 1 Burr. 434; *King v. Dickin*, 4 T. R. 282; *State v. Bailey*, 19 Ind. 454; *State ex rel.* 64 L. R. A.

Sleeth v. Gordon, 87 Ind. 174; *State ex rel. Howard v. Crawfordsville & S. Turnp. Co.* 102 Ind. 283, 1 N. E. 395; *People ex rel. Platt v. Oakland County Bank*, 1 Dougl. (Mich.) 283; *Com. ex rel. Atty. Gen. v. Bala & B. M. Turnp. Co.* 153 Pa. 47, 25 Atl. 1105; *Atty. Gen. v. Johnson*, 2 Wils. Ch. 87, 18 Revised Rep. 156; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

Such an acquiescence and waiver as that set out in the plea will bind the state.

Atty. Gen. v. Petersburg & R. R. Co. 28 N. C. (7 Ired. L.) 456; *People v. Manhattan Co.* 9 Wend. 351; *People ex rel. Atty. Gen. v. Kankakee River Improv. Co.* 103 Ill. 491; *State v. Bank of Charleston*, 2 McMull. L. 439, 39 Am. Dec. 135; *Trustees of Schools v. Union District*, 88 Ill. 100; *People ex rel. Fitzgerald v. Boyd*, 132 Ill. 70, 23 N. E. 342.

Forfeiture or excessive punishment cannot be allowed for the matter complained of.

State ex rel. Clapp v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; *Atty. Gen. v. Joy*, 55 Mich. 94, 20 N. W. 806; *People v. North River Sugar Ref. Co.* 121 N. Y. 562, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; *People ex rel. Platt v. Oakland County Bank*, 1 Dougl. (Mich.) 283; *State ex rel. Prosecuting Attorney v. Commercial Bank*, 10 Ohio, 535; *State ex rel. Atty. Gen. v. Farmer's College*, 32 Ohio St. 487; *State ex rel. Howard v. Crawfordsville & S. Turnp. Co.* 102 Ind. 289, 1 N. E. 395; *People ex rel. M'Kinch v. Bristol & R. Turnp. R. Co.* 23 Wend. 222; *North & South Rolling Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

JOGGS, J., delivered the opinion of the court:

This is an information in the nature of a quo warranto, filed by the attorney general in the circuit court of Cook county, in the name and on behalf of the people of the state of Illinois, against Pullman's Palace-Car Company. Said company is a corporation, organized in 1867 by a special act of the legislature of Illinois, entitled "An Act to Incorporate Pullman's Palace Car Company." 2 Priv. Laws 1867, p. 337. The act is as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That George M. Pullman, John Crerar, and Norman Williams, Jr., and their associates, successors, and assigns, be and are hereby created a body politic and corporate, under the name and style of 'Pullman's Palace Car Company,' with all powers, rights, privileges, and immunities incident to corporations and necessary or useful for the purposes of this act: Provided, that if the corporation created by this act shall not

organize within one year after the passage hereof, then this act shall be null and void.

"Sec. 2. The capital stock of the said company shall be \$100,000, and be divided into shares of \$100 each, and it may be increased from time to time as a majority of the stockholders may direct, and shall be issued and transferred in such manner and under such conditions as the directors of the said company shall, by the by-laws thereof, prescribe.

"Sec. 3. The corporate powers of the said company shall be vested in and exercised by a board of directors, consisting of such number of persons, not less than three nor more than seven, as the stockholders of the said company may, from time to time, direct. The said directors shall be chosen by the stockholders at such time and place as may be fixed by the by-laws of the said company, and shall hold their offices for one year and until their successors are elected and qualified. They shall elect one of their number president of said company, and may fill any vacancy in the said board, occasioned by death, resignation, or otherwise, for the unexpired portion of the office so becoming vacant, and make such rules, by-laws, and regulations, and appoint such officers and servants, as they may, from time to time, deem expedient. Until an election of directors as herein provided, the persons named as incorporators in the first section of this act shall constitute a board of directors, and shall have and may exercise all the powers of such board.

"Sec. 4. The said corporation shall have power to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper.

"Sec. 5. The said corporation shall have power to borrow money, and may secure the payment of the same by deed of trust, mortgage, or other security.

"Sec. 6. It may be lawful for the company hereby incorporated to purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of their business, and may have power to sell and convey the same.

"Sec. 7. This act shall be deemed a public act, and shall take effect from and after its passage."

The information sets out the charter of the defendant, and then alleges certain acts which are alleged to be usurpations by the defendant of powers not conferred by its charter, and concludes with a prayer for the forfeiture of the charter of the corporation. The allegations contained in the information are as follows:

formation of the usurpations of power on the part of the defendant are, in substance, as follows: First. That it owns and controls a large ten-story business block, together with the ground on which it stands, worth \$2,000,000, in the business center of the city of Chicago; that it rents three fourths of said block to persons, firms, and corporations, and derives a large income therefrom; that this business block is located many miles from its works or what is called the "Town of Pullman," and a small portion of it only is occupied by the company's employees; that this business block was built as an investment, and not because it had any real necessity therefor. Second. That it owns 50 acres of ground at Pullman, Illinois, which are covered with two-story brick dwelling houses, and three-story apartment dwellings, that all these houses are rented by it, and it derives therefrom large rentals; that the dwellings and apartment buildings, so rented, furnish homes for 12,000 people, and are worth a large amount of money, and are usurpations of power on its part. Third. That it owns 50 acres of ground in said town of Pullman which are used for streets, alleys, and ornamental grounds, and that the same is very valuable, and that the owning of such lands for such purposes is a usurpation of power. Fourth. That it owns 15 acres of ground on which are erected, among other buildings, the Arcade building, the Hotel Florence, and some schoolhouses; that the Arcade building is a large business block, and is rented by the company to different persons, and there are carried on therein various and different kinds of business by the tenants occupying the same; and that said Arcade building yields a rich profit to said company. Fifth. That it owns two churches in said town of Pullman, together with the ground on which they are erected, and it rents said church edifices to different congregations, and derives a large profit therefrom. Sixth. That it owns a number of schoolhouses in said town, and the ground on which they are erected, and they are rented by it to the authorized educational authorities, and it derives a large income therefrom. Seventh. That it owns a large hotel, located in said town, and which is known as the "Hotel Florence;" that said company operates and controls said hotel, and pays for the supplies consumed therein, and for all help employed in and about said hotel; that it employs and pays a manager to look after said hotel; and, in connection with said hotel, it owns and operates a barroom or saloon, and which saloon is located in said hotel building, and that in said saloon it sells all kinds of whiskies, intoxicating liquors, and other drinks; that a government license is annual-

ly taken out for saloon purposes; and that the keeping and maintaining said hotel and the keeping and maintaining said saloon are all done for profit, and a large income is derived therefrom. Eighth. That it owns a theater and the ground whereon it stands, and that the same is done for profit; that it employs a manager to manage the same, and plays, operas, and other attractions are performed therein. Ninth. That it owns a large hall, known as "Market hall," and the ground whereon it stands; that said hall is rented by it for divers purposes for which large halls of the kind are rented in cities, and a large income is derived therefrom. Tenth. That it owns a large gas plant, and operates the same in said town of Pullman, and rents said gas to the 12,000 people, residents of said town, to light their homes and for purposes of consumption, as well as to light said streets; and that from all these sources a large profit is derived. Eleventh. That it owns and carries on a system of water mains and service pipes within the town of Pullman, and through these supplies, for profit, water to the different industries located in said town, as well as to the residences and apartment houses owned and rented by it; that it purchases said water from the city of Chicago and other sources, and sells the same, as aforesaid, for a large profit. Twelfth. That it owns a plant for generating steam, and owns the pipes to convey the steam to the residences of its said tenants in the town of Pullman, and supplies said tenants in said town such steam, together with merchants and others, for pecuniary profit, and derives a large income therefrom. Thirteenth. That it owns and operates a large brick plant at Pullman; that it manufactures and sells brick, and places upon the market, wherever purchasers can be found, brick so manufactured; that it has been for many years a competitor in the market for the sale of brick. Fourteenth. That it owns and operates a system of sewerage pipes and a pumping plant connected therewith; that through said sewerage pipes the sewage and refuse accumulated in said town of 12,000 inhabitants is pumped onto a large farm owned by it, and spread over the same; that said company cultivates said land so manured, and raises thereon large quantities of cabbage, celery, beets, and other vegetables, and sells the same in the city of Chicago and other cities where it can find a market therefor, and makes shipments of such produce to the city of New Orleans; and that it realizes in this way large sums from operating said sewerage system and cultivating said farm. Fifteenth. That it operates, in this state and elsewhere, through leases or contracts, a number of cars, and in these, day and night,

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carries and sells for profit stocks of whiskies, wines, beer, and other malt and intoxicating liquors; that such whiskies, etc., are carried and sold for pecuniary gain, and, in doing so, it derives a large profit therefrom. Sixteenth. That it owns near the Belt Line road 25 acres of ground which it does not use. Seventeenth. That it owns near Lake Calumet 175 acres of vacant and unoccupied land. Eighteenth. That it owns 55 acres of land north of its shops which land is vacant and unoccupied. Nineteenth. That it owns 16 acres of lots and blocks in the town of Pullman which are vacant and unoccupied. Twentieth. That a certain corporation, known as the "Union Foundry & Pullman Car-Wheel Company," was organized and existed in Cook county, and owned about 10 acres of ground purchased by it from appellee; that appellee owned its stock, and had it organized, and now, in effect, controls and operates it; that in this way, and through this corporation, it manufactures structural iron, and places the same upon the market. Twenty-First. That it furnishes to the Allen Paper Car-Wheel Company the power that operates its machinery, and receives therefrom a large income. Twenty-Second. That it owns the stock of the Pullman Iron & Steel Company and controls, directs, and manipulates its affairs; that the said company manufactures bar iron, and for many years has manufactured railroad spikes, and sold the same upon the market wherever purchasers could be found therefor; that such sales and the manufacturing of such products are, in effect, made by defendant. Twenty-Third. That it organized, owned, and controlled the Southern Pullman Palace Car Company; that it owned its stock; and that the said company is now merged in defendant. Twenty-Fourth. That it manipulates and controls the affairs of the town of Pullman, and maintains therein water and gas plants, and lights the streets of said town and owns the same, and exercises privileges and powers incident to a municipal corporation. Twenty-Fifth. That it owns 110 acres of ground in Pullman, on which are erected its shops, and all that is not necessary for such purposes is a usurpation of power, and contrary to law.

To the six pleas of the defendant, as originally filed, demurrers were sustained, upon the ground that each assumed to, but did not, answer the entire information. They were amended. Each of the amended pleas sets out the charter of defendant, and then alleges certain matters as inducement, and concludes with a traverse under the *absque hoc*. The first amended plea assumes to answer the entire information, except so much thereof as charges defendant with owning and holding certain shares of the capital

stock in the Union Foundry & Pullman Car-Wheel Works, in the Southern Pullman Palace Car Company, and in the Pullman Iron & Steel Company, and with selling and furnishing, upon its sleeping cars, whiskies, wines, beers, and other malt and intoxicating liquors, to persons traveling therein. The second and third pleas assume each the same burden as that assumed by the first, but with this additional exception: That neither of them purports to answer the charge of owning a large office building in the center of the city of Chicago. The fourth plea undertakes to answer only so much of the information as charges the defendant with owning and holding certain of the capital stock of the Pullman Iron & Steel Company. The fifth plea undertakes to answer only so much of the information as charges the defendant with selling and furnishing, upon its sleeping cars, whiskies, wines, beer, and other intoxicating liquors to persons traveling therein. And the sixth plea undertakes to answer the entire information, except that part of it which charges the defendant with owning and holding shares of the capital stock of the Pullman Iron & Steel Company.

Demurrers were interposed by the attorney general to these several amended pleas. The demurrer to the fourth plea was sustained, and, the defendant electing to abide by its said plea, judgment was entered against it thereon, ousting the defendant from the liberty of owning capital stock in the Pullman Iron & Steel Company. The demurrers to the other pleas, however, were overruled, and, the attorney general electing to abide by the demurrers, judgment was entered finding the defendant not guilty as charged against it in the information, except as to the charge of owning capital stock in said Pullman Iron & Steel Company. To the judgment of the court overruling the demurrer to the first, second, third, fifth, and sixth pleas the people duly excepted, and appealed from said judgment to this court. The defendant has assigned cross errors on the ruling and judgment of the court sustaining the demurrer to the fourth plea.

Paragraph 23 of the amended sixth plea avers as follows: "Defendant further states that heretofore in this plea it has set out all the business in which it is engaged, and all the real property which it owns in said county of Cook, and particularly it here states that it does not own any brickyard, and does not own 175 acres south of Lake Calumet; that it does not own any stock in the Union Foundry & Pullman Car-Wheel Works; that said Union Foundry & Pullman Car-Wheel Company owns no property, and by action of its stockholders it has ceased to

exist; and that defendant does not own any stock of the Southern Pullman Palace Car Company, and exercises no control over it." The demurrer, of course, admits the truth of these several statements and denials, and the effect of this disclaimer is to eliminate from further consideration the charges of the information in respect to said matters.

Each of the amended pleas, as already stated, sets out the charter of the defendant, and then alleges certain matters of inducement, and concludes with a traverse under the *absque hoc*. The design of a special traverse as distinguished from a common traverse, is to explain or qualify the denial. The essential parts of such a plea are the inducement, the denial, and the verification. The issuable part of the plea is the denial, which is under the *absque hoc*, and when the denial under the *absque hoc* is sufficient no issue of fact can be formed upon the inducement. The matter, however, set up in the inducement must be such as in itself amounts to a sufficient answer, in substance, to the declaration or information. The plaintiff may elect to either form an issue of fact by pleading to the *absque hoc*, or to form an issue of law by demurring to the plea, and thereby take exceptions, in point of law, to the explanatory matters set up in the inducement. In the several amended pleas in the case at bar the denials under the *absque hoc* are amply and necessarily sufficient; for, with the exception of the allegations of the organization and existence of the defendant corporation, they specifically deny all the averments of the information. Therefore the questions to be determined upon this appeal have reference to the sufficiency of the matters stated in the inducements to said pleas to constitute valid answers and defenses, in substance, to the several charges made in the information. As matter of course, the demurrers admit the truth of all the statements made in the plea.

Counsel for appellee contend that full warrant and authority for the various acts which, as it appears from the pleas, the corporation has done, are to be found either in the powers expressly conferred by its charter, or in the powers possessed by implication of law. In order to determine correctly the sufficiency of the pleas in the light of this contention of appellee, it is essential the rules and principles of law applicable to the matter of the express and implied powers of corporations should be ascertained and declared.

A corporation in our state has its existence by virtue of the enactment, general or special, of the lawmaking power. The appellee corporation was created by a special act of the general assembly. The only difference

between a corporation organized under a general law and one created by a special statute is "that in the former we look to the certificate of the promoters, while in the latter we look to the special statute, to ascertain the scope of the powers of the corporation." The rule for construing the instruments must necessarily be the same, viz.: The powers specifically enumerated, and such other powers as are incidental or necessary to carry those powers into effect, but none others may be exercised by the corporation. *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 21 N. E. 794.

The enactment creating the appellee corporation is the full measure of its power. In order to enable it to carry into execution the powers thus conferred, it may exercise other powers, known to the law as incidental or implied powers. Implied powers exist only to enable a corporation to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. A power which the law will regard as existing by implication must be one in a sense necessary,—that is, needful, suitable, and proper to accomplish the object of the grant,—and one that is directly and immediately appropriate to the execution of the specific powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. *Illinois Conference Female College v. Cooper*, 25 Ill. 148; *Caldwell v. Alton*, 33 Ill. 418, 75 Am. Dec. 282; *Chicago, P. & S. W. R. Co. v. Marcellis*, 84 Ill. 643; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Northside R. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055; *Field, Priv. Corp.* §§ 53, 54; 4 *Thomp. Corp.* § 5638; 2 *Beach, Priv. Corp.* § 385; *Green's Brice, Ultra Vires*, 88, 89.

Keeping these definitions as to implied powers in view, we may proceed to determine whether the acts set forth in the pleas are within or beyond the measure of power possessed by the appellee company.

The information charges that the defendant owns and controls within the city of Chicago a large ten-story business block, together with the ground on which said building stands, worth \$2,000,000; that the de-

fendant occupies a portion only of said building for purposes of its own corporation business, and that it leases about three fourths of the building to other persons, firms, or corporations, and receives a large consideration from the occupants thereof as rentals; that said block was built by the defendant as an investment; and charges that the said building was erected without warrant or authority of law. The defendant sets up, by way of inducement in its plea, that it has had, ever since its organization, its general offices near the business center of the city of Chicago, and that it is necessary and proper to do so; that it became impossible to rent proper general offices, and that the rentals charged for poor offices were high and exorbitant; that thereupon, in 1880, it purchased a lot of land, 75 by 170 feet at the corner of Michigan avenue and Adams street, and erected thereon a building, in which it ever since has kept its general offices and some storerooms; that said land was valuable, and could not, without great loss, be utilized for erecting a building other than a high building, and such as is in keeping with and equal to the surrounding buildings; that thereupon the defendant erected thereon a nine-story building, of which it now uses nearly one half; and that, if its business continues to increase as it has in the past, it will soon also use it all, for its general offices; that in the meantime it rents to different parties such offices as it is not at present using; that erecting such buildings is in keeping with the usual practice of other large corporations doing kindred business, and that it could not now rent such general offices as it requires, in the business center of Chicago, for a rental as low as 5 per cent per annum on the amount which said building and the land on which it stands cost defendant.

The defendant is authorized, by § 6 of its charter, to purchase, acquire, and hold such real estate as may be necessary for the successful prosecution of its business; but it is contended that the building in question is much larger, and contains many more rooms and offices, than the business or wants of the corporation demand; that only a small portion of it is occupied by the company's employees; that it was erected as an investment by the company, and therefore that the company owns and maintains the building without authority of law. We are concerned, however, with the averments of the plea, the truth of which is admitted by the demurrer. The plea avers it was necessary and proper the general offices of the appellee should be maintained near the business center of the city of Chicago, and that such offices have always been maintained in

that locality; that it became impossible to rent suitable general offices there, and even insufficient and undesirable offices could only be obtained at high and exorbitant rentals; that the business of the company was large and rapidly increasing, and that good business judgment dictated the company should provide its own offices, and that in view of the fact that desirable ground was very valuable, and that more office room would be needed in the future to accommodate the growing business of the company, it was determined to construct a larger building than was at the time actually needed and necessary, and to rent such offices as were not at the present needed, and that, moved by such consideration, the building was erected; that, if the business of the corporation continues to increase as it has in the past, the entire building will soon be devoted to the uses of the company.

We think the plea presented a good defense to the charges preferred in the information with reference to this building. The right of the appellee to construct an office building is indisputable, as so, also, is the right to select the most eligible and desirable site. It would be but a narrow and wholly unjustifiable view of this power to insist that in planning and constructing the building the corporation should leave out of consideration its probable prospective requirements, and should erect a building containing only as many rooms and offices as its present business might demand. The corporation had the right, as we think, to look to, and prepare for, the future. It was but true economy to do so, and if it proceeded in good faith, as we are to assume from the conceded averments of the plea it did, no reason is perceived why it should be deemed bound by law to permit such parts of the building as are not for the present required for the accommodation of its business to remain vacant, but, on the contrary, that it might lawfully obtain such income from the rents of such rooms as might be possible until the growth or increase of its business demanded the additional rooms or offices. A corporation could not be permitted, under mere color and pretense of furnishing accommodations for the transaction of its own affairs, to construct houses or rooms for the purpose of renting the same, and engage in renting such houses or rooms as a business, if such pursuit was, as it here clearly is, beyond and distinct from that it was created to pursue and accomplish. But the averments of the plea do not justify the imputation that the acts of the company under consideration are but colorable, and in this investigation the averments stand confessed by the state.

It appears from the averments of those
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pleas which are intended to answer the allegations of the information set forth hereinbefore as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 24 that the defendant company, about the year 1880, acquired and now holds a certain tract of land containing about 83 acres, on a portion of which, in the year 1880,—at least not later than 1882. — it caused to be constructed a large number of dwellings and tenement houses, some of the height of two stories and others three stories in height; that the total number of such buildings is 2,200, and that it has laid out and now maintains the usual and necessary streets and alleys to afford the tenants to whom it rents said dwellings and tenement houses the proper and usual means of ingress and egress to and from their homes and places of business; that it now rents said dwellings and tenements to its employees; that upon the same plat of ground upon which said dwellings and tenements stand, and where said streets and alleys are located, it caused to be erected a number of school-houses, a church edifice, an hotel, a large building called "The Arcade," in which are a number of rooms, some of which were constructed to be rented for dry goods, grocery, and other retail stores, and other of the rooms were built for school, lecture, and theater rooms, and for the use of religious congregations for church purposes, and that it now rents the rooms in said Arcade for the various purposes for which they were intended when built; that it has also constructed on the same plat of ground a large building called "Market hall," the lower floor whereof it caused to be fitted up for meat and vegetable markets, and it has rented and now rents them to retail dealers in such articles of food, and the upper floor is a large hall, where concerts, dances, and other entertainments may be given, and is rented by it for such purposes; that it maintains a system of waterworks and sewers, and a gas plant, and, for a consideration, supplies those who inhabit its houses with water, light, and heat.

From these averments but one conclusion is admissible, which is, the appellee corporation became, and is now, the proprietor of the lots, streets, alleys, sewer system, dwellings, tenement houses, churches, hotel, schools, theater, and business buildings composing a town or city of more than 2,000 houses, no one of which is occupied by any other than a tenant of the corporation. The powers vested in the corporation by the words of its charter are "to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said

company may think fit and proper." Manifestly, the acts of the corporation which have resulted in the creation of this town or city, and its acts in connection with the streets, alleys, dwellings, tenements, school, church, and business houses, water system, sewerage, heat, etc., which the plea admits it was performing at the time of the filing of the information, cannot be regarded as the exercise of powers expressly given. Can they be justified as the proper exercise of powers incidental to the express powers possessed by the corporation, or by the provision in the sixth clause of the charter that it may be lawful for the corporation to acquire and hold such real estate as may be deemed necessary for the successful prosecution of its business? The declaration of the sixth clause is not that the company may acquire and hold such real estate as it or its directors may deem necessary, but such as may be deemed necessary to the successful prosecution of its business. The true meaning of this clause is not that the company or its governing body is vested with unlimited and unbridled power to acquire and hold such real estate as it may deem necessary, but with power to purchase and hold only such real estate as, under the rules of law, may be deemed necessary for the successful prosecution of its business. "The rule of construction . . . [when any doubt arises out of any language employed in such a charter] is that every power that is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public." *American Loan & T. Co. v. Minnesota & N. W. R. Co.* 157 Ill. 641, 42 N. E. 153; *Illinois Health University v. People*, 166 Ill. 171, 46 N. E. 737. "Irrespective of the operation of statutory restrictions, it is a settled principle of American jurisprudence that a corporation cannot take and hold land except in so far as reasonably necessary to carry out the objects of its creation. These bodies, which never die, are not allowed, against the objection of the state, to take and hold land for purposes wholly foreign to the purposes for which the state endowed them with corporate existence and the power of perpetual succession." 5 Thomp. Corp. § 5772. This court has declared that it is against the public policy of this state to allow corporations to own real estate beyond what is necessary for the transaction of their corporate business, or such as is acquired in the collection of debts. *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236. And, in furtherance of this declared public policy, statutes have been enacted by the general assembly requiring all corporations

which have acquired lands in the collection of debts to sell and dispose of all that is not necessary to the purposes of the corporation, and providing remedies designed to coerce compliance with such requirements. Rev. Stat. chap. 32, § 5, entitled *Corporations*.

It seems perfectly clear the charter of the corporation did not clothe it with express power to purchase the real estate upon which the town or city of Pullman is built, or to construct the buildings in said town or city, or to engage in the business of renting dwellings, storerooms, market places, etc. Nor is express power to authorize such acts relied upon, but the contention is they were fully warranted by the powers derived from the implications of the law. What powers are to be implied by law must, as a matter of course, depend largely upon the surrounding circumstances.

With a view of showing that the situation at the time justified the course pursued by the company, and was sufficient to invest it with the legal right to pursue such course, the appellee company filed pleas averring, in substance, as follows: That, after it had been for several years in the exercise of the powers conferred by its charter, its business increased to such an extent that it became necessary for it to build large and extensive shops in which to manufacture cars; that a large amount of land was necessary on which to locate such shops; that it was decided to locate and build said shops in the county of Cook, in or near the city of Chicago, where its general offices and headquarters were, and where its principal officers resided; that it found that it could not acquire a sufficient amount of land upon which to erect said shops within the city of Chicago, on account of the high price of land in said city; that, after diligent and careful inquiry as to the price of land and the means of access thereto, it decided to build its shops where they are now situated, being upon a parcel of land lying between the west bank of Lake Calumet and the Illinois Central Railroad; that it, about the year 1880, purchased a tract of about 343 acres, then of comparatively small value, being unimproved, low-lying land, held as acre or pasturage land, not included in any municipality, and not subdivided; that at the time of said purchase, and at the time of the planning and laying out of the manufacturing plant of defendant, there were not more than 25 dwelling houses within a radius of 2 miles of said land, all of which were fully occupied; that it was impossible to get good, skilled workmen to come and work at said manufacturing plant unless they could obtain homes in the immediate vicinity; that to get workmen and other employees, skilled and other-

wise, at its said manufacturing plant, defendant was obliged to build and erect a sufficient number of houses or tenements to accommodate as many as possible of its employees, and that, in order to attract to said manufactory the best class of skill and labor, it, in or about the year 1880, and not later than 1882, erected upon a part of said lands 2,200 houses and tenements, and that the same were so built for the purpose of inducing the best class of workmen to become employed at defendant's manufactory; that the same were only built for the purpose of so accommodating defendant's employees, were not built for any profit or income therefrom, but that the defendant might be able to obtain good, skilled labor in its manufactory; that they are not a profitable investment, and were and are only built and held by defendant because the same are "necessary for the successful prosecution of its business."

Defendant alleges also in its pleas, as inducement, that in order to obtain a better class of skilled employees, especially those with families, to work in its manufactory, it was absolutely necessary that there should be provided near their homes proper educational facilities; that to meet the said demand, and to accommodate the desire of said employees that their children should receive ordinary education, defendant erected several schoolhouses near the said dwellings, and schools were and are held therein, and the children of such employees receive instruction therein; that said buildings are all now within the limits of the city of Chicago, and said schoolhouses are rented to the board of education of said city, which has the sole control and charge of said buildings; that it became and was necessary that certain places for divine worship should be provided near the said dwellings of defendant's employees, and, to meet that demand, a church was erected and furnished to a congregation using it, at a purely nominal rental; that on this tract of land, and near said dwelling houses, defendant erected a building called the "Arcade building;" that on the first floor thereof are rooms rented by defendant to storekeepers, because, when the town of Pullman was built, there were no stores within a reasonable distance at which the company's employees could buy the ordinary necessities of life; that from said stores were and are sold to said employees groceries, clothing, and all other things usually purchased by them; that defendant has not, and never has had, any interest in said stores or the profits derived therefrom; that it does not allow its employees to give orders upon it to said stores; that said stores are rented at a very low rate, and that said building was not built for profit,

but only for the convenience of said employees; that on the second and third floors thereof is a public library, for the use of said employees and their families, for which no rent is charged, and two large halls used for religious worship for the use of said employees and their families, and which are furnished by defendant to congregations of its employees at a nominal rental; that in said building are also two or three rooms rented by the board of education of the city of Chicago for school purposes, and in which the children of said employees are taught; that in said building there is also a room erected as a lecture room and theater, provided only to give said employees and their families recreation; that no theatrical entertainments are given in said building by defendant, but the same is furnished for use to said employees or associations of them, and is largely used by them for entertainments given by themselves, and for a place in which they may practise music; that on said land, near its manufacturing plant, defendant erected a small building which was used as a hotel, for the purpose of furnishing accommodations to intending purchasers of defendant's cars, their agents and inspectors; that said hotel was and is a necessary part of defendant's manufacturing plant; that defendant built on said grounds a building known as "Market hall," the upper story of which is a large hall furnished to employees in which they hold entertainments, such as concerts and dancing, and on the lower floor are stores, which are rented out to persons who use the same as meat markets; that, in order to properly operate its manufacturing plant, it became and was necessary to erect a gas plant, from which it furnishes light through all its manufacturing buildings, and has, upon their request, furnished gas, at a fair and reasonable price, to certain of its employees occupying some of its houses, but that the gas so furnished said employees does not amount to 10 per cent of the gas produced by said gas plant, and used in defendant's shops; that, at the time of the erection of said manufacturing plant, there were no waterworks at or near said lands, and defendant erected a water tower and plant upon its premises, principally for supplying water throughout its shops, and contracted with the village of Hyde Park for the furnishing to defendant of large amounts of water through the water mains of said village; that most of the water passing through said water mains and through said water tower is used in the shops of defendant, but a small percentage thereof is furnished to said employees in their homes; that said water is furnished to said employees at a very low rate, and at less than the cost thereof to defendant, and

because said employees cannot in any other way procure a supply of water; that, when said manufacturing plant was built, defendant put in a very large system of boilers for generating steam; that said boilers and steam capacity probably will all be required for use in operating said shops, but up to this time there has been a surplus of steam generated, and, at the request of said employees, steam pipes have, in a few instances, been run into their said houses and dwellings, and through said steam pipes some of said houses and dwellings have been heated; that in like manner it has furnished, for a money consideration, part of its present surplus steam and engine power to the Allen Paper Car-Wheel Company, whose shops adjoin the property of defendant; that, in connection with said manufacturing plant and dwelling houses, defendant set apart 18 acres of land as recreation grounds for the use of its said employees, which includes a place for playing baseball, football, and many other kinds of athletic exercises, and for the use of said recreation grounds it charges no rental or admission fee; that said grounds are furnished with divers appliances for athletic exercises, and are free to all of said employees and their families, and are used as pleasure grounds by them; that also, in connection with said manufacturing plant and dwelling houses, it set apart about 13 acres for pleasure grounds for its said employees and their families, the said pleasure grounds including what is usually called a park, together with a greenhouse and other such accessories, and defendant has established and maintained the same only for the purpose of attracting to its works the best class of skilled workmen.

In the light of the well-settled rule, that a plea is to be construed most strongly against the pleader, the averments of appellee's pleas are to be interpreted to disclose that the measures which the appellee corporation adopted looking towards the relocation and removal of its plant included, as a fully-matured part thereof, the plan of building the residence, tenement, and business houses and constructing the streets and alleys,—in fact, providing a town or city wherein its employees might or should dwell, and of which it should be the sole owner and proprietor,—and that, in pursuance of this plan, a tract of land was acquired sufficiently large to receive and accommodate, not only the manufacturing plant of the corporation, but also to provide the necessary space for the streets, alleys, dwellings, tenements, hotel, church, opera house, and other business houses which the scheme of the corporation included; and it is to be further necessarily inferred, on a proper construction of the plea, that the work of erecting

the buildings comprising the manufacturing plant proper and the buildings which compose the town or city was entered upon and carried along at the same time and together. Nor is this interpretation of the pleas at all harsh or doubtful, but is the same as that entertained by counsel for appellee who drafted the pleas. Speaking upon the point, counsel for appellee, on pages 51 and 52 of their brief filed in this court, say: "Accordingly in the exercise of its best judgment, appellee selected and purchased about 350 acres of land situated upon the shores of Lake Calumet, 14 miles distant from its offices and 10 miles beyond the then limits of the city of Chicago. The land at that time was practically an unoccupied waste. It was surrounded for a very considerable distance, in all directions save towards the lake, by farming and unoccupied lands. There were no convenient places where employee of the company could find homes or dwelling places. The construction of the manufactory, therefore, involved, not the expediency, simply, but the necessity, of providing places suitable for the occupancy of those who were to do its work. The manufactory and the homes for the workmen were mutually and equally necessary to the success of the enterprise. 'The power to manufacture cars' was barren without the other charter power, 'to purchase, acquire, and hold such real estate as may be deemed necessary.' It was only by the combination of the two—by their exercise together, in the manner which has been described—that the object of the charter, 'the successful prosecution of their business,' could be accomplished. Accordingly, the exercise of these powers was undertaken contemporaneously. The construction of the works and the construction of the dwelling places of those who were to operate them was undertaken at the same time, and as a part of a single, harmonious scheme. Two years of time, and the labor of 4,000 men transported daily to and fro between Chicago and the point of location, were devoted to the work. At the expiration of that time the result appeared in the completed structures of a manufactory giving employment to 5,000 persons, and in its immediate vicinity dwelling houses sufficient in number for the comfortable occupancy of a large part of these persons with their families and those dependent upon them, with the necessary schoolhouses for the education of their children, churches for their religious instruction, stores and shops where the necessities of life could be procured, halls suitable for lectures and social entertainments,—all so arranged, with such accessories of streets, parks, and other provisions, as to minister, not simply to the

necessities, but also to the comfort and well-being, of those who might be employed."

It further appears from the plea that the corporation at once, after the buildings composing the town of Pullman and its streets and alleys were completed, rented the dwellings, tenements, business rooms, church, theater room, school rooms, etc., and for a compensation undertook to supply the inhabitants of the town with water, light, and heat, and that it has since continued to perform such acts, and was pursuing the same course when the information was filed. The location selected by the corporation for the new site of its plants was within a few miles of the populous and wealthy city of Chicago, upon a line of railway which furnished adequate and speedy means of transportation to and from the city, so that the plant and its surroundings in fact were within the suburbs of the city. There were then, it is true, only a few buildings in the vicinity of the proposed new location. The establishment of the works of the appellee corporation would make it imperative that other buildings, dwellings, and tenement houses should be constructed for the accommodation of those who should find employment in appellee's shops.

The averment of the plea, that the corporation was obliged to construct such houses and tenements, is but the statement of a conclusion, and we find the facts pleaded do not justify such a deduction. No reason existed, nor do we find in the pleas even a suggestion that there was reason or ground, for the apprehension that individual enterprise and private capital would not at once, after the purpose and intention of the corporation became known, provide all necessary dwellings and tenements for the accommodation of the workmen, or that the wants of the community composed of such workmen would not at once be met by the location in its midst of schools, churches, drygoods and grocery stores, meat markets, etc., or that the necessary streets, alleys, and public ways would not be provided without any intervention whatever on the part of the corporation. The public laws of the state would have supplied the requisite school-houses and teachers, and the inclinations of the individual members of the community could have been safely relied upon to provide church houses and rooms for imparting religious instruction. It is idle to argue that it became, in any sense, necessary or directly appropriate to the accomplishment of the lawful and chartered purposes or objects of the corporation that it should engage its efforts or capital in the construction of dwellings, tenement houses, store houses, streets, alleys, theaters, hotel, churches, schoolhouses, waterworks, a system of sew-

ers, etc. Workmen, if they have families, must have homes, or, if unmarried, must be accommodated with boarding and places of lodging. Homes, groceries, vegetables, bread, meat, clothing, furniture, light, heat, water, school books, medicine, the services of physicians, dentists, and other professional men, and many other things, become necessary to the health, comfort, or convenience of such workmen and their families; but the right and power to supply such wants had, in this instance, so far as the pleas show, no direct relation or connection with the successful prosecution of the specific object of the appellee corporation. The relation was but remote, indirect, and mediate,—not direct and immediate. Implied power cannot be invoked to authorize a corporation to engage in collateral enterprises but remotely connected with the specific purposes it was created to accomplish. A power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and by indirection to promote its interest and chartered objects cannot be justified by implication of law, but are *ultra vires*.

Cases cited holding that corporations operating mines or mills engaged in sawing lumber had implied power to construct dwellings and boarding houses for their employees can have little or no influence upon the question here presented. In those cases the fact that the works or mills of the corporations were necessarily located at mines or near large forests, and other circumstances peculiar to the respective cases, were deemed sufficient to justify the corporations in arranging for the lodging or boarding of their workmen or in building homes to shelter them and their families. The circumstances in each of such cases as can be accepted as having been well considered were such that it became, in a legal sense, necessary to the accomplishment of the chartered purposes of the corporation that it should exercise such power as was accorded it by implication of law. Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted. But in the case in hand the appellee corporation voluntarily assumed to devote its corporate capital and power to that which, to say the least, but remotely and indirectly tended to aid the accomplishment of the purposes it had the right to pursue under conditions and circumstances which were neither rare nor unusual.

The argument of counsel for appellee that

the construction of the manufacturing plant involved, not the expediency simply, but the necessity, of providing places suitable for the occupancy of those who were to do its work, "and that in view of this the company determined to undertake, and did undertake, to construct its works and dwelling places for its workmen at the same time and as a part of a single harmonious plan," is fallacious. It ignores the palpable fact that no duty of providing houses for its workmen was pressed upon the company by surrounding conditions or circumstances as a necessity, but was adopted as a matter of choice, based, it may have been, upon motives which were, in part, benevolent or charitable in their nature. Had it purchased only that quantity of ground needful for its proper corporate uses, and restricted its efforts and expenditures to the construction of such buildings as would have answered its corporate wants, there appears to us no reason to believe that the question of homes for its workmen, market places or stores where such workmen could purchase supplies, or school rooms where their children could receive instruction, or the making of streets and alleys, would ever have demanded the thought or attention of its governing body. It is beyond reason to conclude that, had the way been left open, private capital and individual enterprise would have overlooked this desirable field of operations, or that merchants, tradesmen, butchers, and other classes of business men would not have appeared and entered into business rivalry for the custom of the workmen and their families, and that the prosecution of the business of the corporation would have suffered because its workmen could not find homes or places where the articles necessary to supply their wants and add to their comfort could be purchased; and yet it is upon this ground it is sought to justify the acts of the corporation which are now under consideration.

The prohibition of the law against the unauthorized exercise of power by corporations is based upon grounds of public policy, and the wisdom of the rule may here find exemplification. Conceding the rectitude of the purpose which it is alleged operated to induce the acts of the corporation which resulted in the creation of the town or city of Pullman, we are constrained to declare the corporation had not lawful power to perform such acts, and that the existence of a town or city where the streets, alleys, school-houses, business houses, sewerage system, hotel, churches, theaters, waterworks, market places, dwellings, and tenements are the exclusive property of a corporation is opposed to good public policy, and incompatible with the theory and spirit of our institutions. It is clearly the theory of our law

that streets, alleys, and public ways, and public school buildings, should be committed to the control of the proper public authorities, and that real estate should be kept as fully as possible in the channels of trade and commerce; and good public policy demands that the number of persons who should engage in the business of selling such articles as are necessary to the support, maintenance, and comfort of the people of any community should not be restricted by the will of any person, natural or artificial, but should be left to be determined by the healthy, wholesome, and natural operations of the rules of trade and business, free from all that which tends to stifle competition and foster monopolies. We think the averments of the plea in response to the allegations of the information under consideration were insufficient to present a legal defense.

The information charges, as is shown by the fourteenth allegation, set out in the opening of this opinion, the appellee corporation has constructed, owns, and is operating a sewerage system and a sewerage farm; that it has constructed sewerage pipes so as to receive and convey to the farm the sewage and refuse matter accumulated in and about the residences, tenement houses, and other buildings which it rents in the said city or town of Pullman, and uses said sewerage for the purpose of fertilizing the farm; that the farm consists of 154 acres, and is cultivated by the appellee corporation and large quantities of celery, beets, and other vegetables produced thereon are by the said corporation sold in the city of Chicago, or shipped to other cities for sale. With respect to this sewerage system and the business of gardening or truck farming upon the sewerage farm, the effect of the allegations of the plea is that, having constructed the great number of dwellings, tenement houses, and other buildings, and rented the same to its employees, it became necessary that the corporation should adopt some mode or manner of disposing of the sewage in order to render and keep the said dwellings and buildings in a healthful condition; that it purchased the 154 acres of land in order to enable it to utilize the sewage and refuse matter as a fertilizer, whereby to render the land productive; and that the income from the farm recompenses the corporation in part, and only in part, for the expenses of the sewerage system. But, if we are right in the view hereinbefore expressed, that the action of the corporation in constructing the buildings and dwellings of which the town or city of Pullman is composed was beyond its proper corporate functions, it would necessarily follow that the operation of the sewerage system and the prosecution of the business of farming or truck gardening cannot

be justified upon the ground that it was necessary the dwellings and houses of those persons living in the city or town of Pullman should be supplied with such sewerage system. One usurpation of power cannot be seized upon as a justification for the exercise of a further unlawful power.

The information charges that the defendant, in a large number of its cars, carries a stock of whiskies, wines, beers, and other malt and intoxicating liquors, for the purpose of sale to its guests and the occupants of the cars while traveling therein, and sells and disposes of the same at a large pecuniary profit. The defendant, by its plea, admits that it does provide, for people traveling in its cars, supplies of divers kinds of food and drink, including whiskies, wines, beers, and other malt and intoxicating liquors, but avers that it sells the same, under proper licenses from state and general governments, for the purpose of meeting the necessities and demands of its patrons, and contributing to their comfort, and that it makes no profit whatever therefrom, but furnishes said supplies at a pecuniary loss to itself; and claims a right to sell them by virtue of § 4 of its charter, which provides that "the said corporation shall have power to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper." Express power to sell supplies to persons traveling on its cars must be conceded to the corporation. Are wines and liquors a part of the "supplies" for travelers? No authorities on this subject are cited in the briefs of counsel. Webster defines the word "supply" (plural, "supplies") as "that which supplies a want; sufficiency of things for use or want; specifically . . . the food, and the like, which meets the daily necessities of an army or other large body of men." It would seem that this definition answers the question in the affirmative. Wines and liquors are a part of the supplies which meet the wants of a portion, at least, of the traveling public. They enter into and compose in part the daily meals of many travelers, and are regarded by all such persons, and by others who use them at other times, as wholesome refreshments, contributing to relieve from the fatigue and discomforts of travel. Hence they are supplies for such persons. It is a matter of common knowledge that places for the accommodation and entertainments of travelers, such as hotels and taverns, and steamboats and ocean vessels which carry passengers, almost universally sell to their guests and patrons whiskies, wines, and liquors, and that such

things are regarded by a portion of the traveling public, and by those who transport and entertain them, as part of the "supplies" for travelers. We think that the defendant, having, as the plea averred, had license to sell intoxicating liquors, was authorized by its charter to furnish such supplies to persons traveling in its cars, and that the charge in the information is sufficiently answered by the plea.

The information charges that the defendant owns 55 acres of vacant and unoccupied land north of its shops, and that it also owns other vacant and unoccupied land at Pullman to the extent of 16 acres. The defendant's plea avers, as to said 55 acres, that they are now in actual, constant, and necessary use by it for dumping thereon cinders and other refuse from its shops, and will, in the near future, be necessary for further extensions of defendant's manufacturing plant. It clearly appears, the allegations of the plea being taken as true, that this tract of land of 55 acres is devoted to legitimate corporate purposes, whether so actually, constantly, and necessarily used is a question to be determined on the trial of the issue. As to the other vacant and unoccupied land, the plea admits that the defendant owns 23 acres of such land, but avers that said 23 acres are the unoccupied part of a tract of 63 acres, whereon are located its dwellings and tenements, churches, business houses, etc., which are scattered over the whole of the said tract, and in such a way that no particular part of any appreciable size is unoccupied, and that said 23 acres consist of the spaces between said houses; that the land was purchased, and has been and is held, solely to meet the necessity for additional houses and tenements, as the growth of the company's business may require, and in order that the health and comfort of its employees might be conserved by the avoidance of tenements and houses too closely crowded together. Having hereinbefore determined that the erection by the appellee corporation of the dwellings and buildings in the city or town of Pullman was beyond its corporate powers, the conclusion is inevitable that the corporation has no lawful right to hold and own this 23-acre tract "solely to meet the necessity for additional houses and tenements as the growth of its business may require." The demurrer to the allegations of the plea with respect of this tract of lands should have been sustained.

We think it clearly appears from the allegations of the plea that the corporation acquired and owns the 25 acres of land near the Belt Line Railroad for the proper purposes of its existence. It is stated in the plea that many of the cars made by the defendant, and others sent to it to be repaired,

are delivered upon the Belt Line Railroad running north of its manufacturing plant; that to receive and properly store said cars while waiting their turn to be repaired, and to properly store them after being built and repaired and while awaiting inspection by railroad companies, it was and is necessary that the defendant should have storage yards or tracks near said railroad at Grand Crossing, about 3 miles from defendant's manufacturing plant, and it accordingly purchased about, and not to exceed, 20 acres of ground near said railroad, and now holds the same for the purpose above mentioned; that it has not, as yet, put any railroad or storage tracks upon said land, because the railroad companies owning tracks in the immediate vicinity have built so many side and storage tracks which can be used for storage purposes; but that it will be necessary, in the near future, for defendant to put tracks upon said 20 acres for storing and switching purposes, as aforesaid, and that it holds said land for such use in its manufacturing business. These averments are admitted by the demurrer, and constitute a complete answer to the charge in the information.

The allegation that the appellee company furnishes the Allen Paper Car-Wheel Company with steam power to operate the machinery of the latter company, and receives a large income therefrom, is fully met by the averments of the plea. The plea avers that when the manufacturing plant of the appellee corporation was built, with a view of anticipating its probable future wants, the company put in a very large system of boilers for generating steam; that the steam power which said boilers are capable of producing will, in the judgment of the corporation, be no more than will be required in the future for the successful operation of the machinery and appliances of the plant of the appellee company, but that up to this time more steam has been generated than the company's uses required, and that the surplus has been furnished to the said Allen Paper Car-Wheel Company, whose shops adjoin the plant of the appellee corporation. It is entirely competent and proper for a corporation to keep in view its probable future wants and necessities, and in constructing its buildings and purchasing machinery to anticipate and provide for that which sound practical judgment and wise forethought indicate will be required by the growth of its business and the extension of the volume of its operations. It being lawful to purchase boilers having a capacity to generate more steam than the immediate needs of the company required, the law has no rule which would require that the excess of steam so provided should not be utilized, but should be allowed to go to waste. It was but true
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economy, and in no sense a usurpation of power, to dispose of the excess of steam so produced to the Allen Paper Car-Wheel Company.

The pleas admit the appellee company has purchased and holds a majority of the shares of the capital stock of the Pullman Iron & Steel Company, and avers further that said Pullman Iron & Steel Company was never a competitor in business with defendant; that its products constitute a necessary part of the material required in the construction of the cars manufactured by defendant; that all its product is used and consumed by said defendant; and that said corporation is, in effect, a mere department of defendant in its car-manufacturing business although existing nominally as an independent corporation. The right and power of a corporation to become a stockholder in another corporation was presented to this court for determination in the case of *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798, and the conclusion arrived at was that a corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter, or necessarily implied from it. The conclusion here announced is the prevailing doctrine in America, and we see no reason to depart from it. Such power is not specifically granted to the appellee corporation, and there is no room for the contention that it is possessed as an implied power. The decision of the circuit court ousting the appellee from the right to hold capital stock in the Pullman Iron & Steel Company was correct, and is affirmed.

The defense of acquiescence and waiver has been set up in the case, in the sixth plea. That part of the plea is as follows: "Defendant further avers that said manufacturing plant, houses, and all other improvements in the town of Pullman, and all the real estate in this plea described, were acquired by defendant, and said buildings were erected, in and about the year A. D. 1880, and not later than the year A. D. 1882, and defendant has been in continuous use thereof, in manner above described, ever since; and defendant avers that all of its said acts have been well known to plaintiff ever since said last-mentioned date, and the doings of defendant in regard thereto were a special subject of investigation, report, and approval by the legislature of the state of Illinois since said last-mentioned date, and that defendant has, during all of said time, been taxed by the municipal and state taxing authorities of Illinois, and in, to wit, A. D. 1891, the legislature of Illinois appointed a committee thereof to investigate the property of defendant, and ascertain if it was properly

taxed on all its property; that said committee examined all defendant's property, including all the property mentioned in this plea, and reported to said legislature concerning said holdings of property by defendant, and that its property was all properly taxed, which report was accepted and approved by said legislature, whereby any fault that the defendant may have committed in regard thereto has been acquiesced in or waived by the plaintiff."

It is conceded, the state, acting in its character as a sovereign, is not bound by any statute of limitations or technical estoppel. It is urged, however, that in quo warranto, under the common-law rule, the courts, in the exercise of their discretion to grant the writ or not, or upon final hearing, refused aid when the conditions complained of had existed for a number of years with knowledge on the part of the sovereign, and that the provisions of § 1 of chapter 112 of the Revised Statutes, entitled *Quo Warranto*, that leave to file the information shall be given if the court or judge to whom the petition is presented shall be satisfied there is probable cause for the proceeding, leave the court still possessed of power to consider upon the hearing, and then apply the same doctrine of waiver and acquiescence. It is the general rule that laches, acquiescence, or unreasonable delay in the performance of duty on the part of the officers of the state, is not imputable to the state when acting in its character as a sovereign. There are exceptions to this general rule, but we are unable to see that the allegations of the plea bring the case within the principles of any such exceptions. The case of *Trustees of Schools v. Union District*, 88 Ill. 100, was a writ of certiorari to test the validity of the act of detaching territory from one school district, and attaching it to another; and the case of *People ex rel. Fitzgerald v. Boyd*, 132 Ill. 60, 23 N. E. 342, to test the legality of the formation of a school district by the consolidation of two other districts. These cases are relied upon by appellee. In each of them the doctrine of acquiescence or laches was applied, upon the ground, to quote from the opinion in the former of the cases, "because these bodies [the school directors] exercise powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings;" and the reason which operated to control the decision in the latter case is that public policy forbade that such writ should be granted to test the validity of the organization of corporations exercising governmental power, after such corporations had been acting *de facto* for a considerable length of time. The ground of decision is the same in each case, 64 L. R. A.

namely, that public policy forbids the interference upon the part of the state with corporations created for the purpose of exercising governmental functions, unless application is made to the courts before the public interests become involved. The cases have no application here. The case of *King v. Dawes*, 1 W. Bl. 634, also cited in behalf of the appellee, involved the title to the offices of burgesses of the borough of Winchelsea, and the relators were private informers. The writs were refused upon the ground the informers were private individuals, and knew the alleged disqualifications of the defendants, and had long acquiesced in their official incumbency of the offices, and also upon the same grounds which found operation in the Illinois cases,—that the public consequences "to the borough" forbade the issuing of the writs upon grounds of public policy. Where the design of the writ of quo warranto is to procure a declaration of forfeiture of the charter of a corporation upon the ground it has failed to perform some act the performance of which constituted a condition precedent to its legal organization or upon the ground the organization of the corporation was defective, or where the corporation was formed by the consolidation of two other corporations, and it was alleged the consolidation was irregular or defective in some particular, the state may be deemed to have waived the right to complain of the omission, failure, or irregularity affecting the existence of the corporation by an enactment of the legislature expressly curing or obviating the grounds of complaint, or directly recognizing the corporation as entitled to exercise corporate functions, after the failure, omission, or defect complained of had become known, or such waiver may be deemed to exist from long-continued failure of the judicial department of the government to enforce the forfeiture. The principle is the sovereign shall not be allowed to deny that a *de facto* corporation is a corporation *de jure* if the corporation has attempted to perfect a legal organization, but has failed to comply with some condition precedent, or has failed to proceed regularly and lawfully in some other respect touching its organization, if the sovereignty from which came the grant authorizing the formation of the corporation had knowledge of such failure, and, by the express act of the legislature, remits the penalty of forfeiture, or recognizes the corporation as legally organized and lawfully exercising corporate functions, or if the judicial department of such sovereign omits, for an unreasonable time, to enforce the forfeiture.

We have examined the various cases cited by counsel for appellee as in support of the defense of waiver and acquiescence in the

case at bar, and do not find that in any of them the defense has been deemed available, as against the sovereign or state, except in cases where the right and title of a corporation to corporate existence was questioned because of some defect in the original charter, irregularity in the proceedings for the organization of the corporation, or its failure to perform or fulfil some condition precedent to its legal organization. In such cases, if the conduct of the sovereign be such as to constitute an admission of knowledge of the defect or omission, and a declaration that forfeiture is not insisted upon, it will be deemed, as in other breaches of conditions, the right to declare the forfeiture for such default, omission, or breach has been waived, or, in such cases, forfeiture may be denied on the ground of acquiescence arising from long and unreasonable failure of the judicial department to test the legal organization and existence of the corporation. In the case at bar the appellee is conceded to be a corporation *de jure*, and the complaint is it had assumed and exercised, and is assuming and exercising, powers not granted by its charter or implied by law. We find from its pleas the corporation is without lawful authority to perform the acts complained of; that it entered upon the performance of such acts in 1880 or 1881, in pursuance of a fully matured plan; that it has since continuously engaged in this unjustifiable undertaking, and was so engaged when the information was filed; and that it owns a tract of land 23 acres in extent, which it is holding for the express purpose of building thereon other dwellings and tenement houses, opening streets, alleys, etc., and extending said town or city of Pullman over said tract of land. The usurpations of the corporation are not only those of the past, but also those of the present, and its plea admits it contemplates a repetition of the offenses in the future.

Our interpretation of the law, as applied to facts appearing from the averment of the pleas, is that the appellee corporation, at and before the time of the filing of the information, was exercising powers and performing acts not authorized either by the express grant of the charter or any implication of law; and, further, that, by some of such unauthorized acts, the corporation assumes and exercises powers and functions which the general law of the state contemplates shall be possessed and exercised only by municipal authorities of cities or towns and the public school authorities; and that other of its unauthorized acts tend to restrain competition in various branches of trade, to remove real estate from the operation of our statute of descent, and place the title thereto in a corporation having perpetual succession

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and unending existence, and thereby withdraw it from the channel of trade and commerce; to create monopolies in the business of selling the necessities and comforts of life; and that its acts and doings are opposed to good public policy. We do not think the demand of the sovereign that usurpations so clearly antagonistic to good public policy shall be restrained can be defeated by any imputation of laches, or upon the ground that acquiescence is to be inferred from the failure to invoke the aid of courts at an early day.

Nor do the averments of the plea with reference to the acts of the general assembly present a ground of defense. If the general assembly of the state has, by a later enactment, extended the power of the corporation, the enactment should have been pleaded as was the original charter. The averment, "The doings of the corporation in regard thereto [the acts complained of] were the special subject of investigation and report,"—is but pleading matter of conclusion, and availed nothing by way of defense. Whether held by virtue of its express or implied power, or by usurpation, all the real property in question was properly subject to assessment for purposes of taxation. The duties of a committee appointed by the legislature to investigate the property of the corporation, and ascertain if all of its property was properly subjected to taxation, did not involve an investigation into the title or right by which the corporation claimed to hold the real estate; and the approval by the general assembly of the report of such a committee that the property of the corporation was properly taxed would not amount to the concession on the part of the state that the corporation had a right to acquire the title to the real estate in question; nor is it sufficient to show the state had knowledge that the real estate had been acquired without lawful power, and therefore held to constitute legislative recognition and waiver of the acts of usurpation.

Our conclusion therefore is, the court erred in overruling the demurrer to such of the pleas or parts of pleas as were pleaded in response to, and as in defense of, the charges in the information which are set forth in this opinion as Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 19, 22, and 24 and that otherwise the ruling of the court upon the demurrer was correct.

The judgment must be reversed, and the cause remanded, with directions to the Circuit Court to sustain the demurrer to the pleas as hereinbefore indicated, and in other respects to overrule the same, and to proceed further as may be in conformity with this opinion.

Craig, Wilkin, and Cartwright, JJ., dissenting:

We do not concur in the foregoing opinion adopted by the majority of the court. The principal charges of usurpation made against appellee consist in the construction of dwelling houses sufficient for the comfortable occupancy of its employees; maintaining and furnishing, without charge to its employees, parks, flower beds, recreation grounds, and other like means of enjoyment; building and furnishing to them rooms for a public library, free of rent, and churches, a lecture room, theater, and concert hall at a nominal sum; owning rooms rented to the board of education for schools, and rooms for the sale of groceries and necessities, and furnishing heat, light, and water to some of the occupants, and providing for proper sewerage. The extent to which these things are done, and their purpose and connection with the successful prosecution of the business which appellee was chartered to carry on, are set out in the amended pleas, and substantially stated in the foregoing opinion. The matters so alleged in the pleas are admitted by the demurrers to be true, and, if they show the acts complained of to be reasonably necessary in order to enable appellee to carry into effect the powers expressly granted to it, and to enable it to accomplish the purposes of its creation, then they are within its implied powers, and no less lawful than those expressly authorized.

By its charter the defendant is vested with all powers, rights, privileges, and immunities incident to corporations, and necessary or useful for the purposes of the incorporation; with power to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same to sell or use, or permit to be used, in such manner and upon such terms as the company may think fit and proper; and to purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of the business of the company, and to sell and convey the same. The trial court, in its opinion, quotes with approval—and we concur in such approval—the general rules and principles of law applicable to the matter of the implied powers of corporations as they are stated in the brief of counsel for appellee. That statement is as follows: “It is axiomatic that corporations have not only the powers expressly granted, but those which are necessarily implied; that, while they derive all their powers from the legislature which creates them, it is also true that what is fairly implied is as certainly granted as what is expressed; that, unless restrained by their charters, they have the power to deal precisely, in carrying out the 64 L. R. A.

corporate purposes, as individuals seeking to accomplish the same ends; that they may resort to any means that would be necessary and proper for an individual in executing the same, unless they be prohibited by the terms of their charters or some public law from so doing;’ that while, in regard to their express powers, the grants are construed most liberally in favor of the state and most strictly against the corporation, yet, in regard to incidental powers, neither strict nor liberal, but only reasonable, rules of construction are applied; that corporations may so far develop and extend their operations as to engage in matters not primarily contemplated by their founders, provided these matters be fairly within their scope, and provided, also, that in so developing and extending their undertakings they employ direct, and not indirect, means; that different rules of construction are to be applied to charters of corporations organized under special acts and those organized under a general law, the greater strictness of interpretation being employed in dealing with the latter; that ‘necessary,’ when used in defining the powers of corporations, does not mean what is simply indispensable, but also what is useful, convenient, and proper to carry into effect the franchises granted. I Spelling, Priv. Corp. §§ 68, 73, 75, and cases cited; Green’s Brice, *Ultra Vires*, pp. 66, 71, 73, 75, 87, 91, and cases cited; *Curtis v. Leavitt*, 15 N. Y. 9; *Union Bank v. Jacobs*, 6 Humph. 525; *R. Co. v. Berks County*, 6 Pa. 70; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. 33, 75 Am. Dec. 574; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 541; *Brown v. Winnisimmet Co.* 11 Allen, 326; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *M’Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *State New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537; *Crawford v. Longstreet*, 43 N. J. L. 328; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; 2 Cook, Corp. Law, 3d ed. § 681.” See also *Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co.* 5 Wis. 173, and *Clark v. Farrington*, 11 Wis. 321. In the case of *Curtis v. Leavitt*, 15 N. Y. 9, it was held that corporations, along with their specific powers, take all the reasonable means of execution,—all that are convenient and adapted to the end in view, that the corporation has a liberty of choice among those means; and that if, in the exercise of such liberty, an intelligent good faith is used, then the power to select the means adopted cannot be called in question. In *State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537, it was said by Chief Justice Beasley: “Power necessary to a corporation does not mean sim-

ply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons; and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass, their operations. Such, in similar cases, has never been the legal acceptance of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one." And further said: "The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter." There is a substantial agreement in the authorities as to the general doctrine of the implied powers of corporations. That doctrine has been stated in various forms, but they amount, in substance, to one and the same thing. As formulated in the brief of appellant, it is as follows: "A corporation can only exercise such powers as may be conferred upon it by the legislative body creating it, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable it to carry out the express powers granted." In the case of almost every corporation its implied powers are more numerous and of greater importance than those expressly granted in its charter. No rule can be stated by which can be determined with exactness just what the limits of the implied powers of corporations are. These limits depend largely upon the nature of the corporation, its necessities, and the surrounding circumstances. While grants of power are strictly construed as to those expressly granted, yet in executing such express powers the corporation has an implied authority to carry such express powers into full effect, and for that purpose may adopt any means, not prohibited by law, that are necessary, usual, convenient, reasonable, or suitable for accomplishing the objects of the incorporation; and in respect to these implied powers the rule of strict construction that obtains in the case of an express grant of power has no application, but the rule of a reasonable construction prevails.

Principal among the express objects for which the defendant was incorporated was that of manufacturing and constructing railway cars, with all convenient appendages; and for the accomplishment of such purpose it was expressly given power to purchase, acquire, and hold "such real estate as may be deemed necessary for the successful prosecution of their business," and, along with it, "all powers, rights, privileges, and im-

munities incident to corporations, and necessary or useful" for the accomplishment of such purpose. We have seen that the rule is that, while a corporation can exercise no powers other than those conferred by its charter, and cannot engage in any separate and unauthorized business, yet that it has a right of selection as to the means to be used in carrying into effect the expressly delegated powers, the only restriction being that they shall be necessary, in the sense of being suitable, convenient, and reasonable and not in contravention of any rule of law. In the leading case of *M'Culloch v. Maryland*, 4 Wheat. 413, 4 L. ed. 603, it is said by Chief Justice Marshall, among other things, that to employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable; that it is essential to just construction that many words which import something excessive should be understood in a more mitigated sense,—in that sense which common usage justifies; that the word "necessary" is of this description; that it has not a fixed character peculiar to itself, but admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. In the case now at bar the power given the defendant by the sixth section of its charter is not simply to purchase, acquire, and hold such real estate as may be necessary for the purposes of the incorporation, but such "as may be deemed necessary for the successful prosecution of their business." It would seem, from the rule, that it is not to be presumed that the legislature used idle and useless words, and from the reasoning of Chief Justice Marshall in the case above mentioned, that some force and effect should be given to the words "deemed" and "successful," used in said act. Without these words, the act gave to the defendant the right to purchase, acquire, and hold, not only such real estate as was absolutely indispensable for the purposes of the corporation, but also such as was useful, convenient, reasonable, and proper in the conduct of the business for which it was incorporated. The use of the words mentioned, even if it does not otherwise amplify the power, is at least an indication of an affirmative legislative intention that the corporation should have and exercise some degree of discretion in respect to the amount of real estate it should acquire and hold; the same to be, as matter of course, not an unlimited and unbridled discretion, but a discretion to be exercised in good faith and within reasonable limits.

It appears from the pleas, admitted to be true, that the work of construction was completed in the year 1881, and since that time appellee has carried on its business and exercised the powers now claimed, and the dwelling houses have been occupied by a population of about 10,000 people. It was a conspicuous movement, which attracted general attention and widespread discussion. The provision made by appellee for those in its employment and their families, both as to dwellings and surroundings contributing to their comfort and elevation, was well and generally understood. The plan was carried on for fourteen years, and the powers in question were exercised without attack or question from the state. The charges now brought against it seem to be incited by its proportions and great business success, rather than because of any sound legal objection. From the fact that it satisfactorily supplied a necessity consequent upon the rapid development of a new country and the increase of commerce and travel occasioned by the building of railroads, and by means of wise and discreet management, and the adoption of economical methods of business, it has, in a comparatively few years, grown from a company with \$100,000 of capital stock to a large, wealthy, and prosperous corporation, with a capital stock of \$36,000,000, and with an amount and value of real estate and other property commensurate with the amount of capital it has invested and the extensive business in which it is engaged. If the various implied powers that it has availed of had been exercised by a less wealthy and pretentious corporation, it is hardly probable that the right to exercise such powers would ever have been called in question. In fact, it seems to us that the only difference in that regard between those used by the corporation now at bar and those which are and long have been exercised by the numerous mining companies, lumber companies, manufacturing companies and other companies incorporated and doing business in this state, is a difference that is not based upon any sound legal distinction, but merely one that arises from the vast amount of business done by the defendant. The difference is merely as to the extent to which it has become necessary or expedient to use such implied powers. If a lumber company, with a few thousand dollars of capital stock, may, without express power in that regard, and under and by virtue of its implied powers, construct a dozen or twenty frame dwellings for the use of the employees at its sawmill, and if a coal mining company, with a comparatively small capital stock, may in like manner build fifty or a hundred houses and cottages to be occupied by the families of those who

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work in its mines, it is difficult to see why, upon principle, the defendant, if the nature and magnitude of its business reasonably require it, may not construct 2,200 buildings and tenements suitable for the occupancy of the class of workmen that the nature of its business requires. And if the lumber or mining company, not for the purposes of profit, but merely for the accommodation of its workmen, and for the purpose of inducing them to enter and remain in its employment, can build a log schoolhouse in which the children of its employees may be educated, or church in which such employees and their families may worship, it is not perceived why, upon principle, the defendant has not the implied power to do all that it has done or is doing in respect to the schoolhouses and churches of which complaint is made. It is a matter of common and general knowledge that in this state, and continuously from the days of the earliest development of its resources, lumber and sawmill companies, mining companies, manufacturing companies, and other like corporations have, without question, constructed and used, not for purposes of speculation in real estate, but as a necessary and convenient means for carrying on the several kinds of business for which they were respectively incorporated, houses to be used by their servants and employees as habitations for themselves and their families; and hotels and boarding houses for the accommodation of such servants and employees as had no families, and of such other persons as were temporarily called, for the purpose of transacting business with such corporations, to the localities where their business was being carried on; and structures to be used as churches or schoolhouses for the benefit of their employees, their families and children. There is no difference between what always has been done and is still being done by these various corporations and that which this defendant has done and is still doing, except this: That, owing to the very large and extensive proportions to which the plant and business of the defendant have grown, a much larger number of houses and tenements is required for the accommodation of its employees, and that, owing to the fact that the best class of skill and labor is necessary in the construction of its products, and the proximity of the plant to a large city, a better class of tenements, supplied with more of the conveniences and comforts of life, is required in order to attract and obtain such better class of skilled employees.

In *Vermont C. R. Co. v. Burlington*, 28 Vt. 193, a question of the exemption of certain property of the company from taxation was raised. The court held that only such

of said property as the company was authorized to take without the consent of the owner was so exempt, but in their opinion said: "They may at the same time hold, by gift or grant, woodland for fuel, or land on which to erect tenements for those under their employment, and for various other purposes connected with the use of the road, and to which that exemption does not apply."

In *State, Camden & A. R. & Transp. Co., Prosecutors, v. Mansfield*, 23 N. J. L. 513, 57 Am. Dec. 409, the railroad company owned houses and lots which were let by it to its workmen and employees, and the question involved was the right of exemption from taxation. The court decided against the claimed exemption, but in its opinion recognized the right of the corporation "to purchase land and to erect houses in the right location and of the right kind for all their constant employees."

In *Crawford v. Longstreet*, 43 N. J. L. 325, the question was as to the right of a turnpike company to lease and use premises on which was a house occupied by its servants and other conveniences used by the company. The court held that such right was one of the implied powers of the corporation, and said that, while a habitation for the company's servants and laborers was not strictly indispensable, yet "that such an arrangement was convenient, useful, and essential to the proper management of its business scarcely admits of denial."

In *Locey Coal Mines v. Chicago, W. & V. Coal Co.* 131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503, the right of the coal company to own the property there in question was not raised or specifically involved, but the court in its opinion distinctly recognizes that the thirty dwelling houses, boarding houses, storehouse, and various other buildings connected with the mines were properly a part of its property, and "desirable and necessary for carrying on its business of mining and selling coal."

In *Moss v. Rossie Lead Min. Co.* 5 Hill, 137, the company was incorporated "for the purpose of raising and smelting lead ore at Rossie." It first engaged only in the business of raising ore, the smelting being done by Moss & Knapp. It subsequently bought the property of Moss & Knapp, which included a house and lot, 50 acres of improved land, on which were several houses used as residences for workmen, stoves in the houses, a building which had been occupied as a store, a schoolhouse, a threshing machine, etc. In the opinion of the court it is said: "If articles bought by a corporation cannot possibly be of any use in the line of corporate business, but the purchase is necessarily an excess of power, a question might be 64 L. R. A.

raised on that ground. Yet in dealing with corporations created for manufacturing purposes, who that does not make a part of them shall be holden to penetrate the ramifications of their business so far as to fix the boundary of possible utility? Such a company as the defendants' must have lands, houses, and wood, as well as mines, machinery, and utensils. They may resort to all the ordinary means of paying workmen and providing them and their families with residences; and who would deny, in this country of schools, that they may pay by providing schoolhouses and school masters for the children of workmen?"

In the subsequent case of *Moss v. Averell*, 10 N. Y. 449, which involved the same facts as those in the case last cited, and which also involved the question of *ultra vires*, it was said: "The purchase of the property of Moss & Knapp, for which the notes in question were given, was within the scope of the legitimate business of the company. . . . They did not embark in any other business than that for which they were incorporated. The property they purchased had been got together by Moss & Knapp for the smelting business, and nothing else, and was necessary to carry on that business. It was situated in a new country, at a distance from any village, and required for the accommodation of their hands the erection of suitable habitations. The country was a wilderness, and had to be cleared. The men and animals employed by them had to be supported. If they raised a little grain on their clearings, it must be harvested and prepared for food, or it would be lost." And further said: "One of the shanties had been used by Moss & Knapp as a schoolhouse for the children of their men. Whether it was so used at the time of the purchase does not appear. It would have been no objection to the validity of the sale had it been at that time devoted to so laudable an object."

In *Searight v. Payne*, 6 Lea, 283, the Worley Furnace Company, an incorporated iron company, owned and operated a "supply store" in connection with its furnace, and which was not expressly authorized by the company's charter. The court held that it might be fairly included in the powers of the corporation.

In *Texas & St. L. R. Co. v. Robards*, 60 Tex. 546, 48 Am. Rep. 268, it was held that the railroad company might, under the circumstances of that case, make a contract for the building of an hotel. Among other things the court said: "The power of a corporation to contract extends, not merely to such subjects as are absolutely essential or indispensable to the performance of specified acts authorized by its charter, but

also to such (not being prohibited by law, nor against public policy) as are designed and may be useful in promoting the main enterprise."

In *Watts's Appeal*, 78 Pa. 370, the right of a land and improvement company, under the circumstances of that case, to erect an hotel, was sustained.

Section 362 of Morawetz on Private Corporations, 2d ed., is as follows: "It is a well-established general rule that a corporation may carry on the business for which it was chartered, in the manner in which a business of that particular kind is usually carried on. What the usual manner of carrying on a business is cannot be determined by the application of purely legal principles. It is a question of fact, and not a question of law. Evidently, therefore, it is impossible to decide abstractly that acts of a particular description are within or without the chartered powers of a corporation. The right of a corporation to perform an act depends, in every case, upon all the surrounding circumstances. No act is authorized under all circumstances and facts can be conceived which would render almost any act justifiable. Thus, a railroad company may usually buy coal and material for constructing its road; but it would have no authority to buy coal, or anything else, as a speculation, with the intention of selling it again. On the other hand, it would clearly be unauthorized, under any ordinary state of facts, to use the funds of a railroad company for building a church or theater; yet this use of the corporate funds might be entirely justifiable if a church or theater were required for the use of the company's workmen, in a part of the world where no church or suitable place of recreation was accessible."

Norwich v. Norfolk R. Co. 4 El. & Bl. 397, was a case in which one of the pleas raised the question of the implied powers of the corporation. The question of *ultra vires*, however, was not decided by the court, as the decision of the case turned on another ground. The four judges delivered separate opinions, from two of which we quote, on account of the applicability of the language used to the case now at bar. Coleridge, J., said: "When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever arising improvements in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substan-

tial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and liberally, so as not to defeat the purpose by a too narrow restriction of the means." And Erle, J., in reasoning to his conclusion that the act complained of was not *ultra vires* said: "The question put in the course of the argument, Would a contract by a railway company for a theater or chapel be void? exemplifies the doctrine. It would or it would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation, separate from the railway, and prohibited; or, if works were wanted in a waste place, and the company found it to be for its interest to build a town, and supply it with all requisites for inhabitation, and, in order to secure a permanent supply of workmen of skill and responsibility, added a chapel and a theater, with religious and secular instruction, it might be for the purpose of the railway, and valid, and, though distantly connected, the outlay might be found eventually to increase the profit from the traffic."

In view of these authorities and expressions of judicial opinion, and in the light of the custom that has always prevailed, and still prevails, in this state with corporations organized for mining, lumber, and manufacturing purposes, we are of the opinion that the powers now under consideration, exercised by the defendant in the prosecution of its legitimate business, while they may go to almost or quite the full extent of implied powers that it is authorized to use, still do not, under the circumstances under which it has been placed, and under which it now does business, amount to usurpations of power of which the state has the right to make complaint.

As already suggested, it is admitted by the demurrers to the pleas that the matters alleged therein are true. The statements thus admitted preclude any conclusion that defendant built the houses and tenements, church, schoolhouses, and other structures at Pullman for purposes of speculation or investment, but, on the contrary, show that all that has been done by it in that behalf has been in furtherance of its business of manufacturing, selling, and operating railroad cars. In considering as to whether particular acts of a corporation are within its implied powers, it is necessary to consider, not only the purposes for which it was chartered, but also the particular circumstances under which it is called upon to act. As said by Morawetz in the quotation above made from his work on Private Corporations: "The right of a corporation to perform an act depends, in every case, upon

all the surrounding circumstances. No act is authorized under all circumstances, and facts can be conceived which would render almost any act justifiable." If we take the case at bar,—that of a car-manufacturing company,—and, without any explanation therefor, and as an isolated fact, find that it has erected a church, a schoolhouse, or a building to be used as a meat market or family grocery store, it might appear that the building of such church, schoolhouse, meat market, or storehouse was not within the implied powers of the company. If, however, we take into view a large corporation, in the successful prosecution of whose business the labor of thousands of skilled workmen is required, and which is confessedly pursuing the objects of its incorporation, and then find that its plant, for reasons of such cogency as are set forth in the pleas herein, was located at a place where there were no churches, schools, or stores, and that, in order to attract to it and hold the best and most skilled class of workmen and artisans, the labor of such class of operatives being absolutely essential for the work in which it was engaged, it should erect a schoolhouse, church building, house to be used for stores and family supply shops of various kinds, and other like necessary accommodations, and that it did so, not for the purpose of speculating in real estate, or of merely making a remunerative investment of capital, but in good faith for the purpose of promoting the success of its authorized business of manufacturing and dealing in railway cars, then the erection of such structures may fairly be considered to be within the implied powers of the company.

The foregoing authorities and reasonings apply with equal force to all the various uses to which the Arcade building and Market hall, erected by defendant, are devoted, and to the 50 acres of land, of which a part is used by defendant's employees as recreation grounds, with their appliances for athletic exercises, a part for pleasure grounds and park, with greenhouse and other like accessories, and the remainder for streets and alleys.

There can be no question but that it was fully within the powers of the defendant to construct a gas plant for the purpose of furnishing light in the buildings which it used in its manufacturing business, a water tower and mains for supplying its various shops with water, and a plant for generating steam to be used in manufacturing its products and in heating its shops. This being so, it is difficult to perceive any sound reason why it might not use any surplus gas that was produced for the purpose of lighting its own buildings occupied by its own

employees; or why a small percentage of the water that passed through its water tower and mains, that could not be utilized for strictly manufacturing purposes, might not be furnished to such employees so occupying said houses, and who could not get a supply of water in any other way; or why it might not apply any surplus steam that it generated, to heating such houses, or sell the same for a valuable consideration to some other person or corporation.

In *Brown v. Winnisimmet Co.* 11 Allen, 326, which involved the right of a ferry company to lease a steamboat which it did not at that time require for use in its own business, the court held that such act was not *ultra vires*, and said, referring to a manufacturing company by way of illustration: "But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its millpond, or to employ that portion of its steam power which was not required for its own use." Holding the same principle are *Lafond v. Deeme*, 81 N. Y. 508, and *Simpson v. Westminster Palace Hotel Co.* 8 H. L. Cas. 712, 6 Jur. N. S. 985, 2 L. T. N. S. 707. In *Lyde v. Eastern Bengal R. Co.* 36 Beav. 10, it was held that, if the use of a boat by the railway company was really to assist the traffic on the existing railway, it was lawful and proper, but that, if the object was to extend the traffic to places beyond the railway, which the railway was never intended to reach, then it was illegal and beyond the powers of the company; and the court said that a railway company, for the purpose of obtaining coals cheaper than by purchase, might operate a coal mine, and that it might obtain a profit by the sale of such coals as were not required for the use of the company, provided the principle object of the colliery was to supply itself with coal, and not the selling of coals.

If the defendant, in addition to its right of constructing shops in which to conduct the business of manufacturing railway cars, had also the implied power to erect such dwelling houses as were necessary to furnish residences and homes for its employees and their families, and buildings and stores in which could be kept and sold such supplies and provisions as were necessary for their maintenance and sustenance, and halls and other places in which they might worship and their children be educated, and halls and grounds that they might use for purposes of exercise, recreation, and amusement, then, of course, from the very necessity of the case, it had and has the right to own and hold such real estate as is reasonably required for the purpose of placing thereon the various structures and other

things above mentioned. And, as we have already seen, among the powers expressly granted to defendant in its charter are these: "To purchase, acquire, and hold such real estate as may be deemed necessary for the successful prosecution of their business," and the privilege of exercising "all powers, rights, privileges, and immunities incident to corporations and necessary or useful for the purposes of the act." When the defendant built its shops and dwelling houses at Pullman, it had the right, as incident to its right to build the same,—and, indeed, it became its duty,—to devise some means to carry off the sewage from said shops and houses, in order to insure their cleanliness, and to guard the health of the workmen and their families. It was competent for the defendant to employ the means best adapted to that purpose, and if, in carrying out the plan adopted, it became necessary to purchase land on which to empty the sewage, it was within its power to do so. Possession of the land was essential, for it could not otherwise exercise its right to drain off the sewage in the best and most effective manner. The fact that the defendant sees fit to utilize said land by raising vegetables thereon is of little importance. At all events, it is sufficiently answered by the averment in the plea that it raises and sells the same for the

purpose of helping to defray the expense of maintaining its sewerage system, which it only in part pays. This is merely the exercise of sound business judgment and economy in not letting go to waste what may be made productive.

There is nothing in these pleas which leads us to believe that public policy would be in any manner served by destroying the plan carried on without objection from the state for fourteen years, resulting in no wrong or injury to anyone. Appellee does not now, and never did, manage or operate the churches, schools, or stores, nor have any interest in them, and never attempted to exercise any control in public or municipal affairs. The streets are public highways, and the school buildings are under the control and management of the board of education of the city of Chicago for school purposes, under arrangements satisfactory to them. We are not prepared to condemn as usurpations of power the furnishing by appellee to its employees of comfortable and attractive homes, with the surroundings of parks, churches, and public library, not for motives of investment or gain, but, as alleged and admitted, with the object of appealing to the better and more skillful workmen, and securing and retaining them in its employment.

OREGON SUPREME COURT.

Sol ABRAHAM, *Appt.*,

v.

OREGON & CALIFORNIA RAILROAD
COMPANY *et al.*, *Respts.*

(37 Or. 495.)

1. Parol evidence is not admissible to show that a grant of land for "all legitimate railroad, depot, and warehouse purposes" was intended not to authorize the use of the land for the purpose of a hotel or eating house.
2. The use of land for the erection and maintenance by railway companies of hotels and eating stations along their roads for the use and accommodation of their employees and passengers is a legitimate railroad purpose only when they are reasonably necessary for the convenience of such persons.
3. Injury must be shown, to authorize recovery of damages for breach of contract to permit the taking from a tank of all water not required for certain purposes, by the application of the water to purposes not covered by the agreement.

(April 23, 1900.)

NOTE.—Upon the question of implied powers of corporations see other cases immediately preceding and following this one.
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A PPEAL by plaintiff from a decree of the Circuit Court for Douglas County refusing to enjoin defendants from maintaining a hotel upon their property. *Reversed.*

Statement by **Bean, J.:**

The first cause of suit, in substance, is: That on the 28th of February, 1883, the plaintiff and W. R. Willis conveyed to the defendant the Oregon & California Railroad Company certain premises described in the complaint, by an ordinary warranty deed, the habendum clause of which is as follows: "To have and to hold the same, with all the privileges and appurtenances there-to belonging, to the said railroad company, its successors and assigns, forever, for the purpose of building and maintaining a railroad thereon, and to use the same for all legitimate railroad, depot, and warehouse purposes." At the time of the execution of the deed the plaintiff and Willis were the owners of a large tract of land at what is now known as "Glendale," in Douglas county, and adjoining the land conveyed to the railroad company, which they subsequently laid off and platted as a town; and soon there-

after the plaintiff, who in the meantime had succeeded to Willis's interest, constructed and built thereon a hotel adequate to the wants and conveniences of the passengers of the defendant company, the traveling public, and local custom. Thereafter, and on or about the 1st of July, 1887, the Oregon & California Railroad Company leased to the defendant the Southern Pacific Company all of its railroad and railroad properties in the state of Oregon, including the depot grounds at Glendale, and on or about the 1st of August, 1887, the Southern Pacific Company leased to the defendant Clarke a portion of the land conveyed to the Oregon & California Railroad Company by the deed of February 28, 1883, "and has caused, procured, and suffered said defendant Clarke to erect thereon a hotel for the accommodation of the general public, and incidentally as an eating house for the passengers upon the trains of the Southern Pacific Company, and the said defendant Clarke is now, and ever since to the 1st day of October, 1897, has been, carrying on and conducting upon the said leased premises a hotel for the accommodation of the traveling public and local custom; the said Southern Pacific Company having caused, procured, and suffered a hotel building to be erected and maintained upon said leased premises for that purpose. That the principal business of said hotel and eating house so erected and maintained is the local custom and patronage of an ordinary and general hotel incident to the town of Glendale. That it derives some support from the passengers of the Southern Pacific Company, but said support is not its principal business. That the trains of said Southern Pacific Company do not stop at said station of Glendale regularly for meals, and have never done so since the erection of said hotel, and but rarely stop for meals, and then only when its trains are at least 1½ hours late. That the said Southern Pacific Company has a regular eating station and eating house at Ashland, Oregon, sufficient to accommodate its passengers, and it is not necessary, and does not add to the convenience of its passengers, to have one at Glendale. That, by reason of the construction and operation of said hotel and eating house upon said depot grounds by the defendant as hereinbefore set out, the hotel of plaintiff is rendered practically valueless for the purposes for which it was constructed." It is averred that at the time of the execution of the deed to the railroad company it was expressly understood and agreed by and between the parties thereto that the words "legitimate railroad, depot, and warehouse purposes," as used therein, should not mean or indicate a hotel or

eating house, and such deed was made and accepted with the understanding that the premises conveyed should be limited in their uses, and were not granted for the purpose of building or maintaining either an eating house or hotel thereon; that the defendants the Southern Pacific Company and Clarke had full notice and knowledge of the claim of plaintiff relative thereto at the time the lease was made, and the hotel or boarding house constructed. For a further and separate cause of suit the complaint alleges, in substance, that on or about the 2d day of May, 1883, the legal title to certain lands near the depot grounds referred to was in Willis, although plaintiff was the owner of an undivided half thereof; that, at the date referred to, Willis and his wife, by an instrument in writing, conveyed to the Oregon & California Railroad Company the right to take from a certain stream on the premises owned by the plaintiff and Willis all the water that would flow through a 3-inch pipe from a certain designated point to the water tank of the railroad company, in consideration of which the company granted to Willis and his assigns the right to tap the tank by a pipe 3 inches in diameter, and to thereby take all the water therefrom, beyond the amount needed by the defendant corporation to supply its locomotives; that on or about the 8th of May, 1885, the plaintiff purchased and succeeded to all the rights of Willis in and to the premises referred to, and all his rights under such agreement; that on or about the 1st of November, 1897, the defendants, the Southern Pacific Company and Clarke, caused a pipe to be laid and connected with the water tank referred to, and thereby conducted the water to the hotel built upon the depot grounds, and ever since such time have been, and now are, using the water from said tank, to plaintiff's damage in the sum of \$250. The complaint concludes with a prayer for a decree enjoining and restraining defendants from carrying on, or permitting to be carried on, the eating house or hotel referred to, and from using from the water tank described any other or greater amount of water than necessary to supply the locomotives of the defendant railroad company.

Messrs. Dolph, Mallery, & Simon, Albert Abraham, and J. C. Fullerton, for appellant:

The deed made by the plaintiff granted only an easement for the purposes named in the deed.

The construction and operation of a hotel on these premises are not a legitimate "railroad purpose."

Locks & Canals v. Nashua & L. R. Co.

104 Mass. 1, 6 Am. Rep. 181; *Bank of Commerce v. Tennessee*, 104 U. S. 496, 26 L. ed. 811; *Milwaukee & St. P. R. Co. v. Crawford County*, 29 Wis. 116, 48 Wis. 674, 5 N. W. 3; *State v. Baltimore & O. R. Co.* 48 Md. 77.

The rights of any party having an easement in lands of another are measured and defined by the purpose and character of the easement. For all purposes consistent with that easement, the right to use the land remains in the owner of the fee.

Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100; *Phipps v. Johnson*, 99 Mass. 26; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181.

The language of the deed shows conclusively that the conveyance was intended to cover only an easement for legitimate railroad, depot and warehouse purposes, and these words used in the deed certainly limit the grant to the purposes named; but, even if the deed purported on its face to be an absolute conveyance of the fee, it would only convey an easement.

Chouteau v. Missouri P. R. Co. 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; *Breckinridge v. Delaware, L. & W. R. Co.* (N. J. Eq.) 33 Atl. 800; *Illinois C. R. Co. v. Chicago*, 141 Ill. 509, 30 N. E. 1036; *Wason v. Pils*, 31 Or. 9, 48 Pac. 701; *Flaten v. Moorhead*, 51 Minn. 518, 19 L. R. A. 195, 53 N. W. 807; *Ottumwa, C. F. & St. P. R. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315.

The condemnation of lands for depot grounds does not pass the fee to the railroad company.

Lyon v. McDonald, 78 Tex. 71, 9 L. R. A. 295, 14 S. W. 261; *People ex rel. Heyneman v. Blake*, 19 Cal. 580.

When the parties differ as to the meaning of a term in a contract their statements at the time the contract was entered into are admissible to show their understanding of the terms.

Rogers v. Straub, 75 Hun, 264, 26 N. Y. Supp. 1066; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Wilson v. Higbee*, 62 Fed. 723; *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35; *Missouri, K. & T. R. Co. v. Doss* (Tex. Civ. App.) 36 S. W. 497; *Hannah v. Shirley*, 7 Or. 115.

The court has the right and should look at surrounding circumstances to determine the intention of the parties to a written contract, and will not be controlled by the technical language of the writing or the technical meaning of the words used.

Weiler v. Henarie, 15 Or. 28, 13 Pac. 614.

Messrs. Fenton, Brough, & Muir and Willis & Rice, for respondents:

The deed conveys a fee-simple title to the grantee therein mentioned.

Tinker v. Forbes, 136 Ill. 221, 26 N. E. 64 L. R. A.

503; *Soukup v. Topka*, 54 Minn. 66, 55 N. W. 824; *Vail v. Long Island R. Co.* 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607; *Farnham v. Thompson*, 34 Minn. 330, 51 Am. Rep. 59, 26 N. W. 9; *Coburn v. Cowter*, 51 N. H. 158; *Breckinridge v. Delaware, L. & W. R. Co.* (N. J. Eq.) 33 Atl. 800; *State, Morris Canal & Bkg. Co., Prosecutor, v. Brown*, 27 N. J. L. 13; *McKelway v. Seymour*, 29 N. J. L. 321; *New Jersey Zinc & I. Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133, 15 Atl. 227.

It is immaterial whether the deed conveys the fee or an easement. If an easement is conveyed the deed grants it for "all legitimate railroad, depot, and warehouse purposes." The maintenance of a hotel and eating house for the accommodation of passengers and employees is such a purpose.

Brainard v. Clapp, 10 Cush. 6, 57 Am. Dec. 74; *Tucker v. Tower*, 9 Pick. 109, 19 Am. Dec. 350; *Peirce v. Boston & L. R. Corp.* 141 Mass. 481, 6 N. E. 96; *Gudger v. Richmond & D. R. Co.* 106 N. C. 481, 11 S. E. 515; *Cummins v. Des Moines & S. L. R. Co.* 63 Iowa, 397, 19 N. W. 268; *Illinois R. Co. v. Wathen*, 17 Ill. App. 582; *Gurney v. Minneapolis Union Elevator Co.* 63 Minn. 73, 30 L. R. A. 534, 65 N. W. 136; *Roby v. New York C. & H. R. R. Co.* 142 N. Y. 176, 36 N. E. 1053; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150, 60 Am. Dec. 246; *Elyton Land Co. v. South & North Ala. R. Co.* 95 Ala. 631, 10 So. 270; *Western U. Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Fitch v. New York, P. & B. R. Co.* 59 Conn. 414, 10 L. R. A. 188, 20 Atl. 345.

Extrinsic evidence of a contemporaneous oral agreement is not admissible to vary, alter, or contradict the terms of a written contract.

1 Hill's Anno. Laws 1887, § 692; *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; *Portland Nat. Bank v. Scott*, 20 Or. 421, 26 Pac. 276; *Hindman v. Edgar*, 24 Or. 581, 17 Pac. 862; *Howie v. Hodges*, 1 Or. 252; *West Haven Water Co. v. Redfield*, 58 Conn. 39, 18 Atl. 978; *Baker v. Baird*, 79 Mich. 255, 44 N. W. 604; *Godkin v. Monahan*, 27 C. C. A. 410, 53 U. S. App. 604, 83 Fed. 116.

An antecedent or contemporaneous negotiations or agreements are merged in the writing.

1 Hill's Anno. Laws 1887, § 692; *Stoddard v. Nelson*, 17 Or. 417, 21 Pac. 456; *Finlayson v. Finlayson*, 17 Or. 347, 3 L. R. A. 801, 11 Am. St. Rep. 836, 21 Pac. 57; *Goldman v. Davis*, 23 Cal. 256; *Guy v. Bibbend*, 41 Cal. 325; *Weidert v. State Ins.*

Co. 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242.

Where no fraud, accident, or mistake is alleged, and there is no ambiguity in the terms of a writing, parol evidence is inadmissible to show that the instrument does not express the contract as understood and intended.

Baugh v. White, 161 Pa. 632, 29 Atl. 267; *Davis v. Shafer*, 50 Fed. 764; *Jacobs v. Sheanon*, 2 Idaho, 1002, 29 Pac. 44; *Jones v. Swearingen*, 42 S. C. 58, 19 S. E. 947; *Pilmer v. Branch of State Bank*, 16 Iowa, 321.

A stipulation on a point which the writing either expressly or impliedly controls cannot be added by parol.

Zerrahn v. Ditson, 117 Mass. 553; *Sayre v. Peck*, 1 Barb. 464; *Ellmaker v. Franklin F. Ins. Co.* 5 Pa. 183; *Means v. Presbyterian Church*, 3 Watts & S. 303.

Bean, J., delivered the opinion of the court:

This is not a suit to correct or reform a deed, and hence there are but two questions for decision on this appeal: First, whether, under the allegation that, at the time the deed was made by the plaintiff and Willis to the Oregon & California Railroad Company, it was understood and agreed that the words "for all legitimate railroad, depot, and warehouse purposes" should not mean or include a hotel or eating house, plaintiff is entitled to an injunction restraining the defendants from maintaining a hotel on the premises conveyed, because in violation of the terms of the grant; and, second, if not, whether the hotel constructed and now maintained by the defendants, the Southern Pacific Company and Clarke, is for "legitimate railroad purposes." Considerable discussion was had at the argument as to whether the deed in question conveyed to the railroad company the fee of the land therein described, or a mere easement therein. But, for the purposes of this appeal, that question is immaterial. In any event, the grant was for legitimate railroad, depot, and warehouses purposes only. *Breckinridge v. Delaware L. & W. R. Co.* (N. J. Eq.) 33 Atl. 200; *Robinson v. Mississquoi R. Co.* 59 Vt. 426, 10 Atl. 522; *Thornton v. Trammell*, 39 Ga. 202. We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words "legitimate railroad purposes" were used in the deed in a particular sense. It is an elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and

which do not appear from the context to have been used in a peculiar sense, were in fact so used. Mr. Greenleaf, after stating the rule that parol evidence is always receivable to define and explain the meaning of words in a contract which are purely technical or local, or which have two meanings,—the one common and universal, and the other technical or local,—or where words and phrases are used in a peculiar sense by members of a particular religious sect, says: "But beyond this the principle does not extend. If, therefore, a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence, it seems, is not admissible to show that in that particular case the words were used in any other than their ordinary and popular sense." 1 Greenl. Ev. 15th ed. § 295. And Lord Chief Justice Tindal says: "The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself." *Shore v. Atty. Gen.* 9 Clark & F. 355, 565, 11 Sim. 592, 7 Jur. 781. And Mr. Justice Clifford, in *Moran v. Prather*, 23 Wall. 492, 501, 23 L. ed. 123, 124, speaking in reference to the same subject, says: "Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances." It is therefore not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used. 1 Rice. Ev. 250; *Kemble v. Lull*, 3 McLean, 272, Fed.

Cas. No. 7,683; *Davis v. Shafer*, 50 Fed. 764. Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes.

It is claimed, however, on behalf of the plaintiff, that the hotel is not a legitimate or proper railroad purpose, because it is used for the accommodation of the general public, and not for the passengers and employees of the railroad company. The erection and maintenance by railway companies of hotels or eating stations at suitable and convenient places along their roads for the use and accommodation of their employees and passengers is not only a legitimate and proper railroad use, but almost, if not quite, a necessity, in many instances, of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest. *Gudger v. Richmond & D. R. Co.* 106 N. C. 481, 11 S. E. 515; *Western U. Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Gurney v. Minneapolis Union Elevator Co.* 63 Minn. 70, 30 L. R. A. 534, 65 N. W. 136; *Illinois C. R. Co. v. Wathen*, 17 Ill. App. 582. And in cases where hotels or eating houses appear to be reasonably necessary for the convenience of its employees and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered. As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed ques-

tion of law and fact, to be determined from the circumstances of each particular case. The question as to when and under what circumstances a hotel is a necessary or legitimate railroad use or purpose is quite fully considered in *Milwaukee & St. P. R. Co. v. Crawford County*, 29 Wis. 116; *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271; *Chicago, M. & St. P. R. Co. v. Crawford County*, 48 Wis. 606, 5 N. W. 3; and, within the doctrine of these cases, we are of the opinion that, under the allegations of the complaint, the operation of the hotel in question cannot be held, as a matter of law, to be a "legitimate railroad purpose," and within the terms of the grant from the plaintiff, because it is alleged that it is not necessary, and does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public. It seems to us, therefore, the demurrer should be overruled, and the case tried upon its merits, so that the court, aided by the testimony, can determine whether the hotel is in fact a legitimate railroad purpose.

But little need be said in reference to the second cause of suit. The complaint does not show any injury to the plaintiff by the alleged violation of the contract pleaded. It is nowhere alleged that he ever attempted to avail himself of the right given by the contract, although a period of sixteen years has elapsed since its execution; nor is it averred that he has any use for the water, or is damaged or injured in any way by its alleged diversion.

It follows that *the decrees of the court below must be reversed*, the demurrer overruled, and the cause remanded for further proceedings consistent with this opinion, and it is so ordered.

OHIO SUPREME COURT.

CENTRAL OHIO NATURAL GAS & FUEL COMPANY, *Piff. in Err.*,

v.

CAPITAL CITY DAIRY COMPANY.

(60 Ohio St. 96.)

*1. The implied powers which a corporation has in order to carry into effect those expressly granted, and to accomplish the purposes of its creation, are not limited to such as are indispensable for these purposes, but comprise all that are nec-

*Headnotes by the Court.

NOTE.—Upon the question of the implied powers of corporations, see cases preceding and following this one.

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essary, in the sense of appropriate, convenient, and suitable, including the right of reasonable choice of means to be employed.

2. Acts of a corporation, which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily *ultra vires* when they are incidental to, or form part of, an entire transaction, that, in its general scope, is within the corporate purpose. The validity of such a transaction is to be determined from its general character considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others.

3. Where a corporation formed for the purpose of manufacturing and dealing in a particular line of goods, instead of incurring the delay and expense in-

cident to the construction of a new manufacturing plant and building up of an independent business, in good faith, with a view of promoting the interests of the corporation, chooses to purchase of an existing partnership engaged in a like business its established plant and assets, including its outstanding claims, among which is one for damages to the property caused by another's negligence, the corporation acquires a valid title to the claim for damages, as against the party liable, and may maintain an action thereon.

(March 28, 1899.)

(*Spear, J., dissents from paragraphs 2 and 3.*)

ERROR to the Circuit Court for Franklin County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for negligent injuries to property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Outhwaite & Linn and A. L. Thurman for plaintiff in error.

Mr. Thomas E. Steele, for defendant in error:

Conceding that the acquisition of this chose in action was not warranted by the charter, the plea of *ultra vires* cannot be relied upon by a third person, not a party to the contract, against whom it is sought to enforce the right in action, and who is not injuriously affected in any way by the transfer of title.

Ehrman v. Union Cent. L. Ins. Co. 35 Ohio St. 324.

The title of this corporation, if otherwise good, would be entirely valid, a transfer having been taken directly from Kelly and Schilder, surviving partners.

The surviving partner is, in law, the owner of the chattel property, as well as the choses in action.

Bates, Partn. § 18.

After the death of an ostensible partner, a surviving dormant partner may sue alone on a partnership contract.

Beach v. Hayward, 10 Ohio, 455.

Every corporation has by necessary implication the power to do whatever is necessary to carry into effect the purpose of its creation, unless the doing of the particular thing is prohibited by law or by its charter.

Thomp. Corp. §§ 5641-5644, 5840; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484; *Lamprecht v. Kehrwicher*, 40 Ohio St. 646; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287.

Though it might be highly improper or unlawful for the defendant in error to make a business of buying up unliquidated damages, sounding in tort, it by no 64 L. R. A.

means follows that it could not acquire this particular chose in action, intertwined and intermixed as it was with the other assets of the partnership and with the single transaction by which said partnership was transformed into the plaintiff in error.

Thomp. Corp. § 5828; *Graham v. Hendricks*, 22 La. Ann. 523; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *State v. Woram*, 6 Hill, 33.

The law recognizing our modern tendency to transform partnerships into corporations has encouraged such transformations and the conveyances incidental thereto, by sanctioning transactions by the new corporation apparently beyond the usual limits of corporate power.

Thomp. Corp. 278, 5725; *Waterman's Appeal*, 26 Conn. 96; *Francklyn v. Sprague*, 121 U. S. 215, 30 L. ed. 936, 7 Sup. Ct. Rep. 951.

The new corporation had a right expressly to assume the debts of Kelly and Schilder as surviving partners.

Waterman's Appeal, 26 Conn. 96.

It might have received notes held by someone against the former partnership or its surviving partners, and enforced their collection.

Stoddard v. Shetucket Foundry Co. 34 Conn. 542.

Whether a certain corporate act is or is not *ultra vires* can only be inquired into by a direct proceeding on behalf of the state.

Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; *Smith v. Sheeley*, 12 Wall. 358, 20 L. ed. 430; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; *Reynolds v. Crawfordsville First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 552.

It will be hard to imagine how the plaintiff in error was injured by the transfer of this claim to the defendant in error. It admitted the infliction of the injury and the amount of the damage, and seeks now utterly to escape paying any penalty for its negligence because its scrupulous conscience is agitated by fear that the defendant in error may have exceeded its powers in taking an assignment of this claim.

Ehrman v. Union Cent. L. Ins. Co. 35 Ohio St. 324; *Western Reserve Bank v. McIntire*, 40 Ohio St. 528; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450; *Vought v. Columbus, H. Valley & A. R. Co.* 58 Ohio

St. 123, 50 N. E. 442; *Reece v. Kyle*, 49 Ohio St. 475, 16 L. R. A. 723, 31 N. E. 747.

Williams, J., delivered the opinion of the court:

In May, 1893, a copartnership owning a plant, in the city of Columbus, equipped for the manufacture and sale of oleomargarine, was engaged in carrying on that business under the firm name of the Capital City Dairy Company, and then had an established trade. At that time the Central Ohio Natural Gas & Fuel Company, a corporation organized under the laws of this state for the purpose of furnishing and selling natural gas to the inhabitants of the city was prosecuting its business of supplying gas through pipes, some of which were laid in close proximity to the manufactory of the copartnership. That property and its contents were damaged by an explosion of the gas occasioned by the negligence of the corporation, for which it was liable to the copartnership. Shortly afterwards, in July, 1893, the property and business of the copartnership, with its accounts and bills receivable, including its demand for the damages resulting from the explosion, were sold and transferred to a corporation organized in this state by the members of the copartnership and some other persons. This corporation was formed for the purpose of continuing the business of the copartnership, adopted its name, and thereafter carried on the business at the same place; and in September, 1893, it commenced the action below against the plaintiff in error to recover the damages resulting from the gas explosion, the demand for which, it was alleged, had been sold and assigned to the plaintiff as already stated. Issue was joined by denial of the alleged transfer of the demand, as well as of the allegations of the defendant's negligence, and the cause was submitted to the court upon the evidence and the following agreement of the parties: "It is stipulated and agreed by and between the parties hereto that the amount of damages caused by the explosion set out in plaintiff's second amended petition herein was, as of the date of that explosion, the sum of \$800, and that said damages were caused by the explosion of natural gas in the pipes of, and belonging to, defendant, and was caused solely by defendant's negligence. It is further stipulated and agreed by and between the parties that, as to all other questions in issue between the plaintiff and defendant, a jury may be, and it is hereby, waived, and said issues may be tried by the court." This agreement left no issue of fact for trial, except that relating to the alleged transfer of the cause of action to the plaintiff, which the court found in favor of the plaintiff, and 64 L. R. A.

rendered judgment accordingly. The judgment was affirmed by the circuit court. The legal question to which our attention is directed concerns the corporate capacity of the plaintiff to acquire the demand sued on, and enforce it by action against the defendant. The plaintiff corporation was formed, as declared in its articles of incorporation, "for the purpose of manufacturing, selling, and dealing in oleomargarine and the materials and utensils employed in the manufacture, storage, and transportation thereof, and all things incident thereto." And the contention is that the purchase of a chose in action—especially one founded on negligence or other tort—is so foreign to the objects of the incorporation of the plaintiff that it could acquire no title thereto, and consequently was without authority to prosecute the action below.

It is a general rule, as sound as it is well settled, that a corporation, in addition to the powers expressly granted, has, by necessary implication, the power to do whatever is needed to carry into effect those granted, and accomplish the purposes of its creation unless the particular act is forbidden by the law or charter. This is, in substance, the statutory rule of Ohio corporations. Rev. Stat. § 3239. And it should be reasonably applied, with a view of promoting the legitimate objects of the corporation, rather than with a strictness that would so hedge it about as to obstruct the practical attainment of the corporate purposes, or embarrass the corporate business. These implied powers which a corporation has in order to carry into effect its legitimate purposes are not limited to such as are indispensable to their accomplishment, but comprise all those powers that are necessary, in the sense of appropriate, convenient, and suitable, including a right of reasonable choice of means to be employed; and whether an act comes within those powers must be determined in each case from all its facts and circumstances. Acts which, if standing alone, or when engaged in as a business, would be beyond the powers of the corporation, are not necessarily *ultra vires* when they are merely incidental to, or form part of, an entire transaction, that, in its general scope, is within the corporate purpose. For instance, a railroad corporation has power to acquire and hold real property for its right of way, and other uses necessary in the operation of its road, but is without corporate power to purchase or hold such property for sale or rent; and yet if, in locating its roadway, it should be deemed expedient to run it across an improved lot, the damages to which would be enhanced on account of buildings and other improvements upon it, and to avoid the expense and uncertainty of

an assessment of damages by a jury, the company should purchase the entire property, parts of which, including the buildings, would not be needed for any railroad purpose, it could hardly be claimed the corporation so exceeded its powers that it acquired no title to, or might not thereafter sell or lease, that part of the premises not actually needed for corporate purposes. So, if a corporation formed for the purpose of manufacturing and dealing in a particular line of goods, in order to obtain from an existing partnership, engaged in a similar business, an established and going concern with its good will, should in good faith buy out its whole plant, including some articles not pertaining to the objects of the corporation, instead of incurring the delay of constructing a new plant, and the expenses that usually attend the building up of an independent trade, there would seem to be no good reason for declaring the purchase void, so as to deprive the corporation of the title to the property, even of those articles not strictly necessary in its business. The corporate objects might be materially promoted by such transaction as an entirety, and the power to make a reasonable choice of means to accomplish that end properly belongs to the corporate body. The transformation of partnerships into corporations by this method is not uncommon. In *Thomp. Corp.* § 1645, that author says: "The ordinary way of reorganizing a partnership in the form of a corporation is to organize the corporation in form, whereupon the partners make a formal deed of the partnership to the corporation, in exchange for its shares, which are distributed among them according to their respective holdings in the partnership. That assets of the partnerships, of all kinds, may be thus turned in to the corporation in payment of its shares, where the corporation is capable of engaging in the business of the partnership, and is not disabled from holding the property which the partners may own, is a proposition which has the sanction of every-day experience, to say the least." And see *Franclyn v. Sprague*, 121 U. S. 215, 30 L. ed. 930, 7 Sup. Ct. Rep. 951. The validity of transactions like these is to be determined from their general character, considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others; though undoubtedly a corporation would not be sustained in uniting a legitimate corporate act with one forbidden or unauthorized, for the purpose merely of enabling it to accomplish the latter.

The proper application of the doctrine of *ultra vires* depends largely on the relation of the parties to the litigation. When the action of a corporation is challenged by the

sovereignty which gave it existence, or by whose favor it is permitted to pursue its business, it may be required to show a clear warrant for the acts so called in question; while in suits between individuals and corporations, or between corporate bodies, where private rights only are involved, the rule is not inflexible and yields to considerations of right and justice. In suits of that kind, it is maintained by the highest authority that the title of a corporation to real or personal property cannot be assailed, nor its enjoyment defeated, on the ground that its acquisition was in excess of the corporate power, or in a mode not conformable thereto. This is held in *Union Nat. Bank v. Matthews*, 98 U. S. 621-628, 25 L. ed. 188-190, where it is said by Mr. Justice Swayne that, "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose." This principle is approved and applied in a number of cases subsequently decided by the same court,—among them, *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. Rep. 234; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93. And the same principle was recognized and enforced in *Ehrman v. Union Cent. L. Ins. Co.* 35 Ohio St. 324, as far as was necessary in the decision of that case. It was there held that the title of a corporation to a chose in action which it had purchased from another corporation could not be controverted by the debtor on the ground that the purchase was made in a mode or for a purpose not authorized, and a judgment in favor of the purchasing corporation against the debtor was sustained. The debtor, it was said, was a stranger to the transaction by which the chose in action was purchased, was not injured by the transfer, and had no right to question its validity. In this case the plaintiff virtually became the successor of the partnership, by the purchase of all its assets, and continuing the same business at the same place and in the same name. The primary object of the purchase was to obtain an equipped and going manufacturing establishment, and the transfer was completed under one entire contract, in which was included the claim in suit, for damages which the property had recently sustained. No party to that agreement questions the plaintiff's title, and the defendant was neither injured by, nor interested in, the transaction. On the trial the liability of

the defendant was admitted, and the parties agreed on the amount of the damages. Either the plaintiff or the copartnership is entitled to the money, and, as the latter in no way disputes the right of the plaintiff to it, we see no good reason for disturb-

ing the judgments which the courts below have rendered.

Judgment affirmed.

Spear, J., dissents from the second and third paragraphs of the syllabus.

ILLINOIS SUPREME COURT.

NATIONAL HOME BUILDING & LOAN ASSOCIATION, *Appt.*,

v.

HOME SAVINGS BANK *et al.*

(181 Ill. 35.)

1. A corporation, being a creature of the law, has no powers which the law has not conferred upon it.
2. A building and loan association has no power to engage in the business of trading in real estate or acquiring the same, except as incidental to its legitimate business.
3. The right of a building and loan association to purchase such real estate as it has a mortgage on for its necessary protection in making collections does not extend to the purchase of additional real estate, though taken as a part of the same transaction.
4. A contract of a corporation which is beyond its corporate powers and *ultra vires* in the strict and legitimate sense, and against public policy, cannot be made binding on the corporation by way of estoppel.
5. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense of *ultra vires*.

(June 20, 1899.)

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a decree of the Superior Court for Cook County in favor of plaintiffs in an action brought to foreclose a mortgage and recover a deficiency judgment against the building and loan association. *Reversed.*

The facts are stated in the opinion.

Messrs. Cutting, Castle, & Williams and Wagner, Bingham, & Long, for appellant:

The appellant could lawfully act only through its board of directors, and unauthorized acts by an individual director, or by an officer or agent, without the sphere of his powers, are not binding on the appellant.

Thomp. Corp. § 4875; **Bouton v. McDonough County**, 84 Ill. 384; **Chicago v. Shober & C. Lithographing Co.** 6 Ill. App. 560; **Morawetz, Priv. Corp.** § 590; **Mahoney Min. Co.**

NOTE.—Upon the question of implied powers of corporations, see cases immediately preceding and following this one.

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v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; **Reese, Ultra Vires**, § 151.

Appellant had no power to purchase real estate upon which it had no mortgage, lien, or other encumbrance, or in which it had no interest, and therefore no power to assume and agree to pay a mortgage on such real estate so purchased by it.

Homestead Loan Asso. (Ill.) Rev. Stat. chap. 32, § 13; **Central R. Co. v. Collins**, 40 Ga. 582; **Reese, Ultra Vires**, pp. 9, 10, 17, 21 *et seq.*, 81, 85, §§ 48, 54, 55; **Head v. Providence Ins. Co.** 2 Cranch, 127, 2 L. ed. 229; **People ex rel. Atty. Gen. v. Utica Ins. Co.** 15 Johns. 358, 8 Am. Dec. 243; **New York Fireman Ins. Co. v. Sturges**, 2 Cow. 664; **Perrine v. Chesapeake & D. Canal Co.** 9 How. 172, 13 L. ed. 92; **Hood v. New York & N. H. R. Co.** 22 Conn. 502; **Pearce v. Madison & I. R. Co.** 21 How. 441, 16 L. ed. 184; **Thomas v. West Jersey R. Co.** 101 U. S. 71, 25 L. ed. 950; **Davis v. Old Colony R. Co.** 131 Mass. 258, 41 Am. Rep. 221; **Central Transp. Co. v. Pullman's Palace Car Co.** 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; **Lucas v. White Line Transp. Co.** 70 Iowa, 541, 50 Am. Rep. 449, 30 N. W. 771; **Colman v. Eastern Counties R. Co.** 10 Beav. 1, 16 L. J. Ch. N. S. 73, 11 Jur. 74; **East Anglian R. Co. v. Eastern Counties R. Co.** 11 C. B. 775, 7 Eng. Ry. & C. Cas. 150, 21 L. J. C. P. N. S. 23, 16 Jur. 249; **Bissell v. Michigan S. & N. I. R. Cos.** 22 N. Y. 258; **Jemison v. Citizens' Sav. Bank**, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; **Fridley v. Bowen**, 87 Ill. 154; **Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.** 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; **People ex rel. Peabody v. Chicago Gas Trust Co.** 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; **Endlich, Bldg. Asso.** 1st ed. §§ 120, 283, 305-307; **McCauley v. Workingman's Bldg. & Sav. Asso.** 97 Tenn. 421, 35 L. R. A. 244, 56 Am. St. Rep. 813, 37 S. W. 212; **Metropolitan Bank v. Godfrey**, 23 Ill. 579.

There being no power in appellant to make the contract to pay appellees' mortgage, it could not ratify it.

Reese, Ultra Vires, §§ 46, 59, 60, 72, 98; **Central Transp. Co. v. Pullman's Palace Car Co.** 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct.

Rep. 478; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427; *Durkee v. People*, 53 Ill. App. 396; *Thomp. Corp.* §§ 6007, 6009; *Morawetz, Priv. Corp.* p. 551, § 581; *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407.

Estoppel cannot be urged against the party to a contract not fully performed.

Thomp. Corp. § 6024; *Swan v. Scott*, 11 Serg. & R. 155; *Reese, Ultra Vires*, § 71.

Relief will not be given when an illegal contract is relied on to sustain it.

Fridley v. Bowen, 87 Ill. 151; *Bishop v. American Preservers Co.* 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Reese, Ultra Vires*, §§ 69, 70, 72, 73; 7 Wait, Act. & Def. p. 64.

A member of a building and loan association is charged with notice of the powers conferred on its officers, and provisions of its charter.

Citizens' Sav. Bldg. & Loan Asso. v. Ruhl, 55 Ill. App. 65; *Morawetz, Priv. Corp.* §§ 580-591; *Ang. & A. Priv. Corp.* §§ 288-301; *Thomp. Corp.* § 6009; *Reese, Ultra Vires*, §§ 52, 53; *Thompson v. Bemis Paper Co.* 127 Mass. 595; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332.

Corporate acts, in order to be unlawful and void, need not be immoral or expressly prohibited. It is sufficient that they are unauthorized, and therefore impliedly prohibited.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 286, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9.

Mr. Ralph Martin Shaw, with *Messrs. Winston & Meagher and Alexander L. Whitehall*, for appellees:

If agents conduct themselves so that, if they had been acting for private employers, the person for whom they were acting would have been affected and bound by their conduct, the same rule must prevail when the principal under whom the agent acts is a corporation.

New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Frankfort Bank v. Johnson*, 24 Me. 490; *Henderson v. San Antonio & 64 L. R. A.*

M. G. R. Co. 17 Tex. 560, 67 Am. Dec. 675; *Scotfield Rolling Mill Co. v. State*, 54 Ga. 635.

When the officers or agents of a corporation openly exercise powers affecting the interests of third parties, which presupposes a delegated authority for that purpose, and other acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers or agents will be deemed rightful, and the delegated authority will be presumed.

New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; *Metropole Bldg. & Turkish Bath Co. v. Garden City Fan Co.* 50 Ill. App. 681; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Page v. Fall River, W. & P. R. Co.* 31 Fed. 257; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 58.

If it is possible, under any hypothetical condition of facts, for an act to be within the express or implied power of a corporation, the corporation will be estopped in a particular instance to say that the act is not within such expressed or implied power, when such a defense would be to the injury of a party contracting with it, unless the act itself is *malum prohibitum* or *malum in se*.

Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Grommes v. Sullivan*, 43 L. R. A. 419, 26 C. A. 320, 53 U. S. App. 359, 81 Fed. 45; *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407; 17 Am. Rep. 702; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

Kadish v. Garden City Equitable Loan & Building Asso. 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Dorst v. Gale*, 83 Ill. 136; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. ed. 816.

When a party dealing with a corporation has acted in good faith, and the contract has been completely executed, so that nothing remains to be done except the payment by the corporation to the party, the corporation is always estopped to set up its want of authority as a defense, unless the action is *malum*

in *se* or *malum prohibitum*. This is always the law, even though the party contracting with the corporation knows at the time that the corporation is transacting business beyond its chartered powers.

Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; *Parish v. Wheeler*, 22 N. Y. 494; *Towers Excelsior & Ginnery Co. v. Inman*, 96 Ga. 506, 23 S. E. 418; *Kadish v. Garden City Equitable Loan & Bldg. Assn.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Darst v. Gale*, 83 Ill. 136; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Dimpfel v. Ohio & M. R. Co.* 9 Biss. 127, Fed. Cas. No. 3,918; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252, 21 Am. St. Rep. 448, 27 N. E. 831; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Woodruff v. Erie R. Co.* 93 N. Y. 609; *Hays v. Galion Gaslight & Coal Co.* 29 Ohio St. 330; *Thompson v. Lambert*, 44 Iowa, 239; *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702.

Under such circumstances, when the contract has been fully executed, the question of *ultra vires* can only be raised by a direct proceeding in quo warranto.

Alexander v. Tolleston Club, 110 Ill. 65; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Citizens' State Bank v. Hawkins*, 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369; *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 621; *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

Cartwright, Ch. J., delivered the opinion of the court:

In November, 1893, Flora D. Bishopp made a trade of lots in the city of Chicago with the National Home Building & Loan Association, appellant, in pursuance of which appellant conveyed to her lot 10 in Lee Bros.' addition to Englewood, lots 15 and 16 in block 60 in Chicago University subdivision, and lot 36 in block 2 in Herring's subdivision. In exchange for these lots said Flora D. Bishopp and Jonathan D. Bishopp, her husband, conveyed to the building and loan association lots 5 and 6 in block 2 in Johnson & Clement's subdivision, and in the deed of the same it was agreed that the building and loan association should assume and pay an encumbrance on said lot 5 in the form of a trust deed executed by said Flora D. Bishopp and husband for Charles T. Page, trustee, to secure a note for \$3,000 and interest. The trade was negotiated and carried out on the part of the association through J. O. Duncan, agent, who was employed by the as-

sociation to negotiate loans and examine abstracts for it in Chicago, and he acted under the direction of the secretary of the association. After the exchange the association paid a mortgage of \$600 on said lot 5, and the delinquent interest on the mortgage assumed in the conveyance. On May 14, 1895, the board of directors passed a resolution that the assumption clause in the deed was made without authority of the association, and directed the execution and tender of a quitclaim deed of the lot to Flora D. Bishopp. The deed was made and tendered unconditionally, and the association thereby offered the lot to her without a return of the consideration, or any other condition. The note for \$3,000 secured by the trust deed was transferred to the Home Savings Bank, one of the appellees; and it filed its bill in the superior court of Cook county to foreclose the same, asking for a decree against Flora D. Bishopp, a sale of the mortgaged premises, and a decree against the building and loan association for such deficiency as might exist. The building and loan association answered that the trade was consummated by direction of its president and secretary, but the clause assuming the mortgage was inserted without their knowledge or authority, and without the knowledge and authority of its board of directors, that such an agreement was *ultra vires* the corporation, and that it had tendered a quitclaim deed of the lot to the said Flora D. Bishopp. The bill was answered by Flora D. Bishopp and her husband, who admitted its material allegations, and filed their cross bill, alleging the agreement for an exchange of the properties and the conveyances, and asking for a deficiency decree against the association. The building and loan association answered the cross bill, setting up the same defense as before, and the cause was referred to a master, who reported in favor of a foreclosure and sale, and a decree against the building and loan association for any deficiency in the payment of the debt, interest, fees, and costs. Exceptions to the report were overruled, and a decree was entered in accordance with it, which has been affirmed by the appellate court.

No objection is made to the foreclosure of the trust deed, or the sale of the premises; and the only question involved in this appeal is whether the contract inserted in the deed, by which the defendant, the National Home Building & Loan Association, agreed to assume and pay the debt, is binding upon it. This defendant, which denied the binding force of the agreement, is a corporation organized under the provisions of an act entitled "An Act to Enable Associations of Persons to Become a Body Corporate to

Raise Funds to be Loaned only among the Members of Such Association," in force July 1, 1879. Laws 1879, p. 83. As a corporation, it is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership; and, if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter, or it does not exist. The law on this subject is stated by the Supreme Court of the United States in *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unencumbered real estate. Manifestly, the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the state has created such corporations, and conferred upon them corporate powers. They have no power to take and hold real estate, and contracts made for the purchase of it are not enforceable. Endlich, Bldg. Asso. §§ 305-308. But for the purpose of collecting debts it is essential that they should have some power with respect to the real estate mortgaged to them, and for that purpose § 13 of the act for their incorporation provides as follows: "Any loan or building association incorporated by or under this act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien, or other encumbrance, or in which said association may have an interest, and the real estate so purchased, to sell, convey, lease, or mortgage at pleasure to any person or persons whatsoever." Such corporations are not authorized, either by their charters or as an incident to their existence, to acquire or hold any real estate except such as has been mortgaged to them, or which they may have an interest in. Not only is this the rule to be derived from the act of the legislature authorizing their incorporation, under the general principles of law, but it is, and always has been, against the policy of the state to permit corporations to accumulate landed estates, or to own real estate beyond what is necessary for their corporate business, or such as is acquired in the collection of debts. *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *United* 64 L. R. A.

States Trust Co. v. Lee, 73 Ill. 142, 24 Am. Rep. 236; *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 125, 51 N. E. 664; *First M. E. Church v. Dixon*, 178 Ill. 280, 52 N. E. 887. It is also a settled principle of American jurisprudence. 5 Thomp. Corp. § 5772. If a building and loan association were permitted to invest its money in the purchase of real estate, or to traffic or trade in such property, instead of keeping within the powers conferred upon it, by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation, and against the fixed and uniform policy of the state. In *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798, it was said (page 292, 130 Ill., page 505, 8 L. R. A., and page 803, 22 N. E.): "The word 'unlawful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do, or, in other words, such acts, powers, and contracts as are *ultra vires*." In *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 48, 35 L. ed. 64, 11 Sup. Ct. Rep. 484, the result of the decisions as to the exercise of powers not granted is summed up as follows: "All contracts made by a corporation beyond the scope of those powers are unlawful and void and no action can be maintained upon them in the courts; and this upon three distinct grounds: The obligation of everyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

It is first contended in support of the decree that the contract by which the corporation assumed and agreed to pay the mortgage on lot 5 as a part of the consideration, was within its powers. The ground of this claim is that the corporation had a mortgage on lot 6 (the other lot which was conveyed to it) and the acquisition of that lot was a legitimate exercise of power. We do not see how the fact that it had power to purchase one lot would operate to give it power to purchase another. The right to acquire property in which it had an interest could not be extended to other property in which it had no interest. If it could make a loan on a lot and buy other property in the vicinity or adjoining it by merely including in the deed the mortgaged lot, the law would

be evaded, and the policy of the state subverted. The law has given such a corporation power to purchase such real estate as it has a mortgage on, for its necessary protection in making collections; but that does not authorize it, by including such real estate, to buy another lot, or a subdivision or part of a town, and enter into the business of trading in real estate. If it could not purchase lot 6, upon which it held a mortgage, without buying other real estate, it was not authorized to buy it at all.

It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires*, because it has received the benefit of the contract, by the conveyance of property to it. That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent, and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation,—which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract, there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality, by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a con-

tract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

The powers delegated by the state to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense. *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9; *New Orleans F. & H. S. S. Co. v. Ocean Dry Dock Co.* 28 La. Ann. 173, 26 Am. Rep. 90. Concerning this subject, it is said in *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950: "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that, the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts." We quote again from *Central Transp. Co. v. Pullman's Palace Car Co.* as follows: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense,—that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such prerequisites might in fact have been complied with. But, when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." See also *Reese, Ultra Vires*, §§ 46-72, for a full discussion of the subject. In *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626, the same rules were laid down, and it was pointed out that the cases where a corporation is estopped from asserting that a

contract is *ultra vires* when it has received a benefit under the contract is where the making of the contract is within the scope of the franchise, and the contract is sought to be avoided because there was a failure to comply with some regulation, or the power was improperly exercised. The following was there quoted from the opinion in *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, O. & C. R. Co.* 23 How. 381, 16 L. ed. 488, by Mr. Justice Hoar in *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322, and by Lord Chancellor Cairns and Lord Hatherly in *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power or the failure to comply with prescribed formalities or regulations in a particular instance, when such abuse or failure is not known to the other contracting party."

The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers. *Ottawa Northern Pl. Road Co. v. Murray*, 15 Ill. 336, was a case where the corporation was expressly authorized to borrow money and to mortgage its road. Money was borrowed and received by the corporation, and a bond and mortgage were executed. The corporation sought to question the official character of the persons who borrowed the money and executed the mortgage as directors of the company. It was held that the corporation could not dispute their official relation after receiving the money. In *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, the North Star Gold & Silver Mining Company had given its notes for borrowed money. The court said: "The borrowing of the money was not in itself an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind." The bill was filed in the case by one of the stockholders to enjoin the payment of the notes because the money was appropriated to mining in the territory of Colorado. It was not decided whether engaging in mining in Colorado was *ultra vires* or not, but the doctrine of *ultra vires* has never been carried to the extent of requiring one who honestly lends money to a corporation authorized to borrow it to see that it is not applied to an improper purpose. The transaction was perfectly lawful,

and not *ultra vires* the corporation, and the rights of the lender were maintained, with some natural and proper remarks about honesty as applied to corporations. In *Dart v. Gale*, 83 Ill. 136, an insurance company borrowed money which it had a right to borrow to carry on its business, and mortgaged real estate to secure its payment. A purchaser of the real estate subsequent to the trust deed, and therefore subject to it, tried to avoid the encumbrance on the ground that the company had no right to execute the mortgage. The court said: "That in certain cases it might have lawfully done so, even against the remonstrance of those who had the right to directly interfere in its management, we think can admit of but little controversy." It was deemed unimportant whether it was in fact necessary to make the mortgage, because, conceding that the evidence did not show such a necessity, the defense could not be availed of by the corporation, or by the purchaser, who bought with full knowledge of the trust deed. The case belongs to a class already explained. The corporation had the right to do the very thing complained of, and neither it nor the purchaser could set up that the requisite conditions for the exercise of the power did not exist. In *Kadish v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236, the court purposely avoided deciding whether corporations for manufacturing purposes could become members of homestead and loan associations, and whether such an association could loan money for general business purposes. The corporation had a right to loan money, and the loans were made to actual members. All that was insisted upon was that the borrowers, though in fact members, were ineligible to membership, and the money was applied to general business purposes. It was held that the eligibility to membership could not be questioned, nor the purpose for which the money was borrowed; and the term *ultra vires*, as there used and defined, did not embrace unlawful acts which the corporation could not perform, as being different from the purpose of its organization and against the policy of the state. In this case the transaction was beyond the corporate powers, and *ultra vires*, in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitations and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it can-

not be done by affirming or enforcing the contract, but in some other manner.

The decree of the Superior Court against the National Home Building & Loan Association for any deficiency that may exist, and for execution to collect the same, and the judgment of the Appellate Court affirming said decree in that respect, are each reversed.

Carter, J., dissenting:

I do not agree to the doctrine announced in the decision of this case,—that a corporation may not be estopped from pleading its own lack of corporate power. As I understand the decisions, it has long been the settled doctrine of this court that where the contract has been wholly executed, and the corporation has received the benefit of it, it will be estopped from setting up in defense of payment its own lack of power under its charter to enter into the contract, where the contract is not one either *malum in se* or *malum prohibitum*; and I do not under-

stand that the application of the doctrine of estoppel is confined to those cases where the contract is within the powers of the corporation, but only beyond the mere authority of its officers or agents. The doctrine of estoppel does not rest upon the principle of agency, that there may be a ratification of the unauthorized acts of agents. It has been held, not only by this court, but by many others, that in many cases the question of *ultra vires* can only be raised in a direct proceeding by the state to oust the corporation of its assumed and usurped powers. *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Kadish v. Garden City Equitable Loan & Bldg. Assn.* 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Darst v. Gale*, 83 Ill. 136; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

Rehearing denied October 6, 1899.

OHIO SUPREME COURT.

STATE of Ohio *ex rel.* John M. SHEETS,
Attorney General, *Plff. in Err.*,
v.

PITTSBURGH, CINCINNATI, CHICAGO,
& ST. LOUIS RAILWAY COMPANY.

(68 Ohio St. 9.)

*1. An association, established by a railway company, composed of some or all of its employees and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employees who apply for membership in said fund and are admitted,—the railway company to take charge of, and be responsible for, the funds, make up deficiencies in the same, supply facilities for conducting the business, and pay the operating expenses, supply surgical attendance for injuries received in its service and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company,—is not an insurance company or association; and, in agreeing to perform and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business.

2. The said acts of the railway company are within the implied powers of a railway corporation, and are not *ultra vires*.

3. Nor are they contrary to public policy.

(March 8, 1903.)

* Headnotes by the COURT.

NOTE.—For cases on the implied powers of corporations, see those immediately preceding and following this one
64 L. R. A.

ERROR to the Circuit Court for Franklin County to review a judgment dismissing a petition for a writ of quo warranto to determine by what authority defendant was operating a relief department for the benefit of injured employees. *Affirmed*.

Statement by Price, J.:

The plaintiff in error filed in the circuit court of Franklin county a petition in quo warranto against the railway company, now defendant in error, in which petition it is alleged that, on or about the 28th day of August, A. D. 1890, the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company and the Chicago, St. Louis, & Pittsburgh Railroad Company were consolidated under and pursuant to the laws of the state of Ohio, under the name of the defendant, the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, whereby, under the latter name, it became, and still is, a corporation duly organized under and by virtue of the laws of the state of Ohio. It is further stated that the purpose of the incorporation of said company was to "acquire, build, maintain, and operate a line of railroad along certain lines and between certain points designated in its articles of consolidation and incorporation." The relator then charges that, "in violation of law and in abuse of its corporate powers, and in the exercise of privileges, rights, and franchises not conferred upon it by law, the defendant, from and after the 1st day of October, 1890,

has been engaged, and still is engaged, in transacting the business of life and accident insurance, whereby it insures its employees against sickness, accident, and death, in consideration of the payment, to wit, by the insured, of stipulated monthly sums, and an agreement on the part of such insured that in case of accident or death neither the insured, nor his legal representatives, shall be entitled to ask, demand, or receive, by suit or otherwise, any compensation whatever on account of such injury or death resulting from the negligence of the defendant or the Pennsylvania Company, or their servants or agents." The relator further states that "the profits, if any, growing out of said business of insurance, belong to the defendant, and the losses, if any, incident thereto, are borne by it." The prayer is for a judgment ousting the defendant from further continuing the business of insurance by means of its relief department, or in any other manner whatever. The defendant answered, admitting the official character of the relator, and that the defendant is a corporation duly organized in the manner, at the time, and for the purposes stated in the petition. Each and every other allegation of the petition is denied.

In the circuit court the parties agreed upon the following facts, and other facts which appear in the opinion:

"The parties to this cause, for the purpose of the trial of the issues made by the pleadings herein, agree upon the following facts subject to exceptions by either party at the hearing for irrelevancy or incompetency:

"First. The printed pamphlet entitled 'Regulations Governing the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh,' hereto attached, marked 'Exhibit A,' and made part hereof, is a true and correct statement of the organization, regulations, and mode of conducting the business of the relief department of the defendant, mentioned in the petition herein. The defendant has not been, from or after the said 1st day of October, 1890, and is not now, engaged in transacting the business of life and accident insurance, or either, unless the business set forth in said printed pamphlet should be held to be such life and accident business.

"Second. The defendant since about the said 28th day of August, 1890, has owned, and still does own, more than 1,000 miles of railroad, and during said period has operated, and still does operate, more than 2,300 miles of railroad, extending from the city of Pittsburgh, Pennsylvania, through the state of Ohio, to the cities of Cincinnati, Chicago, Indianapolis, and Louisville, with many branch lines, and, together with the lines of the Pennsylvania Company, men-

tioned in said petition, and of other companies mentioned in said regulations, forms one of the main systems of railroads between the Atlantic seaboard and the Mississippi river."

The third fact agreed upon is a table showing the number of employees of the defendant company at the close of each fiscal year from June 30, 1890, to June 30, 1901, and the number of employees who at such times were actually members of said relief fund, and also shows the percentage of membership to the number of employees; the percentage being 47.7 in 1890, and 65.9 in 1901. The fourth fact agreed upon is a table showing the amount contributed by members during each triennial period, amounts of benefits paid members during such period, and the operating expenses paid by defendant. The fifth and sixth facts agreed upon relate to amounts of benefit payments, according to certain regulations of the relief department.

Among sections of the regulations of this relief department above referred to under Exhibit A, the following are quoted as pertinent in this case:

"(1) The 'voluntary relief department' is a department of the service of the several railroad companies, respectively, associated as set forth in the agreement to which these regulations are attached, in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the general manager.

"(2) In these regulations, unless otherwise indicated, the titles 'company' and 'general manager' will be understood as meaning the Pennsylvania Company, and the general manager of that company.

"(3) The object of this department is the establishment and management of a fund to be known as the 'relief fund,' for the payment of definite amounts to employees contributing to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the applications of such employees.

"(4) The relief fund, from which the proposed benefits are to be paid, will be formed by voluntary contributions from employees; appropriations, when necessary to make up any deficit, by the several companies respectively, and income or profit derived from investments of the moneys of the fund, and such gifts or legacies as may be made for the use of the fund.

"(5) The associated companies under the stipulations of the agreement between themselves, hereinbefore set forth, will take general charge of the department, guarantee the fulfillment of the obligations assumed by

them respectively, in conformity with the regulations from time to time established, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof. The company will take charge of the funds, and be responsible for their safe-keeping."

Section 6 provides for the selection of an advisory board; one member to be chosen by the contributing members of the six or more constituent companies composing the association, and three to be selected by the board of directors of the Pennsylvania Company, and three to be selected by the directors of the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company.

"(10) The moneys received for the relief fund shall be held by the company in trust for the relief department. The advisory committee shall, subject to the approval of the board of directors of the company, direct the investment, and any changes therein, of money which is not required to be kept on hand for current use. Such investments shall be in the name of the company, 'in trust for the relief department.'"

"(17) No employee will be required to become a member of the relief fund."

The other important facts necessary to an understanding of the case are stated in the opinion.

Messrs. J. M. Sheets, Attorney General, J. E. Todd, and Smith W. Bennett, for plaintiff in error:

Defendant's scheme or plan of business constitutes the business of insurance.

May, Ins. § 1; 1 Phillips, Ins. § 1; Joyce, Ins. § 2; Com. v. Wetherbee, 105 Mass. 149.

The contract we complain of is the contract between the employee and the company, by which the company agrees to pay the employee in case of accidental injury or death, and the employee agrees to waive his right of action against the company in case he accepts such payment of benefits.

Pittsburgh, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 516, 35 L. R. A. 507, 45 N. E. 641.

There can be no question that the company guarantees to indemnify the employee in case of accidental injury or death. What is there about it to distinguish it from an insurance contract?

Maine v. Chicago, B. & Q. R. Co. 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. 139; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307; *Maryland use of Black v. Baltimore & O. R. Co.* 36 Fed. 655; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; *Pittsburgh, C. C. & St. L. R. Co.* 64 L. R. A.

Co. v. Moore, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Chicago, B. & Q. R. Co. v. Miller*, 22 C. C. A. 264, 40 U. S. App. 448, 76 Fed. 439; *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. 305.

The business of the relief department is *ultra vires* the corporation.

Elliott, Ins. § 1379; Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co. 60 Ohio St. 96, 53 N. E. 711; *State v. Pioneer Live Stock Co.* 38 Ohio St. 347; *State ex rel. Richards v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828.

Messrs. Charles E. Burr and T. M. Livesay, for defendant in error:

The contract between the railway company and the employee is not against public policy, does not lack mutuality, and is based upon a valid consideration.

Pittsburgh, C. C. & St. L. R. Co. v. Cox, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641.

The contracts do not constitute "transacting the business of life and accident insurance," or either, within the legal meaning of those terms. The administering of relief to the employees in the form shown is in no sense a business.

Marietta & C. R. Co. v. Western U. Teleg. Co. 38 Ohio St. 24.

Insurance is a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes surety to the other, that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them.

Lucena v. Craufurd, 2 Bos. & P. N. R. 300, 3 Bos. & P. 101, 6 Revised Rep. 623; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. 139; *Ohio v. Pennsylvania Co.* 71 Fed. 136; 3 *Elliott, Railroads*, § 1380; *Com. v. Equitable Beneficial Asso.* 137 Pa. 412, 18 Atl. 1112; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127, 29 Atl. 854; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 493, 61 N. W. 971; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482, 9 Reports, 223, 42 Week. Rep. 338, 58 J. P. 816; *Pittsburgh, C. C. & St. L. R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290.

The contract has been upheld in the following cases:

Owens v. Baltimore & O. R. Co. 1 L. R. A. 75, 35 Fed. 715; *Maryland use of Black v. Baltimore & O. R. Co.* 36 Fed. 655; *Martin*

v. Baltimore & O. R. Co. 41 Fed. 125; *Ofis v. Pennsylvania Co.* 71 Fed. 136; *Fuller v. Baltimore & O. Employes' Relief Asso.* 67 Md. 433, 10 Atl. 237; *Ringle v. Pennsylvania R. Co.* 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; *Eckman v. Chicago, B. & Q. R. Co.* 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496; *Graft v. Chicago, B. & Q. R. Co.* (Pa.) 8 Atl. 206; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307; *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42; *Shaver v. Pennsylvania Co.* 71 Fed. 193; *Baltimore & O. R. Co. v. Bryant*, 9 Ohio C. C. 332; *Hamilton v. St. Louis, K. & N. W. R. Co.* 118 Fed. 92.

The organization of the relief department, and the administration of relief to employees through the relief fund, are not *ultra vires* of the corporation.

Morawetz, Priv. Corp. §§ 320, 326; *Lyde v. Eastern Bengal R. Co.* 36 Beav. 16; *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; *Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.* 60 Ohio St. 96, 53 N. E. 711; *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908.

Price, J., delivered the opinion of the court:

We assume that the relator commenced the action in the circuit court against the defendant railway company under favor of § 6761, Rev. Stat., which is: "A like action [quo warranto] may be brought against a corporation: (1) When it has offended against a provision of an act for its creation or renewal, or any act altering or amending such acts. (2) When it has forfeited its privileges and franchises by non-user. (3) When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises. (4) When it has misused a franchise, privilege, or right conferred upon it by law, or when it claims or holds by contract or otherwise, or has exercised a franchise, privilege, or right in contravention of law." Inasmuch as neither the voluntary relief department, so called in the statement of the case, or its members, are parties to the suit, it would seem that the right to the remedy is not under clause 3 of § 6760, but under clause 4 of § 6761, just quoted. And the prayer of the petition is "that the defendant be ousted from further continuing said business of insurance by means of its said relief department, or in any other manner whatever, and asks such

other relief as the nature of the case may require." So it is the complaint against the railway company that, under its charter and franchise as a railway company, it is conducting an insurance business in contravention of law, from which it should be ousted. The answer denies that the defendant company transacts an insurance business, and in the circuit court certain facts were agreed upon in the trial and submission of the issue, some of which appear in the statement of the case. But there are some additional facts contained in the agreement which are necessary to be noticed in the determination of the important controversy, for it is not contended that the defendant openly and in the usual manner conducts insurance, and holds itself out to the public as an insurance company, and clearly such is not the fact in the case before us.

It is claimed by the relator, however, that the business done under the name of the "Voluntary Relief Department," and in the manner and by the means employed, amounts, in substance, to an insurance business, and which exceeds the charter powers of the company. A proper determination of this question necessarily requires of us something more than a casual examination of the plans, structure, and operation of the machinery by which the business in question is advanced and carried forward.

It, no doubt, is true that the organization of the so-called relief department was in the first instance projected by the defendant and other railway companies under the control and management of the Pennsylvania Company, and perhaps the plan may have emanated from the latter company; but this is not important in this case, for the record discloses that the defendant, having a relief department, such as is now under criticism, in November, 1890, by written contract with a number of other railway companies who had leased their respective lines to the Pennsylvania Company, associated themselves in the administration of their respective relief departments, and they are denominated the "Pennsylvania Lines West of Pittsburgh." They adopted certain regulations, and it is recited that one of the objects of the association is to "secure uniformity and economy;" that to accomplish this they "associated themselves" for the purpose of a joint administration and regulation of said respective relief departments under one common organization, to be known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." It further appears that prior to November, 1890, the Pennsylvania Company and the defendant company had "each respectively established a relief department

for the benefit of its service and employees," and any other companies owning lines west of Pittsburgh which were being operated by the Pennsylvania Company, and which had adopted or would adopt similar relief departments, might associate with the former companies for the joint administration of the relief departments.

This brief history explains the character and form of the application for membership which is found in the record, and may give some color to the other features of the case. But the defendant, as did each of the other companies so associated, no doubt, continued its own separate relief department, with a subordinate or separate advisory board, partly composed of men selected by the contributing members, and partly of men selected by the boards of directors of the constituent companies.

With this understanding of the general outlines of the origin, purpose, and character of the relief department connected with the defendant, is it guilty of conducting an insurance business in contravention of law? This question suggests another: What is insurance business? Various definitions have been given in brief of counsel, but we are content with the summary given in Bouvier's Law Dictionary (Rawle's Revision) 1068: "A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils." In another form, on the same page, it is said: "An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed." Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death from any cause not excepted in the contract. In the parlance of the business of insurance, ordinarily the contract is called a "policy;" the consideration paid, the "premium;" and the events insured against are called "risks and perils." In case of injury or destruction of the property insured, or injury by accident, or liability for death, the liability is called a "loss." Policies of this character may be preceded by an application for the same. In the relief department practice under review, an application is made the basis for membership, and the applicant must be an employee of the company to which the department is attached. It is required to be addressed as follows: "Pennsylvania Lines West of Pittsburgh, Voluntary Relief Department. Application for Membership in the Relief Fund. To the Su-

perintendent of the Relief Department."

The applicant then states his name and residence, and the name of the company with which he is employed, the nature of the service engaged in, and that he has knowledge of, and will be bound by, the regulations of the relief department; and he constitutes the proper agent of the railway company, his agent to apply, as a "voluntary contribution" to the relief fund, from his wages according to the rate of wages earned, as graded in the regulations, for the purpose of securing the benefits provided for in the regulations for a member of the "relief fund" and "additional death benefit;" stating his class, and name of the beneficiary in case of death. The application contains the following stipulation, which will be discussed later in the opinion: "And I agree that the acceptance of benefits from the relief fund for injury or death shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance." There are other statements in the application not material to our inquiry, and a certificate is issued in pursuance of the terms of such application, if it be approved.

Section 31 of the regulations provides that "the word 'contribution' wherever used in the regulations, or in the organization adopted in connection therewith, shall be held and construed to refer to such designated portion of the wages payable to an employee as he agrees to receive in the form of a right to benefits, in and through the relief fund; and the words 'contributors,' 'contributing employees'—and like words and phrases—are descriptive of employees so agreeing." It is stated in the third regulation, that "the object of this department is the establishment and management of a fund to be known as the 'relief fund,' for the payment of definite amounts to employees contributing to the fund . . . when they are disabled by accident or sickness, and, in the event of their death, to the relatives or other beneficiaries specified in the application of such employees." And by regulation 4 it is said that this fund is formed by voluntary contributions from employees, appropriations by the railroad company when necessary to make up a deficit, etc. In regulation 10 it is provided that "the money received from the 'relief fund' shall be held by the company in trust for the relief department." Investments made of the fund, if any, shall be in the name of the company "in trust for the relief department."

The railway company is the depository of the fund so raised, and is responsible for its management and safe-keeping, and agrees to make good any deficit in the fund which becomes necessary to meet the proper demands on the relief department. This management is by the general manager of the company and the advisory board, the latter being composed of persons mutually selected by members of the fund and the companies. Moreover, the railway company defrays all the expenses of the management, and the emergency services of the surgeons are rendered free by the company surgeons. Not a dollar of the fund ever belongs to the railway company, and it primarily is made up of a certain part of the wages of the employee, retained for that purpose by his direction. The concern has no capital stock. The doors to membership in this fund are not open to the general public. While an employee is not required to become a member, none but employees can do so. While it is true that the railroad company is the depository of the fund, and stands good for its safe-keeping and proper disbursement, it is, after all, but the custodian of a certain portion of wages which the employee directs shall be retained to produce the benefit fund, from which he may draw in times of sickness or other disablement.

Is this an insurance business? It is not held out to be such. The objects stated in the organization and regulations are clearly otherwise. Neither the railway company, nor its relief department, advertises for or in any other way solicits patronage. The members of the fund are volunteers. The business transacted, while in part done by an officer of the company, aided by representatives of the members, is not mingled with the business and accounts of the railway company. It has no offices set apart for an insurance business, and has no agents to promote its interests. It does not undertake to insure or indemnify against either sickness, accident, or death. Such is not the language or spirit of the relation between the member and the fund. On the contrary, in case of sickness or injury the members may draw from the relief fund what they mutually have created from a portion of their wages retained for that purpose, and the payment of the benefit is not the payment of a loss on a risk named in a policy or other instrument of insurance. This differs from an insurance business as commonly, and we might say universally, conducted. It is organized on an insurance basis,—advertised as such. It needs and uses agents to represent it, and it solicits from the general public. It has offices and current expenses, etc.; and, to protect the public, insurance laws have been enacted, 64 L. R. A.

requiring publicity of its resources and methods of business, and in most cases periodical sworn statements of the condition and extent of the business being transacted. All this to prevent imposition upon the public, which might be misled by the representations of agents, or by published inducements for patronage. Another marked distinction between the relief department and insurance business is that there is no profit to the railway company, and no profit, in the business or commercial sense, to the members of the fund, except such increase of the fund as may arise by way of interest on its investment in case of a surplus. Those who organize or embark in insurance business have profit in view as a recompense for the industry, ability, and capital invested, and it would be a strange insurance business that would omit this great incentive from its plans and purposes.

But it is said there is a resulting benefit to the railway company from the maintenance of the relief department, in the nature of profit, and that it consists in the stipulation in the application for membership that the acceptance of benefits under the certificate of membership releases the company from all liability to him or his beneficiary for damages on account of injury or death. We have hereinbefore quoted that stipulation, but it must be observed that the member or beneficiary, after the injury, and all its facts and circumstances are fully known, has the right to elect as between the acceptance of benefits and a claim against the company for damages. He is not compelled to accept benefits or nothing, and he waives no right to proceed against the company until he has accepted the benefits provided for him. It is true that very many may accept the benefits and release the company, but it is not every injury to the employee, and not every case of his death from injury in the service, that furnishes a good cause of action against the company. Whatever benefit may accrue to the company by the acceptance of benefits cannot be called profit, because it is but a remote or probable sequence to the membership of the employee. Indeed, it seems that the liability of the railway company is enlarged by the relief department. It vouches for the payment of benefits if accepted, and independent of any right of action against it, and leaves open the option to accept benefits, or decline them and claim damages of the railway company.

If it is said that the company expects to realize from the relief department by reason of more loyal service and increased confidence of the employee in his employer, we may reply that loyalty of service and reasonable confidence are due the employer so

long as he faithfully and honorably performs his contract and discharges all his duties to his employee. It seems difficult to figure out of the relation that exists after and on account of this membership the idea of profit to the company. If it breeds good will and contentment, the same is laudable, and we see nothing in the rules of the department that takes away or jeopardizes a single legal right of the employee. If sick, he may receive the aid. If injured in the service, even through his own negligence, or in a service the risks and perils of which he assumed, he is entitled to his share of the fund. And if his injury is the fault of the company, he can elect to take the benefits provided or sue at law.

In one form or another, the controversy we are dealing with has been before other courts of final resort, and the almost if not altogether unanimous holding is that managing and conducting such a relief department is not insurance business, but, on the contrary, a beneficial provision, merely, for employees, which the railway company might aid in promoting. We will note but a few of such cases:

Com. v. Equitable Beneficial Asso. 137 Pa. 412, 18 Atl. 1112, is a case where there was a proceeding in quo warranto to require the defendant to show by what authority it claimed the right to make contracts of insurance and issue policies of insurance. The defendant answered the writ, and denied making contracts of insurance or issuing policies of insurance as alleged by the attorney general. In the syllabus the supreme court of Pennsylvania says: "(1) A contract of insurance is purely a business adventure, not founded on any philanthropic, benevolent, or charitable principle; and the design and purpose of an insurance company, and the dominant and characteristic feature of its contract, is the granting of an indemnity, or security against loss, for a stipulated consideration. (2) But the design of what are known as benevolent societies, which are purely of a philanthropic or benevolent character, is not to indemnify or secure against loss, but from the contributions of members to accumulate a fund to be used in their own aid or relief in the misfortunes of sickness, injury, or death."

At the risk of being prolix, we are tempted to adopt here a paragraph from the opinion of Justice Clark, on page 419 of that case (137 Pa., page 1113, 18 Atl.): "To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance. What is known as a 'beneficial association,' however, has a

wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or to secure against loss. Its design is to accumulate a fund from the contributions of its members . . . to be used in their own aid or relief in the misfortunes of sickness, injury, or death. . . . The motives of the members may be, to some extent, selfish, but the principle upon which they rest is founded in the considerations mentioned. These benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members have themselves contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death. Such societies have no capital stock. They yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance, or of indemnity, or of security against loss."

The above case was quoted from with approval in *Northwestern Masonic Aid Asso. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810, 26 Atl. 253.

More directly in point is *Beok v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908. The facts in that case show that it involved a relief department, organized precisely like the one under consideration. The opinion was by a unanimous court, and it held that the transaction was not an insurance contract within the meaning of insurance law. It also held that it was neither *ultra vires*, nor against public policy. On page 241 of the opinion (63 N. J. L., page 216, 76 Am. St. Rep., and page 911, 43 Atl.) Magie, Ch. J., speaking of the relief department, says: "It is limited to such of the employees of the company as voluntarily apply for admission to the fund and are admitted. They agree with each other and the company to contribute a portion of their wages to create a fund out of which they shall be paid certain sums in case of sickness or injury, and out of which, in case of death, certain sums shall be paid to the beneficiaries or next of kin. The sum so paid may save from want, but does not increase the estate of the employee. . . . I can perceive no reason why the establishment of such a fund, and the agreement of those who contribute to it as to its distribution, can be held to fall within the regulations of the insurance laws. Such an association creates its own fund by voluntary action, and distributes it by an agreed-upon plan, and the contract between them is not of insurance, but of beneficial relief. As they have neither sought nor obtained corporate powers for their purpose,

they are not amenable to prohibitions against the use of corporate powers for that purpose, if any such exists."

The question was also before the supreme court of Iowa in two different cases. In *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492, 61 N. W. 971, the character of a similar relief department was under review. One proposition of the syllabus is: "An association organized by a railroad company for its employees, which agrees to pay stated sums to members or their beneficiaries in case a member is killed or injured in the employment, the company paying operating expenses and making good deficiencies after assessment, is not an 'insurance company,' but a 'beneficiary society.'" It was also decided in that case that the contract involved was not against public policy, and the reasons for the conclusion, we think, are unassailable.

Again, in *Maine v. Chicago, B. & Q. R. Co.* 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315, the same holding was made. It is there decided, also, that a railroad company has implied power to make such contract.

The foregoing cases cite many others to support them, but we have no further room for their consideration. The cases form a uniform current of judicial opinion. We have not been cited to a single case holding a contrary view, and our research has not been rewarded with one. We think the tide of judicial opinion is irresistible.

There is another reflection in this case. We have, to a reasonable extent, examined our statutes upon the subject of insurance and insurance companies. They provide carefully for their charter and organization, and for the deposit of the required amount of money or securities before proceeding to business. Certain sworn statements and annual reports are to be filed with the insurance department, etc. But we find no section that makes a call upon such an association as this relief department. The legislature thus far has not recognized its business as that of insurance. On the contrary, there seems to be an express exception in favor of such associations. Section 3631a, Rev. Stat., provides: "This act [viz., §§ 3630a to 3631] shall not apply to any association . . . [of] religious or secret societies, or to any class of mechanics, express, telegraph, or railroad employees, or ex-union soldiers, formed for the mutual benefit of the members thereof, and their families, or blood relatives, exclusively, or for purely charitable purposes"—and then provides how such associations may incorporate. See also § 3631-23, Rev. Stat., where there is an exception of similar associations from the operation of insurance laws. We think it apparent from these and 64 L. R. A.

other sections that it has been the legislative intent to permit some of the plain and useful things of everyday life to be attended to without the wearing of a corporate charter.

It is also urged in argument for the relator that the acts of the railroad company in promoting and managing the relief department are *ultra vires*, and therefore the defendant should be ousted from performing them. Some of the cases we have cited deny this proposition, and there are many others of the same tenor and import. For the purposes of this branch of the case, we need seek no further than a decision of this court in *Central Ohio Natural Gas & Fuel Co. v. Capital City Dairy Co.* 60 Ohio St. 96, 53 N. E. 711. The first section of the syllabus expressed the opinion of the entire court, and it declares: "The implied powers which a corporation has in order to carry into effect those expressly granted, and accomplish the purpose of its creation, are not limited to such as are indispensable for these purposes, but comprise all that are necessary, in the sense of appropriate, convenient, and suitable, including the right of reasonable choice of means to be employed." The second section of the syllabus lacked the support of but one member of the court, and it declares: "Acts of a corporation, which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily *ultra vires* when they are incidental to, or form part of, an entire transaction, that in its general scope is within the corporate purpose. The validity of such a transaction is to be determined from its general character, considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others."

The most of the work of an employee of a railroad company is hazardous, and frequent injuries are sustained, requiring surgical and medical attention. The company has its surgeons along its lines to respond in case of injury, and, the more efficient the organization of this beneficent branch of the service, the better for both the master and servant. And yet the company should not be charged with conducting a medical or surgical school. If it should establish hospitals for its injured employees, and equip them with everything conducing to comfort and speedy recovery, including surgical attention, its acts should not be regarded as *ultra vires*, in that it conducts hospitals. It may, for the purposes of careful and successful management of its business as a railroad, establish telegraph and telephone facilities, and install a proper number of competent operators, and yet it may not be charged with carrying on a tele-

graph and telephone business. It may establish hotels and eating rooms along its lines, and not be in the hotel business. All these things are incidental to the main occupation, and are within the implied powers conferred.

Again, it is said that the scheme adopted and the conditions of membership meet the condemnation of public policy. Some of the cases already cited consider this question also. There are very many others, a few of which we cite: *Otis v. Pennsylvania Co.* 71 Fed. 136; *Pittsburgh, C. O. & St. L. R. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290; *Johnson v. Philadelphia & E. R. Co.* 163 Pa. 127, 29 Atl. 854; *Beck v. Pennsylvania R. Co.* 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908; *Hamilton v. St. Louis, K. & N. W. R. Co.* 118 Fed. 92. These cases cite many others to the same effect, and, as on the first branch of this case,

the authorities present a solid front. We need not pursue this discussion further than to cite a leading case decided by the court: *Pittsburgh, C. O. & St. L. R. Co. v. Cos*, 55 Ohio St. 497, 35 L. R. A. 507, 45 N. E. 641. That case involved the same relief department developed in the present inquiry, and the certificate of membership is precisely like the form now in use by the defendant, and this court held expressly that the contract between the members and the company is not contrary to public policy. We are still satisfied with that decision, and believe it to be entirely sound.

The grounds for ousting the defendant have not been sustained. The Circuit Court correctly so held, and its judgment is affirmed.

Burket, Ch. J., and Spear, Davis, Shauck, and Crew, JJ., concur.

PENNSYLVANIA SUPREME COURT.

O. R. COOKE

v.

James L. MARSHALL, Appt.

(191 Pa. 315; 196 Pa. 200.)

1. The increase of stock is not within the implied powers of a corporation.
2. The issue of stock by a cemetery corporation is ultra vires when it is issued without any specific legislative authority.

On rehearing.

3. The acts of trustees of a corporation elected in strict conformity with the by-laws of the corporation for a long period of time, during which their title was unquestioned, will be regarded as entirely legal, although they were elected by holders of stock which the corporation had no power to create.
4. Original members of a corporation, who organized and chose officers to represent the corporation as their successors, cannot, after the lapse of thirty-two years, ignore their former action, and choose new officers upon discovering that the original choice was illegal, where, in the meantime the affairs of the corporation have been regularly carried on under the belief that the first action was legal.

(Sterrett Ch. J., and Mitchell and Fell, JJ., dissent.)

(May 8, 1899.)

A PPEAL by defendant from a judgment of the court of Common Pleas, No. 1, for Allegheny County in favor of plaintiff in a

NOTE.—For cases illustrating the implied powers of corporations, see cases immediately preceding this one.

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quo warranto proceeding brought to determine the validity of plaintiff's election as secretary and treasurer of the Chartiers Cemetery Company. *Reversed.*

Plaintiff was elected secretary and treasurer of the company at a meeting of the reorganized board of directors after the stock had been increased. Defendant and others organized a new board of directors ignoring the stock and stockholders by which defendant was elected secretary and treasurer. The stock board has been in control of the property except the corporate seal and books, which were in the defendant's possession. This suit was brought to settle the conflicting rights to the property.

Messrs. William M. Watson, C. S. Fetterman, and J. J. Miller, for appellant:

The creation of the stock was wholly contrary to the purpose of the charter, and void, for it sought to divert the control and management of the company away from the plan intended by the charter, and sought to convert a corporation created for general welfare into one for private control and gain.

Evergreen Cemetery Asso. v. Beecher, 53 Conn. 551, 5 Atl. 353.

If the creation of the stock, or the voting power attached to it, be a matter of doubt, then that doubt requires a decision against the stock.

Pearce v. Madison & I. R. Co. 21 How. 441, 16 L. ed. 184; *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. 146; *Bank of Pennsylvania v. Com.* 19 Pa. 144; *Easton Bank v.*

Com. 10 Pa. 442; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471.

Mr. A. W. Duff, for appellee:

Whenever anything is authorized, and especially if as matter of duty required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment.

Broom's Legal Maxims, 486.

When charters of incorporation prescribe the main objects of the companies formed under them, authority to use the means necessary to attain these objects must be supplied by implication.

1 *Morawetz*, Priv. Corp. § 320; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. 33, 75 Am. Dec. 574; *McMasters v. Reed*, 1 Grant Cas. 36; *Com. ex rel. Dickinson v. Detwiller*, 131 Pa. 614, 7 L. R. A. 357, 18 Atl. 990, 992; *Kirksey v. Florida & G. P. R. Co.* 7 Fla. 23, 68 Am. Dec. 426.

Green, J., delivered the opinion of the court:

The Chartiers Cemetery Company was created by an act of assembly approved the 5th day of April, 1862 (P. L. 419). The 1st section of the act created certain named persons, and other persons who might become their associates, into a body corporate "by the name, style, and title of the Chartiers Cemetery Company, and by that name shall have perpetual succession, and shall be capable in law to have and use a common seal and from time to time change the same; to hold, purchase, and dispose of property, real or personal, sue and be sued, plead and be impleaded in any court of law or elsewhere; to ordain, pass, and put in execution all such laws, rules, and regulations, not contrary to the Constitution and laws of the United States or of this commonwealth, as shall be necessary or convenient for carrying into effect the objects of the company; and generally to do all such other matters and things as are incident to a corporation." By the 3d section it is made the duty of the corporators to establish a cemetery on the land of James L. Marshall, not less than 30 nor more than 100 acres in extent. The 4th section authorizes the corporation to lay out the ground into lots, plots, avenues, lanes, sites for offices, dwellings for its necessary officers or servants, chapel for religious services, etc., and to sell and convey by deed or otherwise lots, plots, etc., to individuals, societies, or congregations. The remaining sections contain minor provisions for the regulation and management of the cemetery. After the passage of the act, the corporators met and organized the company, 64 L. R. A.

and passed a resolution to establish a cemetery on the ground designated in the act, containing 32 acres and 75 perches, "and for this purpose the capital stock of the said Chartiers Cemetery Company shall be \$8,000, divided into 160 shares of the par value of \$50 each." A committee was appointed to take subscriptions, and on May 14, 1862, the full amount of stock was subscribed by several persons, and the said stock was issued to J. L. Marshall and his associates in payment for the cemetery grounds. At successive meetings after that the stock was increased,—first to \$50,000, and later to \$150,000, in consideration of various improvements and expenditures made upon the ground.

The question, then, is, Was the original creation and issue of stock lawful, and, if so, were the subsequent increases lawful? The issue was made for the purpose of performing the original duty to establish a cemetery. It was necessary to acquire land in order to create the cemetery, and the corporators adopted the method of obtaining the land by issuing stock in payment for it. It is not denied that the corporation might have borrowed money for this purpose, and made a mortgage on the property to secure the payment of it, although no such power was expressly conferred by the charter. On the question whether capital stock might be issued for the same purpose where the charter has not specially authorized a capital stock, not a single authority is cited for or against in the paper books of either party. There is no doubt that this particular corporation did possess full corporate powers, and there is also no doubt that it was not only authorized, but expressly enjoined, to create a cemetery of not less than 30 acres in extent, and after that to lay it out into lots and plots, and roads and walks, and to do various other things necessary to its proper development as a cemetery. No method of raising money to acquire the land and do these various things was provided in the charter. The ordinary method in which such things are done is by the creation and issue of capital stock, and it may be argued with apparent reason that it is a necessary implication from the grant of corporate existence and powers that a right to issue stock is conferred. It was decided by this court in *Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75, that a corporation which, by its charter, is authorized to purchase in fee or for any less estate "all such lands, tenements, and hereditaments, and estate, real and personal, as shall be necessary and convenient for them in the prosecution of their works, and the same to sell and dispose of at their pleasure," has power to mortgage its real estate

to secure the payment of a debt. In that case there was no power to mortgage conferred by the charter. It is also established by very numerous authorities that corporate stock may be issued in payment for land and other property purchased by the corporation. The rule is thus stated in 1 Cook, Corp. Law, § 18: "An issue of stock for property is one which finds support, not only in the decisions, but in the daily transactions of corporations, and the law does not compel the corporation and the subscriber to go through the useless form of a payment by the corporation to the subscriber of the value of the property, and an immediate repayment of the same money by the subscriber to the corporation on his subscription." Numerous supporting authorities are cited in the notes.

But, while this may be true, it does not reach the present question. In those cases the right to issue stock under the authority of the charter was unquestioned, and it was only a matter of paying for the stock with the property transferred. In this case, however, the charter confers no power to issue any stock, and for such a company as this no such power is needed. It is remarkable that it is so difficult to find either text-book discussion of this subject or adjudicated cases. Whether a corporation without capital provided for in its charter may create and issue capital stock is certainly a fundamental and radical matter in corporation law. In 1 Cook, Corp. Law, § 279, it is said: "The capital stock of all incorporated companies is generally fixed by the charters, which give them an existence." Section 281: "In the absence of express authority from the state, a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt on the part of the corporation, either by the corporate officers or by the stockholders, to do so, is wholly illegal and void. . . . Where the attempted increase or reduction of the stock is not authorized by the charter, not even the unanimous assent and agreement of all the parties concerned will legalize it." For this last proposition the case of *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35, 37 L. J. Exch. N. S. 2, 17 L. T. N. S. 180, is cited, and an examination of that case shows that it fully supports the text. In support of the general proposition as expressed in § 281, *supra*, there are a number of citations, one of which is *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968, and another is *Sutherland v. Olcott*, 95 N. Y. 93. Of course, these matters of increase and decrease of capital stock are now regulated by the statute law of the several states, including our own. But the principle upon which the adjudged cases

proceed is that the capital stock which is fixed by the charter can neither be increased nor decreased by the officers or the stockholders. In 1 Morawetz, Priv. Corp. § 434, the doctrine is thus stated: "A corporation has no implied authority to alter the amount of its capital stock where the charter has definitely fixed the capital at a certain sum. The shares of a corporation can neither be increased nor diminished in number or in their nominal value, unless this be expressly authorized by the company's charter,"—citing many cases. This being the law, it is not easy to see how the two increases of capital stock made in the present case can be sustained. The first increase was made on May 4, 1868, from \$8,000, as originally established, to \$50,000, and it was done by a resolution passed at a special meeting of the stockholders. The next increase was made on October 5, 1874, from \$50,000 to \$150,000, also at a meeting of the stockholders. It follows, hence, that the increase of stock being void, all the elections held thereunder since that time are void and confer no authority upon the persons elected. This ruling would dispose of the present contention, but it is perhaps desirable that the original creation of the \$8,000 of capital stock should be considered. It is extremely difficult to understand, under the foregoing decisions, how any issue of capital stock by this company can be regarded as valid. The company was chartered to establish a cemetery. While a cemetery company is not necessarily a religious or charitable corporation, yet in many instances it is of that character, and perhaps as a rule this is so. Yet they may be established as merely private enterprises, and carried on for profit. But in either case, if the charter confers no right or power to create capital stock, it is difficult to understand how any right to create and issue such stock has any existence. If capital stock may neither be increased nor diminished without an express power to that effect, how can any stock be created or issued when there is no capital stock fixed by the charter, and no power is given to create it?

In 1 Cook, Corp. Law, § 9, the following definition of capital stock is given: "Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of corporate creditors." This definition is quoted and incorporated in the opinion of the supreme court of New Jersey in the case of *American Pig Iron Storage Co. v. State Board*, 56 N. J. L. 389, 29 Atl. 160. Mr. Justice Depue, delivering the opinion said: "Capital stock is

the sum fixed by the charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation." In the foregoing citations the necessity of fixing by the charter the amount of the capital stock in cases where the authority to issue capital stock is to be conferred is fully expressed. It is true, however, that corporations without capital stock may be created, and may have and exercise valid corporate authority, and of these there are very numerous instances. But the proposition remains that, where a right to issue any capital stock is claimed, the authority to make the issue must be found in the charter. In the case of *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280, much learning is exhibited in the opinion in the description of various kinds of corporations. Among other things, it is said: "On this subject of the capital stock of a corporation, the elementary treatises are comparatively barren. It is the aggregate amount of the funds of the corporators which are combined together, under a charter, for the attainment of some common object of public convenience or private utility. This amount is usually fixed in the act of incorporation, although we have seen in the statutes of 1823 one exception to this practice. It is thus limited in reference to the convenience of the intended corporators, and for the information and security of the public at large."

In the case of *Scovill v. Thayer*, 105 U. S. 148, 26 L. ed. 971, Mr. Justice Woods, delivering the opinion, and discussing the question of the right to increase or decrease the stock of a corporation, said: "As a general rule, corporations can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties. . . . And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void [citing a number of authorities]. In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was *ultra vires*. The increased stock itself was therefore void. It conferred on the holders no rights, and subjected them to no liabilities."

In the case of *Sutherland v. Olcott*, 95 N. Y. 100, the corporation having the right to increase its capital stock, which was fixed by the charter at \$300,000, from that sum to \$1,000,000, did increase it to \$600,000, which was held valid. It then undertook to decrease the amount to \$489,500, and its right to do this was the question in controversy.

In the opinion the court said: "This action of the company, if valid, was in legal effect a reduction of the capital stock from \$600,000 to \$489,500, and the inquiry is whether this reduction was authorized. The legal capital stock of a corporation is that fixed by its charter, or by authority derived from the legislature, a corporation has no implied authority to increase or diminish its capital stock. 'If,' said Parker, J., in *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23, 'a corporation is created with a fund limited by the act, it cannot enlarge or diminish that fund but by a license from the legislature; and, if the capital stock is parceled out into a fixed number of shares, this cannot be changed by the corporation'" (citing a number of authorities).

Now, if the doctrine of these cases (and there are many more of them) be true, and the act of increasing or decreasing the capital stock of a corporation without specific charter power to do so, is a void act, because it is *ultra vires*, how can it be true that a corporation may issue any capital stock without having specific legislative authority to do so? We cannot see. If it is *ultra vires* to increase, it is *ultra vires* to issue any stock where no power to do so is conferred by the charter. The power to create corporate capital stock is a legislative function, and in any given case, in order that such stock may have a legal existence, the function must be exercised. We are therefore of opinion that all the issues of capital stock made by the Chartiers Cemetery Company were *ultra vires* and void, and that the plaintiffs were and are not the legally constituted board of trustees of the said company.

The judgment of the court below is reversed, and judgment is now entered for the defendant, with costs, under the case stated.

A reargument having been granted, the following response thereto was handed down by Green, J., on May 30, 1900:

We were very willing to grant a rehearing in this case, as it is one of a quite exceptional character, and the leading question at issue is so barren of authority as to make it a case of first impression. We have heard with much interest the able arguments of counsel upon the second hearing, and have given a patient study of the case, but we are unable to see any sufficient reason for changing the conclusions expressed in the first opinion filed. For the reasons there stated, we still think that all the issues of capital stock were entirely illegal and void. As the claimants represented by the plaintiff (of the office of trustees) found their title to the office upon the votes of the holders of capital stock, and we hold that there

never was any valid issue of stock, we cannot consider them as having any title to the office claimed. But there can be no doubt, we think, that the administration of the affairs of the company during the long period succeeding the organization of the company must be regarded as entirely legal in all respects. The trustees were originally elected in strict conformity with the by-laws of the company, and their title was never questioned until in the present litigation. They were trustees *de facto*, and the acts done by them were within the line of their duty as such officials. The claim of title to the office by the defendant and those whom he represented we cannot consider as valid. The function of the original corporators was exhausted when their successors were designated by them, and we do not see how their original authority could be resuscitated by the action of two of their number after a delay of thirty-two years, and a constant acquiescence in the action of the original corporators in establishing their successors in office. We do not consider the title of the defendant and those he represents, to the office of trustee, as of any validity. In this situation, it seems to us that immediate steps should be taken to remedy this anomalous condition of affairs. The corporation is certainly the owner of the property, except such as has been sold to plot holders, and is devoid of a legally constituted managing body. As the private interests of certain parties have always been recognized in the way of a proportionate holding of the corporation, it seems to us that there ought to be no difficulty in effecting a reorganization under the general corporation law of the commonwealth. Of course, we cannot undertake to give advice as to what should be done, nor to be bound by any suggestions we now make; but it may be quite possible that in any such reorganization the proportionate interests of the several parties holding stock can be recognized as the basis upon which the ultimate division of interests may be founded. We make no decision upon the subject, but leave the whole matter open for future consideration. We make no change in the judgment as formerly entered. The judgment of the court below is reversed, and judgment is now entered for the defendant, with costs, under the case stated.

Mitchell, J., dissenting:

By the act of incorporation certain persons were declared and created to be a corporation under the name of the Chartiers Cemetery Company, and as such empowered, not only to carry into effect the objects of the company, but, also, "generally do all such other matters and things as are inci-

dent to a corporation," and specifically to establish a rural cemetery on Marshall's land. The power to issue stock was necessarily implied. No mode was provided for the acquisition of the land, and the natural and usual method "incident to a corporation" for that purpose was to obtain subscriptions for stock, and buy the land from the fund thus raised, or by the direct issue of stock to the landowner. It is said that the corporators might mortgage the land, and thus obtain the money. Perhaps so, and perhaps not. There is nothing to show whether they could or not. But, conceding that they might, they were not confined to this mode. The money had to be raised, and there is no evidence that the organizers were willing to contribute it in equal amounts. If not, they could only protect their proportionate interests by a partnership, which the statute did not contemplate, or by the creation of stock. Even if not the only, or even the best, way, it was a reasonable and effective way of performing the express duty laid on the corporation, and was therefore within the discretion necessarily implied by the command of the act. The power subsequently to increase the number of shares is not so clear, but it is not now material to consider.

But, secondly, even if the original issue of stock was *ultra vires*, the title of the complainants should be sustained until they are deprived of office in some regular and orderly way. They are the *de facto* and *de jure* board of trustees, to which the government of the affairs of the corporations is committed by the charter. Section 2 of the act of incorporation provides that "the government of the said company and the management and disposition of its affairs is hereby vested in a board of trustees who shall be elected at such times and in such manner as the said company shall by its rules and regulations direct." Under this section the corporators met and elected the predecessors of complainants by a vote in proportion to the funds each contributed to start the corporation. It was a perfectly lawful mode of election. Even if they had formed a partnership, a regulation that each should have a voice in the management in proportion to his capital invested would have been entirely valid. The act of incorporation commanded the creation of a board of trustees, but left the mode of election wholly to such rules and regulations as the company should establish. The company established the mode of election by stock vote, and, even if the stock was invalid and *ultra vires* as stock, it was a legitimate means of carrying out the regulation established by the company for the election of its trustees, and has been recognized and acted under as such for thir-

ty-five years. Under it the plaintiffs were duly elected in the same manner as all their predecessors had been, and their title now should be held clear and valid until their successors are elected in accordance with the practice, or the regulation itself is changed in some orderly and legal manner by the full board of the corporators, or their successors or representatives in the present corporation. The appellants are a

body of disgruntled stockholders, mere intruders into the government, self-elected by a disorderly and illegal proceeding, not authorized by any regulation of the corporation, but in direct violation of the only corporate regulation on the subject, and the uniform usage for thirty-five years.

Sterrett, Ch. J., and Fell, J., join in this dissent.

TENNESSEE SUPREME COURT.

STATE of Tennessee *ex rel.* Walker WELL-FORD, *Appt.*,

v.

J. J. WILLIAMS, Mayor of Memphis.

(.....Tenn.....)

1. A citizen and taxpayer of a municipal corporation is not deprived of the right to inspect its books by the facts that an ordinance requires the submission of the books to the inspection of certain officers or committees appointed by them, and that the grand jury has a right to make such inspection.
2. That one seeking to inspect the books of a municipal corporation is politically hostile to their custodian does not deprive him of the right of inspection, unless it is sought with the corrupt purpose of merely furthering such animosity.
3. That inspection of the books of a municipal corporation by a taxpayer will produce worry and inconvenience, and that the transactions shown by them are

numerous and involve vast amounts of money, are not sufficient grounds for denying the inspection.

4. Although the right of a taxpayer to examine the books of a municipal corporation is absolute, the court has discretion to refuse to enforce it by mandamus, unless a proper case for the exercise of that right is shown.

5. A citizen and taxpayer should be allowed by the court to make a general examination of the books of the municipal corporation when it is shown to be important to the public interests that such examination be made.

6. The right to make a general examination of the corporate books by a taxpayer of a municipal corporation should not be lightly granted, or permitted with unnecessary frequency; the occasion should be grave and important; and the persons seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court.

NORM.—Right of taxpayer to inspect books of municipality.

- I. What is a sufficient interest, 418.
- II. Necessity of a sufficient purpose.
 - a. In general, 419.
 - b. What is a sufficient purpose, 420.
- III. The right under statutes, 424.
- IV. Effect of statutory authority to inspect, vested in designated board, 425.
- V. Regulations as to manner of inspection, 426.

I. What is a sufficient interest.

In a number of decisions, while the right of taxpayers or rate payers to inspect municipal or parish records is not in question, the right of freemen, burgesses, corporators, citizens, inhabitants, or residents is discussed, thus being, in effect, relevant decisions as to a taxpayer's right, since the greater class includes the lesser.

Some cases, especially the earlier ones, would seem to indicate that nothing but residence within the municipality was necessary to give a right to inspect public records. Thus, in one early English case, *Herbert v. Ashburner*, 1 Wils. 297, apparently no restrictions are placed upon the right of inspection on the ground that any special interest in the applicant is necessary. In response to a contention that the applicant ought not to be allowed to

inspect the session books of the town, unless he could show that they contained information relating to the specific thing in question, the court said: "These are public books which everybody has a right to see," and ordered a rule absolute without hearing the other side.

So, being an inhabitant of the parish seems to be regarded as the only prerequisite to a right to inspect the records thereof, in *Rex v. Clapham*, 1 Wils. 305, where mandamus was granted ordering the old overseer of the poor to deliver the books of the poor's rate to the new overseer on the ground that they were public records, and that the overseer and church wardens for the time being ought to have the custody of them, so that all the parishioners might have access to them.

And in *Anonymous*, 2 Chitty, 290, it was held that a rule for an inhabitant of a parish to inspect parish books might be absolute in the first instance.

In *Ex parte Stafford*, 1 L. J. K. B. 41, it was declared that the freemen of a borough have an undoubted right, at all seasonable times, to have access to inspect all the charters and grants made to the borough.

And the sworn application of freeholders for a public highway was held, in *People ex rel. Palmer v. Vail*, 2 Cow. 623, to be a public document belonging in the town clerk's office, and which every inhabitant had a right to inspect.

According to the digest proposition in vol.

7. A writ of mandamus to enable a taxpayer to secure a general examination of the books of the municipal corporation should be allowed where a period of several years is to be covered, and, notwithstanding the collection of vast sums as taxes which are heavy and burdensome, and the borrowing of additional sums, and the opportunity to secure from the legislature the means of raising additional taxes, the mayor finds it necessary to call a meeting of taxpayers to devise means of paving and repairing streets in the city.

8. Pending judicial proceedings to obtain the privilege of making a general examination of the books of a municipal corporation cannot be thwarted by the appointment of a committee on the part of the custodian of the books, or his associates in authority, to make an examination in lieu of the one sought.

(June 29, 1908.)

4, Brightly's N. Y. Digest, 6500, it was held, in *People v. Flack*, Daily Reg. May 18, '86, that "the right of the public to have access to indices to records in the office of the clerk of the city and county of New York will be enforced by mandamus."

The case of *People ex rel. Henry v. Cornell*, 47 Barb. 329, very fully set out in the opinion in *STATE ex REL. WELLFORD V. WILLIAMS*, went so far in holding that a corporator had the right to a general inspection of the public record of the municipal corporation, even in the absence of any especial interest, as to be a strong authority in favor of a taxpayer's right to do so; but, as is also stated in the opinion above referred to, that decision was reversed without opinion, but by the general term of the supreme court in 35 How. Pr. 31, instead of by the court of appeals, as the opinion states.

A few late American cases go on the theory that a taxpayer, by virtue of his interest as such, has an absolute right to inspect the records of his municipality.

Thus, it was held, incidentally, in *McChesney v. People*, 178 Ill. 542, 53 N. E. 356, that a property owner had the right to inspect any public record or book in a county tax collector's office, and might enforce that right by appropriate proceedings.

And in *Barret v. Godshaw*, 12 Bush, 592, where it appeared that the charter of a city provided that all records, official proceedings, and papers of the mayor and general council and other officers under the charter should be deemed public records, the court held that the citizens and taxpayers were bound to take notice of the contents of those records.

In a dissenting opinion in *Payne v. Staunton* (W. Va.) 46 S. E. 927, it is said: "All that the applicants should be required to show is that they are citizens, taxpayers, and voters, and as such have an interest in the records of an election in which they participated, and have demanded, and been refused, the right to inspect the poll books of such election deposited with the clerk; and on such showing a mandamus should issue as a matter of course, unless the clerk shows that the purposes for which such inspection is desired are unlawful, scandalous, or for some other reason improper."

But, in order to be entitled to an inspection, petitioner must be a resident, for the right of a

A PPEAL by relator from a decree of the Chancery Court for Shelby County denying a writ of mandamus to compel respondent to permit relator to make a general examination of the books of the city of Memphis. *Reversed*.

The facts are stated in the opinion.

Messrs. Carroll, McKellar, & Bullington and Caruthers Ewing for appellant.

Mr. W. B. Henderson, for appellee:

Neither at common law nor by statute is the duty imposed upon the custodian of public records to allow continuing and permanent inspection and use of the books.

Bean v. People, 7 Colo. 200, 2 Pac. 909; *Webber v. Townley*, 43 Mich. 535, 38 Am. Rep. 213, 5 N. W. 971; *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236; 19 Am. & Eng.

rate payer or parishloneer to inspect does not extend outside of his own parish or municipality, and a rate payer outside of a parish has no interest sufficient to allow him to inspect the records thereof.

Thus, in *Queen v. Sewer Comrs.* 3 Q. B. 670, 3 Gale & D. 92, 11 L. J. Q. B. N. S. 231, 6 Jur. 1059, certain rate payers were allowed to examine all entries of rates and other matters relating to their own parish, but were not allowed to examine documents relating to matters outside.

And where a rate payer claimed that his premises were not within a certain parish, and therefore not liable to be rated therein, he was afterwards refused permission to inspect parish rate books, because he had disclaimed being a parishloneer, and notwithstanding the parish authorities had averred on record that he was a member of that parish. *Burrell v. Nicholson*, 3 Barn. & Ad. 649.

A rule to allow a freeman of a city, as such, to inspect corporation records in reference to a matter for which he was being sued by the city was discharged upon its appearing to the court that the applicant was not a freeman of that city when the cause of action arose. *Bristol v. Visger*, 8 Dowl. & R. 434.

II. Necessity of a sufficient purpose.

a. In general.

But most of the decisions, while going on the theory indicated in division I., that a taxpayer or parishloneer, by virtue of his interest as such, has a right to inspect municipal records, nevertheless turn on the sufficiency of the purpose for which the applicant shows that he desires the inspection, and therefore, as the court says in the opinion in *STATE ex REL. WELLFORD V. WILLIAMS*, "in theory the right of examination is absolute, but in practice it is at last only a matter of discretion."

The court stated in *Ex parte Briggs*, 1 El. & El. 881, 28 L. J. Q. B. N. S. 272, 7 Week. Rep. 445, that an unqualified right in every taxpayer to inspect parish accounts at any time, and know all that was going on, did not exist; that a parishloneer's right to inspect parish rate books was a mere private right, and that, in order to entitle him to a mandamus to inspect, he

Enc. Law. pp. 231-233; *Central Cross-Town R. Co. v. Twenty-third Street R. Co.* 53 How. Pr. 45; Morawetz, Priv. Corp. 2d ed. p. 473; *Reg. v. Mariquita Min. Co.* 1 El. & El. 289, 28 L. J. Q. B. N. S. 67, 5 Jur. N. S. 725, 7 Week. Rep. 98; *Com. ex rel. Sellers v. Phœnia Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115, 9 L. J. K. B. 146; *Birmingham, B. & T. Junction R. Co. v. White*, 1 Q. B. 282, 4 Perry & D. 649, 2 Eng. Ry. & C. Cas. 863, 10 L. J. Q. B. N. S. 121, 5 Jur. 800; *Imperial Gas Co. v. Clarke*, 7 Bing. 95, 4 Moore & P. 727, 9 L. J. C. P. 28; *Hoyt v. American Exch. Bank*, 1 Duer, 652; *Queen v. Grand Canal Co.* 1 Ir. L. Rep. 337; *Reg. v. London & St. K. Docks Co.* 44 L. J. Q. B. N. S. 4, 31 L. T. N. S. 588, 23 Week. Rep. 136.

If the relator moves for a peremptory writ

must show, besides his private right, some special grounds of a public nature.

The rule is stated in *State ex rel. Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219, to be that every person is entitled to the inspection of public documents, provided he shows the requisite interest therein.

In *Owens v. Woolridge*, 22 Pa. Co. Ct. 237, the court was of the opinion that, in view of the fact that several statutes expressly gave the right to examine particular records, the privilege of examining records did not exist in Pennsylvania in the absence of statute, unless the applicant had some particular, tangible interest in the records he wished to examine.

Therefore, the question really comes to what is a reason or purpose for examining municipal records sufficient to entitle a taxpayer to do so. The decisions upon this point are collected in subdivision II., b, following.

b. What is a sufficient purpose.

In England, by the common law, the right of inspection is very guardedly granted by the courts after a consideration of the purpose for which it is desired.

Thus, it has been denied when the inspection was desired for private, rather than public, purposes.

A parishioner was held to have no right to inspect parish books for the purpose of gaining information which might be useful to him in supporting his claim to an estate in the parish, and therefore the court refused a mandamus for that purpose, in *King v. Smallpiece*, 2 Chitty, 288.

The court refused to compel the vestry clerk to produce and permit copies of parish documents to be taken by an inhabitant of the parish who was defendant in a libel suit prosecuted against him by the vestry clerk, although the applicant contended that an inspection of the documents was absolutely necessary for his defense. But the court held that the vestry clerk could not be compelled to furnish evidence against himself; although, "if the papers had been wanted for the purpose of advancing any parochial right, the case would have been different." *May v. Gwynne*, 4 Barn. & Ald. 301, 23 Revised Rep. 273.

And in *Rex v. Osmond*, 4 L. J. K. B. 52, the 64 L. R. A.

upon the pleadings, this motion is equivalent to a demurrer to the action for not stating facts sufficient to constitute a defense.

Harris v. State, 96 Tenn. 513, 34 S. W. 1017; High, Extr. Legal Rem. §§ 521-523; *State ex rel. Stewart v. Marks*, 6 Lea, 12.

The writ of mandamus is not a writ of right, but lies within the discretion of the court, and should never be granted in doubtful cases.

State v. Commissioners, 1 Shannon's Code, 490; *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. 704; *Harris v. State*, 96 Tenn. 516, 34 S. W. 1017.

Neil, J., delivered the opinion of the court:

This was a proceeding instituted in the chancery court of Shelby county for a man-

privilege of inspecting vestry books was denied a parishioner who had appealed against the poor rate, on the ground that the inspection was not clearly shown to be desired for parochial purposes and those only.

So, in *Ex parte Briggs*, 1 El. & El. 881, 28 L. J. Q. B. N. S. 272, 7 Week. Rep. 445, a mandamus to allow a rate payer the privilege of inspecting church warden's accounts was denied because the affidavit did not clearly show that he desired the privilege bona fide in order to contest a particular church rate for the benefit of the public. The court stated that, had the applicant shown that a church rate was to be made in the parish; that he was liable to be rated to it; that, as such rated inhabitant, he wished to inspect the accounts in order to qualify himself for taking part in the proceedings at the vestry meeting at which the rate would be made; and that he had applied for leave to inspect for that purpose and been refused,—the court would have been bound to grant mandamus.

It was contended in *King v. Nottingham Justices*, 3 Ad. & El. 500, 5 Nev. & M. 160, 1 H. & W. 318, 4 L. J. Mag. Cas. N. S. 113, that a rate payer had the right to inspect the items of bills and charges to be defrayed out of the county rate for the town and county, for the purpose of contesting them; but the application was denied, partly on the ground that no proper demand had been made, but also for the reason that, if the principle and practice contended for were allowed, the rate payers would become auditors instead of the justices, and the latter would be stripped of their jurisdiction.

In *Cox v. Copping*, 5 Mod. 396, where an impropiator brought an action in ejectment against parishioners for a house which the parishioners claimed belonged to the parish, he was refused the privilege of inspecting parish books, because it was not a parochial right, but a title, which was in question; also because the production of the parish books would show the parishioner's defense.

While conceding that a burgess has a right to inspect the corporation books where his rights as a burgess are affected, it was held in *Stevens v. Berwick-upon-Tweed*, 4 Dowl. P. C. 277, 1 H. & W. 517, that an attorney who was suing the corporation for payment for services

damus upon the defendant, as mayor of the city of Memphis, to compel him to allow the relator to examine the corporation books of the said city of Memphis with an expert accountant. An alternative writ was issued by the chancellor, to which the defendant responded. Thereupon the relator demanded the peremptory writ on the pleadings as they then stood. The chancellor denied the relief sought, and complainant has appealed and assigned errors.

In order to fully understand the scope of the litigation, it will be necessary to set out the substance of the bill or petition, and of the defendant's response or answer to the alternative writ. Before doing this, in order to properly understand the legal effect of the allegations and averments in the pleadings referred to, it is necessary to state certain rules applicable thereto. In *Harris v.*

State, 96 Tenn. 496-513, 34 S. W. 1017, it is said: "The power to issue mandamus, and the practice under it, is to some extent regulated in this state by statute. Code 1858, §§ 3567 *et seq.*; *State ex rel. Stewart v. Marks*, 6 Lea, 12. By these provisions the return to the writ is made traversable, and the averments of the petition may be put in issue by a denial in the return or answer, in which event the case will be determined by the court, or tried by the jury on evidence. With these exceptions, the proceeding is one largely controlled by the rules of pleading established by the common law. . . . Among these rules, we think the following are well established: (1) Whenever it appears that 'the return fails to answer the important facts alleged in the petition, every intendment and presumption will be made against it.' High, *Extr. Legal*

rendered would not be allowed the right of inspection, although he was a burgess. The court says: "The mere accidental circumstance of his being a burgess cannot give him a right to inspect the corporation books for the purpose of sustaining his private claims. If such applications were allowed, the time of public officers would be perpetually occupied in consequence of them."

But a resident within a town, although not a corporator thereof, was held entitled to inspect the corporation books for the purpose of seeing what a law was which he was charged with having violated, in *Harrison v. Williams*, 4 Dowl. & R. 820.

And one of the justices, in *King v. St. Mary-le-Bone*, 5 Ad. & El. 278, 6 Nev. & M. 600, 6 L. J. Mag. Cas. N. S. 150, stated that, on the trial of a cause arising out of disputes in the parish, it was wrong to withhold the public rate books, etc., from any respectable person; but that he did not in this instance feel justified in granting a mandamus in view of local acts in which the right was not clear.

But where the applicant is involved in litigation in the interest or on behalf of the public, the right to inspect the necessary public records has been granted.

A parishioner who was prosecuting a suit to try the validity of a rate was held entitled to inspect the parish books without paying any fee to the person attending to exhibit the books in question, in *Newell v. Simpkin*, 6 Bing. 565, 4 Moore & P. 895, 8 L. J. C. P. 228. The court refers to a similar rule in *St. Martin's* in the Fields, *St. Giles-in-the-Fields*, and *St. Paul's*, *Covent Garden*, cases which do not seem to be otherwise reported.

The report of this case, as given in 4 Moore & P. 894, is somewhat different. The reporter there states that a rated parishioner who had sued church wardens for turning him out of a vestry room where the church wardens had met for the purpose of making a rate for the relief of the poor was permitted to inspect and take copies of certain minutes and proceedings entered in the parish books without paying any fees to the person producing them, it appearing that he could not safely proceed to trial without such inspection.

Freemen and burgesses of a corporation were granted a mandamus allowing them to inspect 64 L. R. A.

corporate deeds and documents when they were involved in a dispute with the corporation which was the successor of an old corporation under which they claimed their rights. *Reg. v. Beverly*, 8 Dowl. P. C. 140, 1 W. W. & H. 343.

But the right to inspect is limited to the necessary records.

In *King v. Babb*, 3 T. R. 582, a rule in the nature of quo warranto had been granted on the relation of some of the corporators of a town against one claiming to be mayor, to show by what authority he made the claim, and another rule was made, in the same cause, for inspecting "all the corporation" books. It was held, however, that allowing an inspection only of such as related to the election and office of mayor was a sufficient compliance with the order.

It was ordered in *Ex parte Stafford*, 1 L. J. K. B. 41, that, since the applicants were agreed as to what they desired to inspect, a mandamus should issue confined to those particular documents.

At one time, in *King v. Leicester*, 4 Barn. & C. 891, a more liberal rule was adopted in regard to what is a purpose sufficient to entitle the applicant to the privilege of inspection. In that case rate payers who desired to inspect and take copies of all records relative to rates imposed upon their parish by the justices of the borough, for the reason that, "upon due investigation, they doubted not, and believed, it would appear that the said justices had raised greater sums upon the inhabitants of the said borough than were necessary and warranted by law," were granted an absolute mandamus allowing them to inspect and take copies of the last two assessments made, orders for the expenditures of the same, and documents and proceedings relating thereto. But this decision met with criticism in a number of subsequent instances where the question arose. One of the justices, in *King v. St. Mary-le-Bone*, 5 Ad. & El. 278, 6 Nev. & M. 600, 6 L. J. Mag. Cas. N. S. 159, said that he doubted whether *King v. Leicester* was well decided, and the reporter states, in a note, that, upon a subsequent hearing on return to the mandamus, *King v. Leicester* was overruled. Upon its authority, counsel contended in *King v. Nottingham Justices*, 3 Ad. & El. 500, 5 Nev. & M. 180, 1 H. & W. 318, 4 L. J.

Rem. § 461. (2) That allegations not denied, nor confessed and avoided, are taken to be true. Merrill, *Mandamus*, § 274. (3) That, if the relator moves for a peremptory writ upon the pleadings, this motion is equivalent to a demurrer to the return for not stating facts sufficient to constitute a defense. High, *Extr. Legal Rem.* §§ 521, 523; *State ex rel. Stewart v. Marks*, 6 Lea, 12. With these principles in view, we shall now endeavor to ascertain the facts, as contained in the pleadings.

The petition contains the following allegations: That the relator is a resident citizen and taxpayer of the city of Memphis, and as such one of the incorporators of the city, which is a municipal corporation under and by virtue of chapter 11 of the Acts of 1879 and the acts amendatory thereof; that the defendant is the mayor and chief executive

of the said municipality; that as such mayor and chief executive he has the custody of the books of the said city, on which are kept the receipts and expenditures of the funds of the said city; that in the said receipts and expenditures the relator, as a taxpayer and citizen, has a direct interest; that some time before the petition was filed the relator, uninvited, attended a meeting of 200 invited citizens, called by the mayor, for the purpose of devising ways and means to assist the city administration to pave, repair, and "round up," more or less, the streets of the city, and, being interested in the material prosperity of the city, he afterwards attended the meeting of a committee of 15 appointed at the aforesaid meeting of citizens; that the relator, having the interest of a coporator and taxpayer (the financial condition of the city showing the necessity for

Mag. Cas. N. S. 113, that rate payers had the right to demand the inspection of items charged by the justices against the county, but the application was denied. In *King v. Staffordshire Justices*, 6 Ad. & El. 99, 1 Nev. & P. 260, 6 L. J. Mag. Cas. N. S. 85, the court said that the great authority attached to *King v. Leicester* induced the granting of an alternative *mandamus* in order to see what return would be made, and in order deliberately to revise the principles upon which that decision rested, with the result that it would not be supported by deciding the case at bar according to its doctrines. And further, the court declared that rate payers who had nothing more than a rational curiosity to gratify, or the ascertainment of facts useful to them in advancing some contemplated measures in regard to the regulation of their county's expenditures, had therefore merely an interest in the general subject which would furnish an equally good reason for inspecting the records of any other county; and that there was not that direct and tangible interest, which is necessary to bring them within the rule on which the court acts in granting inspection of public documents.

So, too, in *Queen v. Harrison*, 9 Q. B. 794, 2 New Sess. Cas. 490, 16 L. J. Mag. Cas. N. S. 33, 10 Jur. 981, where *King v. Leicester* was cited by counsel, a rate payer was denied a *mandamus* commanding overseers of the poor to permit an inspection of their appointment, when the ground for the inspection was a belief, merely, that the appointment was bad. The court said that it was only a fishing application made in the hope of finding out some defect, the existence of which was not suggested.

An American case, *Payne v. Staunton* (W. Va.) 46 S. E. 927, adheres to a similar doctrine. It appearing that the object of an attempt by certain citizens, taxpayers and voters, to obtain a *mandamus* allowing them to inspect poll books and ballots in a county clerk's office, was to know whether election officers had honestly and lawfully performed their duty, and for the purpose of instituting criminal proceedings against them if the disclosure of the facts would warrant it, the court declared that *mandamus* could not be made a "fishing writ;" also that it could not be had when no pecuniary interest was involved, or to gather evidence for a

criminal prosecution; and the relief demanded was refused. Two judges dissented.

But, in conflict with *Payne v. Staunton* (W. Va.) 46 S. E. 927, it was held, in *State ex rel. Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219, that an inhabitant and taxpayer of a city had such an interest in the proper observance of the provisions of the city charter for licensing saloons as to entitle him to the right to inspect the letters of recommendation filed with the collector of taxes, upon which liquor licenses to sell liquor were granted, when he was aiming at the accomplishment of a public purpose which the courts would allow him to prosecute in a suit instituted by him in the public behalf.

The writer of the dissenting opinion in *Payne v. Staunton* (W. Va.) 46 S. E. 927, *supra*, was of the opinion that the inspection of public records (in that case, poll books) for the purpose of the institution of a criminal suit was not an improper purpose, since it was for the benefit and for the interest of the public.

Another, and still more emphatic, authority in favor of the taxpayer's right to inspect, even when his purpose is not direct and tangible, but is for the purpose of examining into the management of the public affairs, and discovering, if possible, any dereliction in that regard, is *State ex rel. Colscott v. King*, 154 Ind. 621, 57 N. E. 535, where, many of the citizens and taxpayers of a county believing that there had been an unlawful conversion and use of the public funds, one of their number, in a representative capacity, went to the auditor's office for the purpose of inspecting the public records, and, upon being refused permission to do so, applied by petition for a *mandamus*, which petition was demurred to and the demurrer sustained; but that judgment however, was reversed on appeal. The court, in discussing the sufficiency of the grounds, or nature of the reason, upon which the taxpayer claimed a right to inspect the public documents, has this to say: "The various county officials, in a political sense, are considered as the agents of the people in managing and conducting the business of the county. These officials are commonly denominated—and properly so—"public servants," and are directly responsible to the people who select them for the honest and faithful discharge of the duties and powers with which, under the

the providing of additional means for the purposes aforesaid and the tax rate being already very high and very burdensome), thought that business men, in the conduct of their own affairs, ought to know the sources of the revenue of the city and the items of expenditure of that revenue, and thereupon the relator proposed to the said committee to provide for an examination of the books of the city, for the sole purpose of ascertaining the exact financial condition of the city, the sources from which it was received, and for what it had been paid out; that afterwards a subcommittee of 5 was appointed from the said committee of 15; that this subcommittee undertook to make such investigation as was practically of a superficial character, and, having called upon the defendant for such information as would enable the members thereof to have a con-

ception of the amount of revenue received, the sources from which it had been received, and the accounts to which it had been appropriated, the defendant, as mayor, furnished the committee with certain figures, which are exhibited with the bill and marked "A;" that the proposition of the relator for the examination of the city books by experts resulted in a declination by the chairman of the committee of 200 before referred to; and that thereupon the relator demanded of defendant the right to make an examination of the books, records, papers, and vouchers in his possession, claiming as a corporator and taxpayer in and of the city, the right to make a general inspection of the public records of the city, and to make copies of its public documents and records, under such rules and regulations as would insure their safety,—the relator stating at the time

law, they are invested. Under such conditions and circumstances, as they exist under the peculiar structure or genius of our government, it would certainly be a harsh interpretation of our laws, and one which would be, in our opinion, adverse to sound reason, to deny any taxpayer or citizen the right, subject to the reasonable rules and regulations previously mentioned, to inspect or examine the public records of his county in order to discover or ascertain whether the public officers had properly administered the funds of the county to which such taxpayer had been required to contribute. In fact there can be no sound reason advanced for depriving a citizen of this right, for it is evident that the exercise thereof, for the purpose in view in this case, will serve as a check upon dishonest public officials; and will in many respects conduce to the betterment of the public service."

State ex rel. Colscott v. Brockman, 154 Ind. 695, 57 N. E. 268, is a companion case to *State ex rel. Colscott v. King*, 154 Ind. 621, 57 N. E. 535, with identical facts, and decided along the lines laid down in the latter decision.

Thus, it must be admitted that in America, while the sufficiency of the taxpayer's interest in the records he desires to inspect is subject to the consideration of the court, which may, in its discretion, refuse an application for a mandamus giving him the right, nevertheless, the existence of a desire to obtain information for the purpose of ascertaining whether public officers have properly administered the public affairs, and, if they have not, for the purpose of correcting the abuses discovered, is, by several decisions, considered a reason sufficient, according to the spirit of our laws and Constitution, for the granting of judicial permission to inspect the necessary public records, subject, of course, to such regulations as will prevent any interruption or interference with the orderly course of business, or any mutilation or loss of the records or documents examined.

Poll books were held, in *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620, to belong to that class of public records which are open to inspection when the applicant who desires to inspect them shows that the purpose of the inspection is to vindicate some public or private right.

Following *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 624, it was held, in *State ex rel. Conran v. Williams*, 96 Mo. 13, 8 S. W. 771, that reg-

istration lists of voters were public records, and therefore subject to inspection for any proper purpose by any inhabitant of the corporation.

The English rule has some adherents in Pennsylvania.

The county marriage license docket was held, in 4 Pa. Dist. R. 162, to be a public record, and therefore open to the free inspection of a citizen and resident of the county for the purposes of publication, during business hours.

But in 4 Pa. Dist. R. 284, where the same question again arose, the court held that, in the absence of statute, the English rule is observed in Pennsylvania,—that only those persons who have a special interest in public records are entitled to an inspection of them; and the order of inspection prayed for was refused.

Subsequently, by the act of May 22, 1895, the Legislature provided that the marriage license docket should be kept open to public inspection.

In *Com. ex rel. Walton v. Bair*, 5 Pa. Dist. R. 489, the publisher of a newspaper was held entitled to inspect the records relating to liquor licenses, for the purpose of publishing the names of applicants for licenses, by virtue of the interest and right which he held in common with every other citizen. This holding, however, was made in view of a statute which directed the publication of lists of applicants for liquor licenses, and thus apparently invited the examination of such records by the public.

Com. ex rel. Biddle v. Walton, 6 Pa. Dist. R. 287, is based upon the authority of the decisions of other states. In this case mandamus was granted to compel the custodian thereof to permit inspection of all documents relating to a poll tax by a citizen and candidate for office. The court declares it to be settled law in America that every corporator or citizen of a municipality has the right, on all proper occasions, to inspect and copy its records, books, and documents; and that the right, which is not confined to such persons only as may have a special interest in the result of the examination, may be enforced by mandamus against any custodian who fails to give it recognition.

But it was held in *Owens v. Woolridge*, 22 Pa. Co. Ct. 237, that the publishers of a newspaper could not compel the right of inspection by mandamus for purposes of publication, although claiming the right on account of being citizens and taxpayers. The ground of the decision was

that the books would be examined with the least possible inconvenience to the mayor and to the other officers of the city government, and that he trusted that the examination might be made without any hard feelings between any officers of the city government and himself, but that this demand was ignored and refused, and treated with contempt and derision.

The petition then proceeds: "The relator is advised by counsel that the books of the city of Memphis are public records, and that as a corporator and taxpayer of said city of Memphis he has the right to inspect them, to make copies of them under such rules and restrictions as will preserve their safety; and he is entitled, to this end, to the benefit of agents and employees, and to the right of a general inspection. That the relator is informed and believes, and upon infor-

mation of a public character avers the fact to be, that the refusal to grant him the right he claims by the defendant is not based upon any abuse or inconvenience likely to arise by inspection, examination, and making note of the records, or any damage or loss that is likely to ensue by reason of such examination of the records, but is predicated wholly upon the assumed and unwarranted claim of the defendant that the examination sought by the relator and demanded as of right is predicated of political animosity, which the relator, says is ill-founded in fact; he claiming the right purely because of his interest as a corporator and taxpayer, and making the demands to the end that he may know that which he has the right to know,—the exact status financially of the corporation of which he is a member, and what has become of its funds."

that their petition disclosed no particular right or privilege existing in them peculiar to themselves independently of that which they held with the public at large; and the rule is stated to be that records, although public in their nature, are not open for inspection, except to those who have a special and definite interest in them. This case is distinguished by the court from *Com. ex rel. Biddle v. Walton*, 6 Pa. Dist. R. 287, *supra*, on the ground that in the latter decision the applicant showed a direct and personal interest in the records he sought to inspect.

Owens v. Woolridge is the last case in which the question has arisen in Pennsylvania so far as discovered.

The whole subject of inspection of public documents in England is, since 1892, almost entirely regulated by statute, as shown in III., *infra*.

III. The right under statutes.

A few decisions are reported under statutes giving the right of inspection to rate, or tax, payers, or corporators, of specified records or documents.

Thus, it was provided by 17 Geo. II. chap. 28, § 1, that any person assessed for poor rates should be allowed to inspect and take copies from the rate book upon payment of a specified sum.

A rate payer was given permission to inspect poor-rate accounts under this statute, in *Rex v. Great Farlington*, 9 Barn. & C. 541, 8 L. J. Mag. Cas. 3, although they had been examined and passed. The court said: "We have no doubt that the party is entitled to inspect the books at a reasonable time. Assuming that he has no right to appeal, or that the time for appeal is gone by, he may have other good reason for inspecting the books. He has a right to see what has been done."

But in *Rex v. Clear*, 4 Barn. & C. 899, 7 Dowl. & R. 393, 4 L. J. K. B. 53, 28 Revised Rep. 498, a rate payer who had applied to inspect church warden's account under the same statute was refused permission to do so because he did not state the reason for which he wished to make the inspection.

Where a statute (32 Geo. III. chap. 58) provided that the officer having the custody of corporation records must permit any member of 64 L. R. A.

the corporation, upon payment of a fee, to inspect the records of the swearing in of freemen, or be liable to a penalty, it was held, in *Davies v. Humphreys*, 3 Maule & S. 223, that the town clerk did not render himself liable to a penalty when he offered to permit inspection of the entries of admission and swearing in of burgesses, but refused to permit inspection of the common-council book, in which orders therefor were made.

But, according to *Schuldham v. Bunniss*, 1 Cowp. 192, candidates, agents, or any two freemen empowered by 3 Geo. III. chap. 15, to inspect the entries of freemen entitled to vote, are entitled to inspect all books, papers, etc., in which the admissions of freemen are entered.

In *King v. St. Mary-le-Bone*, 5 Ad. & El. 276, 6 Nev. & M. 600, 6 L. J. Mag. Cas. N. S. 159, a rate payer claimed the right to inspect rate books ordered by a local statute to be kept for the parish, containing the names of persons assessed, the amount, and the arrears against each outstanding at the end of the year; but the statute, however, did not expressly give the right of inspection. Under another statute other books were kept, containing an account of all the money received and disbursed for parochial purposes, and by this statute it was expressly provided that any person rated might inspect and take copies from said books. By virtue of this latter statute, which, it was claimed, provided for and included the keeping of such a rate book as was compelled to be kept by the act first above referred to, the right of inspection was claimed; but the court, while seemingly of the opinion that ordinarily a rate payer would have a right of inspection of the parish rate books, held that, under the circumstances, the parish having chosen to obtain a peculiar act of Parliament which did not expressly allow inspection, there was no power in the court to interfere in the presence of the statutes and grant mandamus.

In considering a return to a mandamus previously granted to show cause why an inspection should not be allowed, it was held, in *King v. Staffordshire Justices*, 6 Ad. & El. 99, 1 Nev. & P. 260, 6 L. J. Mag. Cas. N. S. 65, that rate payers could not inspect and copy bills of charges of county officers, which, having been paid by the treasurer under orders of the justices, had become items in his accounts which

The prayer of the bill was for an alternative mandamus and for ultimate relief in accord with the substance thereof. An alternative writ was issued in accordance with the prayer of the petition or bill, and thereupon the defendant filed his answer.

The answer does not deny that the relator was, at the time the petition was filed, a resident citizen and taxpayer of the city of Memphis; that he attended the meeting of citizens mentioned in the petition; that this meeting was called for the purpose stated; that the relator also attended the meeting of the subcommittee of 15, and that he proposed to the committee to provide for an examination of the books; that the subcommittee of 5 was appointed as stated, and that the defendant furnished to that committee the figures mentioned in the petition; that the relator's request for an exam-

ination of the city's books by experts was declined by the chairman of the committee of 200; and that thereupon he demanded of the defendant the right to make an examination of the books, records, papers, and vouchers of the city, claiming as a corporation and taxpayer the right to make a general inspection of the public records of the city, and to make copies of its public documents, under such rules and regulations as would insure their safety, and that this demand was refused by him. These facts, therefore, must be treated as established.

In response to the allegation that he was the custodian of the books and papers referred to, the answer contains the following: "He denies that he is the custodian of the city's books as set forth in complainant's bill of complaint. His connection with or power over said books is controlled by or-

had been passed by orders of sessions, and, the treasurer having been discharged, had been deposited by the clerk of the peace among the county records, and an abstract thereof had been published in pursuance of statute. One of the grounds of this decision was that the statute providing for the course of proceedings did not in express terms provide for an inspection by rate payers.

Under consolidation act (Laws 1882, chap. 410), § 50, providing that all books or papers in any department of the city government of New York, except the police department, should at all times be open to the inspection of any taxpayer, subject to reasonable rules and regulations, a petitioner showing by his petition that he was a citizen and taxpayer of that city, and had been refused permission to inspect, for a proper purpose, records of death in the vital statistics of the health bureau, by the clerk in charge, was granted an order permitting him to inspect the records specified. *Neville v. Board of Health*, 29 Abb. N. C. 59, 21 N. Y. Supp. 574.

Where, by statute, it was provided that the officers of any county, city, or town records should furnish proper facilities for the examination of the records upon file in their offices, to all persons having occasion to make examination of them for any proper purpose, it was declared, in *Burton v. Tuite*, 78 Mich. 363, 7 L. R. A. 73, 44 N. W. 282, to be the intent of the legislature to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of public records as the necessity of their business might require.

Even when the right is conferred by statute the application will be denied if not made in good faith.

Thus, in *Reg. v. Wimbledon*, 77 L. T. N. S. 599, a rate payer who applied for a mandamus to compel a burial board to allow his attorneys to inspect its books, under a statute allowing the privilege to rate payers, was refused his request, it appearing that the attorneys were in the employ of other parties who were not rate payers, and for whom the inspection was in reality desired.

The English municipal corporation act of 1882 provides, in reference to the inspection of public documents, that the minutes of proceedings of the council shall be open to the inspection of a burgess upon payment of a fee of 1 64 L. R. A.

shilling, and that a burgess may make a copy thereof or take abstracts therefrom. The treasurer's accounts are open only to the inspection of the city council, members of which may make copies thereof or take abstracts therefrom; but the abstracts of the treasurer's accounts, made by the city council, are open to the inspection of all rate payers of the borough, and copies thereof may be had by them upon payment of a reasonable fee. By the same act a burgess is defined to be one of full age, in occupation of any qualifying property in the borough, who has been rated according to such property for all poor rates for the parish, and has paid the same, etc.

IV. *Effect of statutory authority to inspect, vested in designated board.*

It was contended in *State ex rel. Colscott v. King*, 154 Ind. 321, 57 N. E. 535, that since a statute provided that the county treasurer should at all times keep his office and books subject to the inspection of the board of county commissioners, the right and duty, therefore, of the county commissioners must be held to be an exclusive one, debarring any citizen or taxpayer from that right; but the court held the contention to be of no force,—especially in view of another statute providing that "all the books, accounts, vouchers, papers, and documents, touching the business or property of the county, shall be carefully kept by the auditor, and open to the inspection of any person."

This bears out the holding of the court in *STATE EX REL. WELLFORD V. WILLIAMS*, that the existence of an ordinance requiring the submission of the municipal records to the inspection of the mayor, or members of the legislative council, and providing that the grand jury has the right to make such an inspection, is not exclusive, and does not thereby deprive a citizen and taxpayer of the right of inspection.

But in *Owens v. Woolridge*, 22 Pa. Co. Ct. 237, it appearing that provision had been made by statute for the investigation, annually, of the official conduct of county commissioners, and the settlement of their accounts by the county auditors, to whom all papers, records, and vouchers were directed to be exposed,—from whose settlement, ordered to be published annually, the taxpayers were given the right of

dinance, which provides as follows: "The mayor shall have power to inspect such of the books, papers, and records of the officers of the city as may, in his opinion, be necessary to enable him to discharge the duties imposed upon him, and may call upon all of the officers of the city to furnish him in writing with any information connected with the respective offices." Respondent states that under the legislative enactment creating the city of Memphis, and the acts amendatory thereof, the government of the said city is vested in a board of fire and police commissioners, a board of public works, and a legislative council. "The entire government of the city of Memphis, under and by virtue of the charter of the taxing district of Shelby county and the amendments thereto, is lodged in said two boards and legislative council and such agents as they and the mayor may appoint. The custody and the control of all of the property of the city, its books, and cash funds are under the control and supervision of said boards and legislative council, and county trustee of Shelby county; he being the tax collector of the city. Respondent further states that, under the legislative enactments creating the city of Memphis and the ordinances thereof, the custody of all the city books is vested in the secretary and bookkeepers of the various city departments, the county trustee, and a general secretary of the city government, who do not hold them for, or subject to, the orders of the mayor, but as the

officers and representatives of the board of fire and police commissioners and the board of public works and the legislative council of the city of Memphis, and subject to such duties with regard to the same as are imposed upon them by law. Respondent has not the right, under and by virtue of the laws and ordinances of the city of Memphis, to grant the inspection of the books demanded by complainant in his bill."

In an amended answer he adds concerning the custody of the books as follows: "Respondent does not have the charge or control of the books of the city, as he has already explained; they being in the possession and control of W. B. Armour, the secretary of the city, and other secretaries and bookkeepers, who are under heavy bond for the correct and honest keeping of the books, their custody, preservation of papers, etc." The matters here referred to are partly matters of law and partly matters of fact, and the question as to the defendant's right of custody to the papers and records referred to will have to be determined later by the language of the charter, taken in connection with the ordinance above referred to and the facts above stated.

As to the refusal on his part to allow the relator to make the extended examination he demanded the opportunity of making, while not denying that he had so refused, he answered, further, that he had never refused to relator, as a citizen of Memphis, "the right personally to inspect the

appeal.—It was held that no right existed to have the minute books and other records of the commissioners kept open for public inspection prior to the annual settlement by the county auditors.

V. Regulations as to manner of inspection.

It was contended in *State ex rel. Colscott v. King*, 154 Ind. 621, 57 N. E. 535, that the examination sought to be obtained by a taxpayer was incompatible with public policy, inasmuch as it might subject the public records to loss and mutilation, and interfere with the duties of the office, and consume the time of public officials without compensation; but the legislative intention to recognize the right of any person to inspect the public records in the county auditor's office was held to be plainly indicated by a statute providing that "all the books, accounts, vouchers, papers, and documents, touching the business or property of the county, shall be carefully kept by the auditor, and open to the inspection of any person;" although the court said that, of course, this right of inspection was not to be viewed as one wholly unqualified or free from all restrictions, but must be so accepted and exercised by the inspector as not materially to interrupt or interfere with the officer in the discharge of his official duties; and that it was the right and duty of the latter to make and enforce such reasonable rules and regulations as would prevent the mutilation or loss of the records or documents.

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The court remarks, in *Com. ex rel. Biddle v. Walton*, 6 Pa. Dist. R. 287, that the right of inspection of the public records of a city, by the citizens thereof, must be exercised under such regulations as are reasonably necessary for the safety of the records sought to be inspected, and in such manner and at such times as not to interfere with the business of the office where they are stored.

The privilege of custodians of public records to make and enforce proper regulations consistent with the public right of inspection is recognized in *Burton v. Tuite*, 78 Mich. 363, 7 L. R. A. 73, 44 N. W. 282.

It is stated, *arguendo*, in *Cormack v. Wolcott*, 37 Kan. 384, 15 Pac. 245, that "the right to inspect must, of necessity, have some restrictions, and must be exercised under such rules as the register may fairly impose, that will tend to the safety and preservation of his trust."

It was declared in *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620, that courts will, by mandamus, compel the inspection of public records on condition that the inspection be made under such reasonable rules and regulations as the court or officer having them in charge may impose.

The right of the court granting the mandamus, to regulate the manner of the inspection by orders from time to time, is declared in the opinion in *STATE EX REL. WELLFORD v. WILLIAMS*.

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books of the city in any reasonable manner, which this respondent has never denied to any citizen, but has at all times been ready to concede and accord [this] to all." We construe this to mean that he has not denied the right to make an examination for any special or particular matter. But, taking this in connection with other parts of the answer, we infer that the defendant did not consider as reasonable the demand made by the relator for a general examination, such as is claimed in the petition, and that the demand for such examination he did refuse.

Upon the subject of the motive and animus of the relator, after referring to the proposition for an examination made by the relator to the committee called by defendant, the answer proceeds: "Respondent states that the complainant is very hostile politically to him, and to the present city administration, and he believes that the design of the said proposition, made at the time it was, or the effect of it, was, or would be, not to promote and aid, but rather to impede and thwart, the objects and purposes had in view when said citizens were invited to meet to consider the subject of streets. Respondent, under the circumstances, regarded the proposition of complainant as an intended obstacle to what he was desiring to accomplish for the good of the city of Memphis, and did not accede to the demand."

After setting out the fact that he had addressed a letter to certain well-known gentlemen in Memphis, asking them to consent to act as a committee to examine the books of the city, and that, upon their expressing a willingness to act, they had been appointed for that purpose and to perform that duty by the legislative council of the city of Memphis, the answer set forth the following correspondence that passed between the chairman of that committee, Mr. A. S. Caldwell, and the solicitors of the relator, as indicating and throwing light upon the motive and purposes of the relator in demanding the examination. The first letter is as follows:

Memphis, Tenn., Feb. 11, 1903.

Carroll, McKellar, & Bullington and Caruthers Ewing,

Attorneys for W. L. Wellford.

Dear Sirs:—

I am instructed by the committee who have accepted Mayor Williams's invitation to supervise the examination of the city's books to address this communication to you and to make the same public. We call your attention to the letter of the mayor, dated February 10, 1903, published in the daily papers, which conferred upon us full author-

ity to make this examination without any limitations whatever, and with the power to increase our membership. We accepted the mayor's invitation because we believed this work was a public duty we should not shirk. We desire the investigation to be made in a thorough and comprehensive manner, and under such supervision that the report, when made, will command the respect and confidence of the whole community. We believe that this can best be accomplished with the co-operation of your client, and therefore suggest that all legal proceedings be dismissed, and that you select five prominent citizens, irrespective of their business occupations, and we will appoint them members of our committee. If desirable to further increase the committee, the new committee of ten may do so. If this proposal is accepted by you, it will not be necessary for Mr. Wellford, or those interested with him, to contribute any money toward the examination. Our sole object in making this proposal is a sincere desire to obtain your co-operation, to the end that only one examination shall be made, and that by a committee representing all of the citizens of Memphis. Will you kindly let me hear from you by 11 o'clock tomorrow?

By order of committee.

Albert S. Caldwell, Chairman.

The reply to this is set forth in the answer as follows:

Memphis, Tenn., Feb. 11, 1903.

Mr. A. S. Caldwell,
City.

Dear Sir:—

Referring to your call on yesterday, when you requested that Mr. Wellford select five more members to be added to your committee, and let the increased committee of ten select accountants and examine the books of the city, we wish to make the following suggestion in lieu thereof: Mr. Wellford has put up his money and can close his contract at any time with accountants to examine the books. We suppose that your committee has the funds and can do likewise. Why not, then, simply let the accountants employed by your committee and those employed by Mr. Wellford get to work on the books and examine them? In this way there will certainly be an examination of the books, concerning which no one can complain, and in which examination no one can be injured. We submitted the matter to our client, Mr. Wellford, who directs us to say that, the mayor having assumed such a hostile attitude toward him, he is now, in justice and fairness to himself, unwilling to take part in any examination of the city books unless he has the legal right to do so. Mr. Wellford directs us to say to your commit-

tee that we shall be glad to meet you in conference at any time.

Very truly yours,
Carroll, McKellar, & Bullington.
Caruthers Ewing.

The answer further avers that, prior to the reception of this letter from the attorneys of Mr. Wellford, the aforesaid Mr. Albert S. Caldwell, as chairman of the committee of five, had addressed another communication to the said attorneys, and in reply thereto received the following:

Memphis, Tenn., Feby. 12th, 1903.
Mr. A. S. Caldwell,
Chairman, City.

Dear Sir:—

After conferring with our client, Mr. Walker L. Wellford, we have concluded to accept for him your proposition that we select five prominent citizens, who, with the five gentlemen selected by the mayor, shall constitute a committee of investigation of the city's books and affairs, subject, however, to the following express conditions: The scope of the investigation to be conducted shall embrace the following:

(1) A thorough and complete examination of all books, contracts, vouchers, and other documents in any way bearing on the conduct of the city's affairs during Mayor Williams's administration. The committee to be aided by such reputable expert accountants and other agents and employees as may be necessary, who shall be named by the five citizens selected by us.

(2) A searching and exhaustive investigation, with a view of being able to report definitely as to: (1) The disposition of all taxes and revenues collected by the city. (2) The amount collected, and the methods employed in collecting money, from gamblers and other violators of the law, and the disposition made of same. (3) Whether all persons appearing on the city's pay rolls rendered services to the city. (4) Whether improper influences have been brought to bear on any member of the city council for the purpose of securing franchises or other concessions; if so, specify same. (5) Whether relations between members of the city council and corporations granted franchises or concessions have been entirely proper and legitimate. (6) Whether money has been borrowed, or direct or indirect benefits of any kind have been received by members of the city council, from such corporations or individuals granted franchises or privileges. (7) Whether any city official has been or is interested, directly or indirectly, in contracts awarded by the city for paving or other purposes. (8) Whether mayor or other member of the city council has used his position for personal profit. (9) The relation of the mayor or any member of the city council, directly or indirectly, to gamblers, those selling liquors without license, and those who are permitted to carry on their business, though under the ban of the law. (10) Whether the city has received adequate compensation for its franchises, and whether it has received materials, services, etc., on reasonably fair terms, or whether considerations other than those of the best interests of the city have entered into such matters. (11) Whether the affairs of the city during Mayor Williams's administration have been conducted in an honest, economical, and businesslike manner, or otherwise. (12) Whether the contracts, purchases, or sales made by the city during the present administration have been made in accordance with the law, after proper advertising, or whether any of such contracts, purchases, or sales have been made privately, or in any other way in violation of the law.

(3) That every member of the committee shall bind himself to adopt such means and to employ such agencies as may be necessary to conduct a thorough and earnest investigation in accordance with this agreement, and to this end that any witnesses whose names may be suggested by three or more of the committee shall be summoned, and every member of the committee shall demand that said witness shall answer any and all questions that may be propounded by the committee bearing on the subjects of inquiry herein set forth, and a refusal to answer shall call forth the censure of the entire committee. That the money provided for the examination shall be used by the committee for the above purposes. That the chairman of the organized committee of ten shall be named by the five gentlemen selected by us.

Having stated that you desire the investigation to be made in a thorough and comprehensive manner, and under such supervision that the report, when made, will command the respect and confidence of the whole community, we feel assured that you will accept the above conditions, by which alone, in our opinion, this much desired result can be achieved. On receiving the unanimous approval of these terms, we will at once select the five gentlemen whom we wish to co-operate with the five appointed by the mayor, all of whom can then meet, organize, and proceed to business.

Very truly yours,
[Signed] Carroll, McKellar, & Bullington.
Caruthers Ewing.

To this letter the committee replied as follows:

Memphis, Tenn., Feby. 12th, 1903.
Messrs. Carroll, McKellar, & Bullington,
and Caruthers Ewing,
Attorneys for Walker L. Wellford.

Dear Sirs:—

Your letter of Feby. 12th has been referred to my committee, and I am instructed to reply as follows: Your proposals that we shall have no voice in the selection of accountants and other agents and employees connected with the investigation, and that the chairman of the reorganized committee shall be selected by you, reflects such want of confidence in us that we can see but little hope for useful and harmonious action along the lines you suggest. We are still of the opinion that the investigation should be impartial, and, as far as possible, free from public criticism; and to evidence our entire disinterestedness we now propose that you and we jointly request Chancellor Heiskell to select a committee of five or ten, as his judgment may seem best, to conduct this investigation. If you agree in this, we will join you in an immediate request to the chancellor to name this new committee, and upon its appointment we will tender to the city council our resignation, with a request that they appoint the chancellor's committee in our stead. Kindly give me an answer as early to-morrow as possible.

Sincerely yours,

[Signed] Albert S. Caldwell,
Chairman.

The answer avers: "Thus closed the repeated attempts of the city government and a committee of five to bring about the representation of all conflicting interests in an examination which should have been satisfactory to every citizen in the entire city of Memphis."

With respect to the selection of the committee whose chairman conducted the foregoing correspondence with the attorneys of the relator, the answer contains the following: "Respondent further states that, as complainant persisted in insisting on an investigation of the city's books by himself or others designated by him, without pursuing the course prescribed and authorized by law, this respondent, in order to satisfy any reasonable demands of the complainant, or the desires of any other citizens, addressed a communication to Messrs. M. S. Buckingham, J. A. Omberg, James Nathan, C. W. Schulte, and A. S. Caldwell, requesting that they take charge of the matter of the investigation of the city's books, and to have them thoroughly examined by bonded expert accountants. These gentlemen agreed to serve in the matter. The complainant objected to this, and was himself determined to have a hand in such examination. Re- 64 L. R. A.

spondent states that the above five named gentlemen are citizens of Memphis, of the very highest character and standing in the community, socially and commercially, and are men of spotless reputation for fairness, honor, and integrity. Not one of them will suffer if a comparison is made between him and the complainant. Any work which they may agree to undertake will be honestly done, and the result would entirely satisfy the public at large."

The answer then sets out the correspondence between the gentlemen referred to and the defendant, Williams, the substance of which was an offer to appoint them a committee to make an examination and their acceptance. The answer then sets out a communication from the mayor to the legislative council, asking that body to ratify his action in appointing the committee, and a resolution of the council making such ratification of the appointment and organization of the committee for the purpose of conducting a fair, impartial, and thorough examination of the books of the city of Memphis by such means and in such manner as they may decide on, and appropriating \$5,000 for the purpose.

The amended answer contains the following upon the same subject: "Respondent states that, since the filing of the answer on yesterday, February 18, 1903, the said committee reported to the board of police and fire commissioners that they had selected to do the said work the American Audit Company of New York, which is an institution of as high standing, character, and integrity as any in America; and the board of fire and police commissioners approved of said selection and recommendation, and placed said audit company immediately in charge of the books, papers, and vouchers of the city for the purpose indicated, and it is in charge and control of the same, in pursuance of the authority given said committee by said city council. Respondent submits that there should be no interference with the said work by either the complainant, respondent, or this honorable court. While respondent denies the right of the complainant to make such an examination as he had demanded of the books of the city through any agent he may appoint, and while respondent does not have the control of said books, yet so far as he is concerned, or is permitted to express his views, he states that he is perfectly willing that the complainant, Wellford, should select, and that the court should appoint, a competent bonded expert accountant to examine, check over, and verify the work of said American Audit Company, and he would be glad to have this done. Respondent believes that the legislative council of the city would

not object to this, although he has no authority to speak for them. The matter, however, is entirely in charge of the aforesaid committee of five, and respondent cannot interfere with them, nor in any way speak for them; but he believes from their high character, impartiality, and disinterestedness, that they would accede to any reasonable request made of them in the matter, to the end that the result shall be satisfactory."

The answer contains the following as further reasons why the relator has not a right to enforce a personal examination of the city's books on his part: "In addition to the lack of control of said books as already stated, respondent states that it is provided by the ordinance of the city of Memphis how an examination of the books shall be made, and who has the right and authority to grant the same. The ordinance controlling this matter was passed as early as the year 1879, in the month of February, shortly after the city of Memphis under its present form of government was created, and years before this respondent held any official position in the city government. The ordinance is as follows: 'Every officer or agent of the city shall at all times, when requested, submit his books and official papers to the inspection of the mayor, or any member of the legislative council, or to any person or committee appointed or authorized by the legislative council to examine the same.' City Digest (Watkin's ed.) p. 168. Respondent avers that by this ordinance the mayor or any member of the legislative council may inspect the books, and that the legislative council of the city is vested with the sole and exclusive authority to determine when, how, and by whom examinations shall be made of the papers, books, and records of the city of Memphis; and therefore your respondent denies the right of the complainant to inspect, or to make copies of the records from, the books of the city of Memphis, and this honorable court is without authority of law to grant or decree the same. Respondent would aver that it would cause a great deal of confusion, worry, and much inconvenience to the business of the city of Memphis, and to the various officers of the said city and other employees, to allow any and every one, at their own whim and desire, to make a continuous examination of the books, vouchers, and papers of the city, as the various officers thereof and their deputies would be required to keep a close and careful supervision over any and all examinations of the books and vouchers constituting the public records of the city of Memphis. They involve transactions covering a period of five years, and many millions of dollars, and it would take at least five or six months to make a complete and thorough in-

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vestigation of all of the affairs of the said city, during which period much valuable time would be lost by its employees and officers, public business would be interfered with, and the establishment of such a right would cause great damage to the public service, and would place within the power of the political enemies of the city administration, or any person, upon the least pretext and slightest suspicion, to demand and inaugurate examinations of the city books, which examinations would impede the public service and impair the usefulness of the various departments of the city. With such possibilities confronting it, the city of Memphis, as set forth herein, in the year 1879, passed the ordinance hereinbefore referred to, in order to provide and regulate such an examination as this complainant is now desiring at the hands of this honorable court. Respondent further states that, in addition to the said authority for and mode of examining the city books, under the law and ordinance aforesaid, the power to examine the books of all officials, state, county, and municipal, is vested by the law in the grand jury of Shelby county, which body has full power in the premises, not only to inspect and examine the papers, books, and records of the city officials, but also to summon witnesses and interrogate them, and examine and report upon the condition of the records of the city, and any wrongdoing or delinquency of this respondent, or any other official of the city of Memphis. Respondent submits that, under the foregoing provisions of the law, the complainant has no right to the inspection of the city records, as is claimed by him in his bill, in person and by his agents and employees, but that the grand jury of the county is the body designated by the law to perform this public service, and that it is their province and duty to act in the premises; and if they fail in this regard, or if any citizen or committee desire an investigation of the books of any city official, the law prescribes that the legislative council, upon proper application to it, may have this done."

It was stated in the beginning of this opinion that the relator, upon the coming in of the answer to the alternative writ, had made demand for the peremptory writ. As a matter of fact, while this was, in substance, what was done, the form of the proceeding was different. The decree of the court below recites that the cause has been specially set down for hearing by the complainant, or petitioner, on the bill or petition and the answer of the defendant, and was so heard. The effect of such an order would be, under our chancery rule, to treat every fact properly set out and averred in the answer as proved and as true. So the

same result is reached as if the petitioner had formally demanded the peremptory writ, upon the coming in of the aforesaid answer to the alternative writ; the latter act, as already stated, being equivalent to a demurrer to the said answer or return. It results that we must treat every averment of fact in the answer, for the purposes of the present hearing, as true, and, after consideration thereof, either grant or deny the peremptory writ.

Turning to the legal questions involved, we shall first consider whether the relator, as one of the corporators of the municipality, has the right to make the general examination he asks for in the petition. Several authorities have been cited to us by the counsel for the respective parties.

For the petitioner we are cited to *Herbert v. Ashburner*, 1 Wils. 297; *King v. Babb*, 3 T. R. 582; *Rea v. Great Faringdon*, 9 Barn. & C. 541, 8 L. J. M. C. 1, and other authorities which will be presently stated.

In *Herbert v. Ashburner* there was a rule made to show cause why the defendant should not have the liberty of inspecting the books of the session of the corporation of Kindale. It was objected that the party was not entitled to see the books, unless he could show to the court by affidavit that they contained matters relating to the thing in question, which was whether certain park lands were within the town or corporation of Kindale. Upon this matter the court said: "These are public books which everybody has the right to see." The rule was thereupon made absolute, without more.

In *King v. Babb*, when a rule had been granted for an information in the nature of a quo warranto against A. to show by what authority he claimed to be mayor of G., on the relation of some of the corporators, and another rule in that cause for inspecting all the corporation books, papers, etc., directed to the town clerk, an inspection of such only as related to the election and office of mayor was held to be a sufficient compliance with the latter rule, so as to protect the town clerk from an attachment as for a contempt of the court; it appearing that he had acted bona fide. But Lord Kenyon, in that case, in rendering judgment, assumed "that in certain cases the members of the corporation may be permitted to inspect all papers relating to the corporation."

In *Rea v. Great Faringdon*, 9 Barn. & C. 541, 8 L. J. M. C. 1, it was held that a rated parishioner had a right to inspect the accounts of the expenditure of the parish moneys, kept by the guardians for the poor, appointed under 22 Geo. II., chap. 83, and the court granted a mandamus to the guardians, etc., commanding them to allow such inspection.

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In *Glover on Municipal Corporations*, 262, it is said: "Every corporator has a right to inspect all the records, books, and other documents of the corporation upon all proper occasions, and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a mandamus to enforce his right."

In *Dillon on Municipal Corporations*, § 303, it is said: "The following points have been ruled as stated by Mr. Willcock: Every corporator has a right to inspect all the records, books, and other documents of the corporation upon all proper occasions; and if, upon application for that purpose, the officer who has the custody refuse to show them, the court will grant a mandamus to enforce his right." Again the same author says in § 848: "In this country the records, books, and by-laws of municipal corporations are of a public nature, and if such a corporation should refuse to give inspection thereof to any person having an interest therein, or perhaps for any proper purpose, to any inhabitant of the corporation, whether he had any special or private interest, or not, a writ of mandamus will lie to command the corporation to allow such inspection, and copies to be taken under reasonable precautions to secure the safety of the originals."

The relator also referred to *People ex rel. Henry v. Cornell*, 47 Barb. 329, not as an authority (because the decree in that case was subsequently reversed by the court of appeals, without any written opinion, however), but for the benefit of its reasoning. In the course of his opinion in that case, Mr. Justice Barnard in part said: "Upon the argument, I was strongly of opinion that such corporator had such right, and subsequent reflection and investigation have confirmed that opinion. It was claimed, and strongly urged upon in the argument, that the corporator had the right to inspect such records only when he had some private interest for the enforcement and protection of which the inspection of said document is necessary, and that even then the inspection must be limited to those documents; and it was claimed that this rule was established by the English decisions. I have examined the English authorities referred to on the argument, and also such as I have been able to discover in the books, and think that none of them so restrict the right of inspection, while many of these distinctly uphold the right of a general inspection." And, again: "I see no principle upon which it can be held that the corporator of a municipal corporation has not the right to a general inspection of the public records. It is true that the whole body of the corporators acting through their legally constituted representatives, as well, perhaps, as the legislature un-

der which the corporation holds its charter, may make laws and ordinances restricting the right of general inspection; but, unless there is such restriction, I am unable to see any principle upon which it can be held that a corporator has not the right to a general inspection of 'public records of the corporation.' In the language of the court in *Herbert v. Ashburner*: "These are public books, which everybody has a right to see." And, again: "The citizens within the corporate limits constitute the corporation, while the mayor, aldermen, common council, street commissioner, and others, are its officers or agents, to whom are confided, under certain restrictions, the care and management of the property, business, and interests of the corporation. If, from the bare facts that the corporation can only act through officers or agents, and that, therefore, officers are appointed to whom the care of the property, business, and interests of the corporation are intrusted, and who are subject to removal before the time for which they are appointed has expired, and who are also subject, on the expiration of their terms, to be replaced by others at the will of the corporators, it results that, immediately on the appointment of such officers, the corporators have no longer any interest in the manner in which their property, business, and interests are cared for, conducted, and looked after by their agents, then it also follows that the corporators would have no right to inspect the books and papers in the custody of the officers relating to their official business. If, however, the corporators, notwithstanding the appointment of such officers, still retain an interest in the manner in which their property, business, and interests are cared for, conducted, and looked after, then it follows that they have a right to as full knowledge of all the official acts of their officers as the officers themselves have, so as to enable them to ascertain whether their officers have performed their duty in such manner as is acceptable to them, with the view to determine whether they will continue them in office or not."

In that case it appeared that the relator was a citizen of New York, and that the defendant was an officer of the corporation, being the head of the street department, and the street commissioner. The affidavit, among other things upon which the application was founded, set forth that the defendant, as such street commissioner, had in his custody certain contracts for various public works done under his direction, and certain vouchers, pertaining to the payment of public moneys of the corporation, made out for such works; that the relator had the right, as a member of the corporation, to see and inspect all such contracts and vouchers,

and that it was the duty of the defendant to exhibit them to any member of the corporation; and that the relator had applied to the defendant in August, 1866, for permission to see such documents, and had been refused. It was held, under the foregoing opinion, that the relator was entitled to the inspection he asked, and had the right to make such copies of the record as he desired, and accordingly a peremptory writ of mandamus was awarded him. As before stated, however, the decree in this case was reversed in the court of appeals; but, no opinion having been handed down, we do not know what the ground of reversal was.

The relator refers to certain other cases—*King v. Shelley*, 3 T. R. 141, 1 Revised Rep. 673; *King v. Allgood*, 7 T. R. 746, 4 Revised Rep. 574; *Rogers v. Jones*, 5 Dowl. & R. 484, 27 Revised Rep. 529; *King v. Lucas*, 10 East, 235, 10 Revised Rep. 283; *King v. Tower*, 4 Maule & S. 162, 16 Revised Rep. 428,—which, indeed, are referred to in some of the text-books above mentioned; but they do not seem to bear, in strictness, on the point we now have under examination, referring, as they do, to the inspection of court rolls or records.

The defendant replies the American cases bearing substantially upon the same class of records, or similar ones. He refers to *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236. It appears that the complainant there insisted upon the legal right to go into the office of the clerk of the supreme court, who was also the register of deeds, and make from the books an abstract of them. As he did not need the aid of the clerks, he insisted that he was entitled to do this without paying any fees. Section 14 of the Code of Georgia declares that all books kept by any public officer shall be subject to the inspection of all citizens of the state, within office hours, every day except Sunday. The fee bill provided fees for inspection and abstracts as follows: For such inspection when the clerk's aid is required, 25 cents, and for examination of books and abstracts of result, \$1. Under this law the complainant insisted that he had a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, and copy from the books when they were not in use, and thus collect material for a book which he proposed to publish for sale. As he was able, by employing experts, to do this inspection and compilation himself, without the assistance of the clerk, he insisted that no fee was required, and, as the clerk refused to allow him to go on, except upon the payment of a fee for each separate investigation of the title, he prayed that the clerk might be enjoined.

To the same effect, in substance, was cited, also, the cases of *Webber v. Townley*, 43 Mich. 538, 539, 38 Am. Rep. 213, 5 N. W. 971, and *Bean v. People*, 7 Colo. 201, 2 Pac. 909. They are cited by the defendant as supporting the general proposition that neither at common law nor by statute is the duty imposed upon the custodian of public records to allow continuing and permanent inspection and use of the books; that he is not bound to give so much of his time as would be required to watch the books while thus continuously examined and used; and that he is not bound to intrust them to persons who desire to so inspect and use them, and who require no aid from him in doing so. These cases are also cited as raising the objection that the right of inspection, whatever it may be, exists without regard to the character of the applicant.

Both sides quote from *High on Extraordinary Legal Remedies*, § 330, as follows: "Upon principles analogous to those already considered, the courts interfere by mandamus to compel municipal authorities to allow the inspection of their records by persons entitled thereto, and the writ will be granted, in behalf of a member of the municipality who is entitled to an inspection of its books, to permit him to make such inspection and to take copies and abstracts of the records at his own cost. It is, of course, essential to the exercise of the jurisdiction in such cases that the relator should show some interest in the records which he seeks to inspect, and it may well be doubted whether the writ would in any case be allowed upon the relation of a mere stranger. But a resident within a municipality, who has been sued by the corporation for a violation of one of its by-laws, is entitled to the aid of a mandamus to procure an inspection of the books of the corporation, so far as they relate to the matter in dispute, and to compel the clerk of the corporation to furnish him with copies of its by-laws at his expense." The complainant relies for authority upon the first sentence of the excerpt, and the defendant upon what follows.

Both sides seek support in the cases which refer to the examination of the books of corporations other than municipal bodies. Among other cases, the relator refers to *Re Steinway*, 159 N. Y. 250, 45 L. R. A. 461, 53 N. E. 1103, and our own case of *Deaderick v. Wilson*, 8 Baxt. 108, and to the following text-books: 4 *Thomp. Corp.* § 4406; *Morawetz, Priv. Corp.* § 473; 2 *Cook, Stock & Stockholders*, § 511. The defendant cites: *Reg. v. Mariquita Min. Co.* 1 El. & El. 289, 28 L. J. Q. B. N. S. 67, 5 Jur. N. S. 725, 7 Week. Rep. 98; *Com. ex rel. Sellers v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *King v. Merchant Tailors' Co.* 2 Barn. 64 L. R. A.

& Ad. 115, 9 L. J. K. B. 146; *Birmingham, B. & T. Junction R. Co. v. White*, 1 Q. B. 282, 4 Perry & D. 649, 2 Eng. Ry. & C. Cas. 863, 10 L. J. Q. B. N. S. 121, 5 Jur. 800; *Imperial Gas Co. v. Clarke*, 7 Bing. 95, 4 Moore & P. 727, 9 L. J. C. P. 28; *Hoyt v. American Esch. Bank*, 1 Duer, 652, and other cases. Also the following text-books: 19 Am. & Eng. Enc. Law, pp. 231-233; *Taylor, Ev.* § 1495.

We shall not undertake an examination of the cases. The conflict of opinion upon the subject will sufficiently appear from a few excerpts made from some of the text-books referred to.

In *Morawetz on Private Corporations*, § 473, it is said: "The members of a simple copartnership are entitled to examine the partnership books and accounts whenever they desire; but this rule is inapplicable to large joint-stock companies and corporations. The control over the affairs of associations of this description is, by common consent, delegated to directors and managing agents elected by the majority, and individual shareholders have no authority or control except by their votes at shareholders' meetings. If every shareholder in a large joint-stock association were allowed to examine its books and accounts at pleasure, it would become impossible, in practice, to keep the books in a proper manner. Moreover, it is evident that the result would be to lay open the affairs of the company to the public, and render any privacy in its dealings impossible [citing *Reg. v. Mariquita Min. Co.* 1 El. & El. 289, 28 L. J. Q. B. N. S. 67, 5 Jur. N. S. 725, 7 Week. Rep. 98; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115, 9 L. J. K. B. 146; *Re v. Hostmen*, 2 Strange, 1223; *Southampton v. Greaves*, 8 T. R. 590, 5 Revised Rep. 480]. It is reasonable, however, that the majority of a company should have the power to examine its books and accounts, through agents appointed for that purpose at a meeting duly convened. However, in the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management. The supreme court of Pennsylvania said: 'Unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them for a definite and proper purpose at reasonable times. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders [citing *Com. ex rel. Sellers v. Phoenix Iron Co.* 105 Pa. 28

111-116, 51 Am. Rep. 184; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Deaderick v. Wilson*, 8 Baxt. 108; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *Union Nat. Bank v. Hunt*, 76 Mo. 439; *Wannell v. Kem*, 57 Mo. 478; *People ex rel. Field v. Northern P. R. Co.* 18 Jones & S. 456]."

In *Thompson on Corporations*, vol. 4, § 4418, after citing several cases that confined the right to inspect to a case with reference to some defined, distinct dispute, as to which it appeared that it might be to his advantage to see the minutes of the corporation, all of them English cases except one (*Com. ex rel. Sellers v. Phoenix Iron Co.* 105 Pa. 111-116, 51 Am. Rep. 184), he adds: "It should be carefully added, however, that this theory has gained no considerable footing in America, nor is it based upon any foundation of sense. Subject to the convenience of the others, or of the common agency, which acts for all, it is the right of every proprietor to know how the business in which he has embarked his money is being carried on, whether there is any dispute about it or not."

In *Cook on Stock & Stockholders*, on the other hand, after stating (§ 511) that the stockholders of a corporation had, at common law, a right to examine at any reasonable time any one or all of the books or records of the corporation, and that this rule grew out of an analogous rule applicable to public corporations and to ordinary copartnerships, "the books of which, by well-established laws, are always opened to the inspection of members," he adds, in § 515, that, in order to justify the granting of a mandamus, either the property, or "some property rights of the stockholder, must be involved, or some controversy exist, or some specific and valuable interest be in question, to settle which an inspection of the corporate records becomes necessary."

Passing from this conflict, it is said, in § 4419, vol. 4, of *Thompson's work*, that the right of a shareholder to inspect the books of a corporation will not be enforced for speculative purposes or the gratification of curiosity. It is also said, in § 4422, that it is no answer to an application to inspect that it is inconvenient to grant the right. Individual shareholders cannot, of course, appropriate the books of a corporation for the purpose of inspecting them to an unreasonable extent, and to the detriment of the interests of the corporation and the rights of other shareholders. But, the right of a shareholder to such an inspection being clear, it is not a sound view that the corporation can deny it upon the mere plea that it would be inconvenient to grant it. The convenience of the corporation and the convenience of the shareholder must to some extent yield to each other, and the law will not permit

either, in the exercise of its rights, to act unreasonably toward the other. The stockholder must take the inspection in a peaceful manner. § 4424. But he may exercise the right of inspection through an agent, attorney, or expert. § 4426. And he has the right to make copies and extracts. § 4421. The courts may control the manner of the inspection. But it is not always a matter of course for the court to grant the inspection when applied to. In § 4427 will be found numerous examples or instances in which inspection was granted, while in § 4428 will be found numerous other instances where the mandamus was refused.

Upon this subject the following from *Cook on Stock & Stockholders* is appropriate (§ 514): "The writ of mandamus, however, does not issue herein as a matter of course. It is an extraordinary remedy, to be invoked only upon special occasions. The courts do not grant the mandamus until they have taken into careful consideration all the facts and circumstances of the case, —the condition and character of the books, the reasons for refusal by the corporation. The specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted in furtherance of essential justice."

Passing, for the present, the question as to who is the true custodian of the books of the city, we shall now consider some of the other reasons given in the answer of the defendant, or his return, to the alternative writ.

We do not think it material that there is an ordinance which provides that "every officer and agent of the city shall, at all times when requested, submit his books and official papers to the inspection of the mayor, or any member of the legislative council, or to any person or committee appointed or authorized by said legislative council to examine same." This provision is not exclusive, nor are we prepared to admit, as intimated in *People ex rel. Henry v. Cornell*, 47 Barb. 329, that the city authorities could, through a by-law, cut off the right of a corporator to make an examination on suitable occasions. It is likewise immaterial that the grand jury has the right to make an examination. This right is not exclusive. Moreover, such examination is nearly always cursory and wholly inadequate. Nor is it a sufficient reply that the applicant is politically hostile to the custodian of the papers, unless it appear that the examination he asks is sought with the corrupt purpose of merely furthering such animosity. If it appear that the examination is sought for an

honest and laudable purpose, the personal antagonism of the parties will not be sufficient ground upon which to deny the right. It should not be granted for any political or other improper purpose. Nor is it sufficient reply that such an examination could produce worry and inconvenience, nor that the transactions to be examined are numerous and involve many millions of dollars. The inconvenience and obstruction to business can be very much modified by the order of the court prescribing the method of examination, and the court's reserving the right to make additional orders from time to time as occasion therefrom may appear; and, indeed, that the objections referred to in this paragraph are not insuperable is shown by the fact that the defendant felt able to overcome them in making a way for such examination by the committee over which Albert S. Caldwell was named as chairman.

Before going further, we shall determine the question whether there is enough set forth in the answer, taken in connection with the admissions made, under the forms of the pleadings, of certain allegations in the bill or petitions, to show that the relator is actuated by a fraudulent and dishonest purpose. It appears that when the relator made his application the defendant had already called together the committee of 200, and had made known the fact that the city was badly in need of money to take care of the streets and was without funds for that purpose. The committee was convened for the purpose of devising ways and means to meet the city's needs. Under these circumstances it was natural that a citizen and taxpayer should desire to know the exact condition of the city's finances, and the plan of a thorough and exhaustive examination necessarily arose in the mind. The purpose he professed was to ascertain the real condition of affairs, how much money had come in, and where it had gone to, as a necessary preliminary to fiscal ameliorations. The defendant does not aver in terms that the present proceeding was instituted for a fraudulent and corrupt purpose, nor, indeed, would mere opinions prevail; but he states that he refused the request because he believed that the proposition was made rather to impede and thwart the object had in view by calling the committee of citizens together, than to forward such object. This is, at most, but the mere expression of an opinion, and, besides, refers to the proposition made by the committee. The correspondence that passed between the counsel for the relator and the chairman of the Caldwell committee was merely an attempt at an adjustment, and, while it manifests a very persistent purpose

to obtain leave to make examination, if possible, it contains no word of vituperation or anything indicating malice.

We pass, now, to a statement of our conclusions upon the general question of law as to the right of a citizen and taxpayer of a city to make an examination of the books and papers of the city. In stating these conclusions we shall not discuss the authorities above referred to, or attempt to reconcile their conflicts. After considering all of these authorities and the whole subject involved, we shall state what we believe to be the sound principles applicable to the matter. In theory the right of examination is absolute, but in practice it is at last only a matter of discretion, because such application is likely at any time to be refused on the part of the custodian of the books and papers sought to be examined, and then the right must be forced by mandamus, and this writ is not of absolute right, but merely of discretion, to be awarded only in a proper case; the facts claimed as authorizing its issuance to be judged of in every case by the court, and the writ to be awarded or withheld upon a consideration of all the circumstances presented. So, while the right is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement as that it can be denominated only a "qualified right." The right to an examination for a special purpose, as, for example, to obtain specific information to use in a litigation between the applicant and third parties, or between the applicant and the corporation, and the like cases, while not, in principle, standing upon higher grounds, yet is the more easily grantable, because it does not involve so much time, and so much inconvenience to the custodian of the books and papers, and so much interruption of business, as in case of a general examination. Yet it cannot be doubted, under a state of facts showing it to be important to the public interest that the general examination of the books of a municipality should be had, that the court should allow such examination at the suit of one who is a citizen and taxpayer of the corporation. The right rests, not only on the ground that the books are public books, but also on the same principle that authorizes a taxpayer to enjoin the enforcement of illegal contracts entered into by the municipality, county, or state, for the protection of the applicant and all other taxpayers from illegal burdens. And it is obvious that, in making and enforcing such application, the taxpayer acts, in a very real sense, not only for himself, but for all other taxpayers, and acts, therefore, in the capacity, as it were, of a trustee for all. It must be admitted, also, that the

exercise of such power, if prudently and carefully guarded, cannot be otherwise than salutary, because the knowledge that it can be exercised by a citizen and taxpayer, and may be exercised when the public good shall seem, on sound reasons, to demand it, cannot result otherwise than in producing an added sense of responsibility in those who administer the affairs of municipal corporations, and in inducing a greater carefulness in the discharge of the trusts imposed upon them by their fellow citizens under the sanctions of law. Yet it is equally true that such general examinations must necessarily to some extent interrupt the ordinary and usual course of business in public offices, and require of the officers in charge thereof some additional duties for the time being. And it follows, from this, that such examinations should not be lightly granted, or permitted with unnecessary frequency; that the occasion should be grave and important; and that the person seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court, to the end that there may be no oppression practised under the guise of doing service to the public, and that the safety of the books and records subjected to the examination shall be continually provided for. All of these matters fall within the principle that the granting of permission to make the examination rests in the sound discretion of the court, in the form of granting or withholding the writ of mandamus.

It only remains to determine whether the occasion shown in the present case is of sufficient gravity to move the discretion of the court. The case presented, as drawn from the petition and answer, is that the period of the examination sought covers the space of five years, during which time many millions of dollars have been collected by the city administration and expended; that during 1902 there were receipts to the amount of \$1,067,916.09 and disbursements to the amount of \$1,060,053.89, and the city borrowed from one bank \$53,357.04, on which \$3,172.36 was paid, from another bank \$52,135.43, on which \$2,982.17 interest was paid, and from another bank \$22,922.33, on which \$552.99 interest was paid, aggregating \$135,122.32, and that during the previous year there was borrowed \$101,361; that the taxes collected from year to year from the taxpayers of the city are already very heavy and very burdensome; and that the mayor, notwithstanding the great revenues collected, a liberal exercise of the power to borrow money, and the recent session of the legislature, to which application could have been made for an increase of the means of raising taxes, if the property of the city could bear

more, found it necessary, shortly before the petition was filed, to resort to the extraordinary expedient of calling a meeting of 200 citizens of Memphis to devise ways and means to pave, repair, and "round up" the streets of the city. Under such a state of facts, we think it not unnatural, and not unreasonable, that the taxpayers of the city should desire to have the books, papers, and vouchers of the city looked into, to the end that they may fully learn the financial condition of the municipality; and we think the facts stated make a case sufficient to justify the court in allowing the general examination sought in the petition.

Indeed the conclusion as to the propriety of making such general examination is substantially conceded in the answer of the defendant, in the fact that he replies that he has set on foot just such examination, through a committee of citizens selected by him and agreed to by the legislative council. However, the creation of that committee can in no wise interfere with the present proceeding. After judicial proceedings have been started, as in the present case, for the purpose of obtaining a general examination, they cannot be thwarted by the appointment of a committee on the part of the custodian of the books, or his associates in authority, to make an examination in lieu of the one sought. The right of the petitioner to have his application passed upon on its merits became complete upon the filing of the petition, and, of course, cannot be affected by subsequent acts of the defendant, taken without his consent, and to which he was not a party. It follows that the writ must be allowed, if the defendant is the custodian of the books and papers of the city in such a sense that he can be justly called upon to produce them.

Upon examination of the laws governing the city and the rights and power of its mayor—as shown in Watkins's Digest (1902) § 6, pp. 19, 20; Id. §§ 1, 2, p. 22; Id. art. 5, p. 170,—we think sufficient powers are vested in the mayor to make it proper that the writ should go against him for the allowance of the examination sought in the petition and for the production of the books and papers.

It results that *the decree of the chancellor must be reversed*, and the cause remanded for the entry of a decree awarding the peremptory writ; but such decree shall reserve to the court below the powers and control above indicated to prevent oppression, and for the preservation of the books and papers, and to so order the examination as to interfere as little as practicable with the transaction of current business, and said decree shall reserve to each party the right from time to time to apply to the court for instructions pending the examination.

NASHVILLE RAILWAY, *Appt.*,

v.

Edgar Meacham HOWARD, by Next Friend.

(.....Tenn.....)

1. In an action for injury to a street-car passenger because of defective condition of the track, evidence is admissible to show the existence of such defect prior to the time of the accident, where the conditions have remained substantially unchanged.
2. There is no basis for imputing to an infant passenger on a street car any negligence on the part of his mother, in whose care he is, which proximately contributes to his injury, where, he is thrown from the car by its jolting, unless the facts show heedlessness on the part of the child and negligence on the part of the mother in failing to prevent his incautious act.
3. A child four years old is not negligent in sitting alone on the seat of an open street car, holding on to the seat guard, so that, in case he is jolted from the seat and injured by the car crossing a defect in the track, the negligence of his mother, with whom he is traveling, in permitting him to occupy such position, can be imputed to him.
4. Refusal of the trial judge to instruct the jury that an infant passenger on a street car could not recover for personal injuries if the negligence of his mother, with whom he was traveling, proximately contributed to the injury, is not error, where there are no facts in the case to show such negligence.
5. A trial judge is not bound to explain to the jury, in an action to recover for injuries to a street-car passenger, the meaning of the words "as far as human skill and foresight will go," as measuring the carrier's duty to provide for the safety of the passenger, where he has not instructed them that such is the measure of the carrier's duty, but has merely told them that the carrier is bound to keep its appliances in reasonably safe order and condition.

(February 2, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. James C. Bradford and J. M. Anderson, for appellant:

The testimony of the witnesses Sloan, Frost, and Vaughn was incompetent, and its admission was ground for the reversal of the judgment of the court below.

1 Greenl. Ev. § 52; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Cleveland, C. O. & I. R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 17 N. E. 118; *Bremner v. Newcastle*, 83 Me. 415, 23 Am. St. Rep. 782, 22 Atl. 382; *Elliott, Roads & Streets*, 2d ed. 863.

It is incompetent and inadmissible to prove the present existence of a defect, not by evidence of what the previous condition of the track was at the place of the alleged defect, but by evidence of the fact that other accidents previously occurred at the place where it is claimed the track is now defective.

The charge is the announcement and declaration of the doctrine of comparative negligence.

Kinkead, Torts, § 257.

The doctrine of comparative negligence has never prevailed in Tennessee.

East Tennessee, V. & G. R. Co. v. Hull, 88 Tenn. 35, 12 S. W. 419; *East Tennessee, V. & G. R. Co. v. Aiken*, 89 Tenn. 248, 14 S. W. 1082.

The charge requires that the negligence of the mother, which contributed to the proximate cause, shall equal that of the defendant, before the right of action is defeated. If the negligence of the mother contributed to, or entered into, or became part of, the proximate cause in any degree, whether in the same degree as the defendant's negligence or not, it defeats the right of recovery.

Saunders v. City & Suburban R. Co. 99 Tenn. 135, 41 S. W. 1031; *Nashville R. Co. v. Norman*, 108 Tenn. 334, 67 S. W. 479; *K Am. & Eng. Enc. Law*, p. 377.

The implied obligation of the street railway company's contract was to carry the child subject to the proper care on the part of the mother. The negligence here sought to be imputed to the child is based upon the negligence of the mother in failing to perform this duty, which she, on behalf of the child, assumed and agreed to do.

Ohio & M. R. Co. v. Stratton, 78 Ill. 88; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 141; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 504; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Waitz v. North Eastern R. Co.* El. Bl. & El. 719, *Affirmed in Court of Ex-*

NOTE.—For other cases in this series as to contributory negligence of parent or custodian as bar to action by child for negligent injuries, see *Chicago City R. Co. v. Wilcox*, 21 L. R. A. 76, and *note*; *Bottoms v. Seaboard & R. Co.* 25 L. R. A. 784; *Atlanta & C. Air Line R. Co.* 64 L. R. A.

v. Gravit, 26 L. R. A. 553; *Bamberger v. Citizens' Street R. Co.* 28 L. R. A. 486; *Roth v. Union Depot Co.* 31 L. R. A. 855; *Ploff v. Burlington Traction Co.* 43 L. R. A. 108; *Ives v. Weiden*, 54 L. R. A. 854, and *Chicago City R. Co. v. Tuohy*, 58 L. R. A. 270.

chequer, El. Bl. & El. 728, 28 L. J. Q. B. N. S. 258, 5 Jur. N. S. 936, 7 Week. Rep. 311.

Messrs. Washington, Allen, & Roins for appellee.

McAlister, J., delivered the opinion of the court:

W. A. Howard, as next friend to his minor son, E. M. Howard, recovered a verdict and judgment in the circuit court of Davidson county against the defendant railroad company for the sum of five thousand dollars (\$5,000) as damages for injuries to the son. The company appealed, and has assigned errors.

The cause of action, as outlined in the declaration, is that the plaintiff, a minor, four years of age, took passage with his mother and sister on one of defendant's cars, for the purpose of returning to his home in Northeast Nashville; that at the intersection of Meridian and Foster streets, by reason of the defective rails and switchboard or frog, and the track thereunder, as well as the careless and negligent handling of the car by the motorman, a sudden jerk or jolt was caused, throwing plaintiff from his seat violently to the ground, and so mangling and crushing one of his legs that its amputation was necessary.

The facts are that on the 21st of November, 1900, the plaintiff, in company with his mother and sister, boarded an open Meridian street car on the public square, occupying the second seat from the front, the child being seated between his mother and sister. When the car reached the bridge, the child, indulging a natural instinct to view the river, moved across to the seat immediately in front, facing his mother, and with his back to the motorman. The child sat near the end of the seat on the left of the car, and took hold of the guard on the end of the seat with his right hand. In this position he was sitting near and readily accessible to his mother and sister. He remained in this position until he was thrown from his seat to the ground at the intersection of Foster and Meridian streets. When nearing this point the mother rang the bell for the car to stop in front of her house, but the motorman, without observing the signal, failed to stop, and continued on around the curve leading to Meridian street, and when the car wheels struck the frog at the point where the curve began, in the language of the conductor, "there was a plunging jerk, like the track going down and the car up." The result of this jerk, as already stated, was to throw the child from his seat to the track, and, before he could be rescued, the wheels ran over his foot and leg. There is evidence tending to show that the sudden plunging

jerk and jar of the car was owing to the defective track. The proof of the plaintiff shows that the rails were lower than the frog, and that there were open joints or spaces between the ends of the rails and the frog, and the rails were loose on both sides of the frog, and were not in alignment with the frog rail, so that when the car passed from the rail to the frog, and from the frog to the next rail, it caused a plunging jerk and jar of the car that was both unusual and dangerous. It is further shown that this had been the condition of the track for several months prior to the injury to the defendant in error.

It is conceded by counsel for plaintiff in error there is evidence tending to show that at the place of the accident the track was in a defective, unsafe, and dangerous condition; while the defendant company introduced a number of witnesses who testified that the track was in a safe condition, and the only jolting or jerking of the car was such as was necessarily incident to passing through the frog or switch. It is conceded by counsel that in this conflict of evidence this court would not undertake to disturb the finding of the jury on the facts touching the defective character of the track.

The first assignment of error is that the court below erred in admitting the testimony of the witness Sloan to the effect that, previous to the accident, he had on several occasions been nearly thrown from the car at the same point. Sloan, it appears, was the conductor on the car at the time of the accident, and had been running as conductor for months prior to that time. He stated that in turning that curve on the occasion of the accident there was a kind of plunging jerk, like the track going down and the car up. The witness further stated there were times when he himself would have been thrown off if he had not been holding.

In this connection will be considered the second assignment of error, in which it is insisted that the court erred in permitting Dr. Frost to testify that, previous to this accident, he had seen cars derailed at this point, and had helped to put them back on the track, and that this had occurred more than one time.

The third assignment of error is that the court erred in admitting the testimony of A. B. Vaughn to the effect that previous to the accident, while attempting to leave the car at the place of the accident, he came near being thrown off.

These assignments of error raise cognate questions, and will be considered together. It is insisted that this evidence was improperly admitted, because it adduced collateral facts and issues, which were incapable of af-

fording any reasonable presumption or inference as to the particular fact or matter in dispute.

We find, upon examination of the testimony of these witnesses, that this railroad track had been in this condition for eight or ten months prior to and up to the date of the injury. It is shown that there had been no changes whatever in the condition of the track.

In *Railroad Co. v. Lindamood*, 109 Tenn. 411, 412, 74 S. W. 113, we approved the following rule: "While in negligence cases the condition of the appliances, structure, or premises at the very time and place of the injuries is the material inquiry, evidence of conditions before or after the accident may be received, where it is also shown that the conditions testified to remain unchanged down to the occurrence of the injuries, or to the time to which the evidence relates. So, evidence is admissible of conditions existing so short a time before or after the accident as, under the circumstances, to warrant an inference of fact that the same conditions existed when the injuries were received."

It is also settled by the weight of authority that evidence of prior injuries to other persons under the same circumstances as those which produced plaintiff's injuries is frequently admitted to show the defendants' actual knowledge of the defective or dangerous conditions or appliances, or as demonstrating the fact that defendants should have anticipated injuries, and were therefore negligent. 21 Am. & Eng. Enc. Law, 2d ed. p. 510.

It must, of course, in all cases be shown that the conditions at the time of the other accident and the one directly involved in the litigation were substantially the same. Id. 520; *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840.

The evidence presented herein shows that the condition of the track at the time specified by the witnesses was substantially the same as its condition at the time of the accident. Hence we think, under the authorities cited, the evidence was clearly competent.

The fifth assignment of error is that the court below erred in refusing the special request of the company as follows: "If you find from the proof that at the time of the accident the plaintiff, Edgar Meacham Howard, by reason of his tender years, was incapable of exercising ordinary care and prudence for his own protection and, while a passenger on the car of the defendant, was in the immediate control, care, and custody of his mother, and that the mother, as such custodian of the child, failed on her part to exercise ordinary care and prudence for the 64 L. R. A.

child's protection, and that this was the proximate cause of the accident, or contributed to it as its proximate cause, then the plaintiff cannot recover, although the defendant may have been itself guilty of negligence; provided, of course, you find that the defendant's negligence was not wilful or intentional."

Counsel aver that, in requesting this charge, he did not invoke the doctrine declared in the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, which has been expressly repudiated by this court in two reported cases, *Whirley v. Whiteman*, 1 Head, 610, and *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 18, 28 L. R. A. 486, 49 Am. St. Rep. 909, 31 S. W. 163. It was held in these cases that, in an action by a child through its next friend to recover damages for personal injuries, the negligence of its parent or guardian would not be imputed to the child, discarding the doctrine to that effect announced in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273. It is insisted, however, by counsel for the company, that the only point decided in *Hartfield v. Roper* was that the negligence of the parent in permitting the child to go unattended into a place of danger, or failing to confine it within safe limits, was to be imputed to the child, so as to defeat its action for damages predicated on the negligence of a third person. The distinction is sought to be made in this case that the negligence charged against the mother is not that she let her child go unattended upon the car. It is admitted that, under such circumstances, the company would have owed to the child a duty commensurate with its inability to care for itself; but it is insisted that, when the mother boarded the car with the child, it was under her immediate care and protection, and as such it was accepted as a passenger; that there was an implied obligation, which the mother assumed, to take care of the child. It is further insisted that the implied obligation of the street railway company was to carry the child, subject to proper care on the part of the mother, and that the negligence sought to be imputed to the child in this case is based on the negligence of the mother in failing to perform the duty which she, on behalf of the child, assumed.

The proposition formulated by counsel is that, in many of the states where the doctrine of *Hartfield v. Roper* has been expressly repudiated, it is nevertheless held that, while the parent's negligence in permitting the child to go into dangerous places unattended cannot be imputed to it, nevertheless where the parent is actually present and personally directing and control-

ling the action of the child, and the alleged breach of duty to the child arises from a contractual relation assumed by the parent for and on behalf of the child, the child must bear the consequences of the parent's failure to discharge the assumed obligations and duties. Citing *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 504; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Waite v. North Eastern R. Co.* El. Bl. & El. 719.

The leading English case on this subject is *Waite v. North Eastern R. Co.* El. Bl. & El. 719-728. It appeared in that case that a child, five years old, was in charge of its grandmother, who procured tickets for both at a railway station, with the intention of taking the train at that place. In crossing the track, for the purpose of reaching a platform on the opposite side, they were run down by a train, under circumstances of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the child sustained personal injuries for which suit was brought. In the court of Queen's bench, Lord Campbell, Chief Justice, held that the infant was so identified with the grandmother that the action could not be maintained. This view was sustained in the court of exchequer chamber. The judges generally based their opinions upon the ground that the action was for a breach of duty arising out of a contract made by the defendant with the person having the infant in charge. Lord Crowder, J., said: "The case is the same as if the child had been in the mother's arms;" therefore whatever rights the plaintiff had must be predicated upon the contract of conveyance. "The contract of conveyance," said Cockburn, Chief Justice, "is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." In this case it was the negligence of the person in actual custody of the child at the time of the injury that was imputed to it. The rule of imputed negligence enunciated by the English courts is limited to cases where the parent or guardian is actually present and exercising control over the movements of the child. 2 Thomp. Neg. p. 1182.

In *East Saginaw City R. Co. v. Bohn*, 27 Mich. 516, the plaintiff, a child four years old, by being thrown from the platform of a street car, was run over, injuring his left leg in such a manner that amputation was necessary. Suit was brought on behalf of

the infant to recover damages sustained by him. It appeared that at the time of the accident the plaintiff was in charge of his twelve and one-half-year-old brother. The judge charged the jury that the railway company was required to act towards the plaintiff in the situation he then was; that is, considering his age and capacity, and the fact that he was there with a brother of the age named. They were not required to use towards him the same care and skill that might have been required had he been alone. They received him as he was, attended by his older brother, and were required to act toward him just as he was situated; and he further instructed them that, if the brother was of an age to have exercised reasonable discretion, and plaintiff was seated where, with the exercise of such discretion in his behalf, he could ride in safety, plaintiff could not recover, unless the injury resulted wholly from the negligence of the company. Judge Cooley said: "This charge appears to me all the defendant had a right to demand."

In *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671, the court said: "The first question which naturally presents itself, in view of the facts, is whether the responsibility of the defendant in this case is varied from that which is ordinarily exacted from it towards persons of mature years, by reason of the tender years of the plaintiff. There are cases in which it is determined that the same degree of care is not to be expected or required from a person of immature age as would be required of one who had reached years of discretion; and, therefore, that what would be contributory negligence in the one case would not be so considered in the other. The distinction was recognized by this court in *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592. These are, however, cases in which the father, guardian, or other protector of the party injured is not present when the injury occurs. In the present case the father and child were together, and it was not simply a permission on his part that his little daughter should cross the railroad at the point she attempted, but the exact place was pointed out to her by her father, and she was proceeding within his view to follow his directions when the injury happened. If, under such circumstances, the father was guilty of negligence, that negligence must be imputable to the child in a suit by the child for damages. As was observed by the supreme court of Massachusetts in a similar action (*Holly v. Boston Gaslight Co.* 8 Gray, 132, 69 Am. Dec. 233): 'She was under the care of her father, who had the custody of her person and was responsible for her safety. It

was his duty to watch over her, guard her from danger, and provide for her welfare; and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she was wholly acting for herself.' In *Waite v. North Eastern R. Co.* El. Bl. & El. 719-728, the question was whether, in an action by an infant for injuries caused to him by the negligence of the defendant, it could be set up by way of defense that the negligence of the person in charge of the infant contributed to the accident. The court of Queen's bench held that it could, and in this opinion the court of exchequer chamber concurred. Williams, J., said: "There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is therefore an answer to the action. The person who has charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that, though himself could not maintain an action, the child could.' In *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88, the supreme court of Illinois held that the negligence of the parent or guardian having in charge a child of tender years, where it is the proximate cause of the injury by unnecessarily and imprudently exposing it to danger, prevents any recovery from the carrier corporation. In the present case the inquiry should have been whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury." *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. 609; *The Burgundia*, 29 Fed. 464; *Chicago & A. R. Co. v. Logue*, 158 Ill. 621, 42 N. E. 53; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, 103 Mass. 507; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Lannen v. Albany Gaslight Co.* 46 Barb. 264, 44 N. Y. 459; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Kay v. Pennsylvania R. Co.* 65 Pa. 276, 3 Am. Rep. 628; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187; *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421.

The circuit judge on the trial of this cause did instruct the jury that the contributory negligence of the mother, who was in actual custody of the child at the

time of the injury, was imputable to the child. The court said: "It further appearing that the child was brought upon the car by its mother, and was in her care and custody, the same degree of care and protection of the child was thus imposed on its mother as would have been imposed upon an ordinary passenger of intelligence and experience, . . . that degree of care and precaution that an ordinarily prudent person would have exercised under like circumstances and conditions; and in arriving at that you can look to the age of the child, the kind of car they were riding on, the fact that the cars in their ordinary travel necessarily cross switches and frogs and use curves upon the track; and if the proof shows that in crossing these frogs, switches, and curves there is jerk, jolt, or jostle occasioned thereby, that fact should be considered; and, if the mother failed to exercise that degree of care and precaution for the safety and protection of the child incumbent on her as explained to you above, and such failure on the part of the mother was the proximate and controlling cause of its injuries, then the child could not recover in this action." And further on in the charge, his honor charged as follows: "Again, should you find that the mother of the plaintiff failed to exercise the ordinary care and caution for the protection of a child that has been explained to you above as incumbent upon her, and such failure upon her part was the proximate and controlling cause of his fall and injuries, then, and in that event, you should find for the defendant. So, also, should you find that the negligence of the plaintiff's mother and the negligence of the defendant company equally contributed towards the accident and injury, in such event you should find for the defendant. Should, however, you find that the negligence of the mother contributed materially to the accident and injury to the child, but was not its proximate and controlling cause, that would not deprive the plaintiff of a right to recover, but should be taken by you in mitigation of the damages you would otherwise allow."

It will thus be seen that the doctrine of imputed negligence was distinctly charged by the circuit judge. But the precise proposition presented by the assignment of error is that the court failed and refused to charge that, if the negligence of the mother contributed proximately to bring about the accident, plaintiff could not recover. It will be observed that in the general charge already quoted the jury were told there could be no recovery if the negligence of the mother was the proximate and controlling cause of the injury, or if the mother

and defendant equally contributed in producing the accident; but the court refused to charge that, if the negligence of the mother proximately contributed in any degree to produce the injury, the defendant company would not be liable. Ordinarily, such failure and refusal to charge would constitute prejudicial error for which there should be a reversal. *Nashville R. Co. v. Norman*, 108 Tenn. 334, 67 S. W. 479. But, unless there are facts in the record showing heedlessness on the part of the child, and negligence on the part of the mother in failing to prevent the incautious act of the child, there would be no basis for imputing to the child any negligence on the part of the mother that proximately contributed to the injury.

It seems that even in jurisdictions where the doctrine of *Hartfield v. Roper* has been recognized, it is now held that the rule is not applicable when it appears that the injured child, although *non sui juris*, has exercised ordinary care to avoid the injury, or, as it is otherwise expressed, when the child used due care there is no imputability. See cases cited in 7 Am. & Eng. Enc. Law, 2d ed. p. 451.

Says Mr. Thompson, a sensible interpretation of the rule is that if a child, though *non sui juris*, has not committed or omitted any act which would constitute negligence in a person of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child. In such a case the child, being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recovery for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510.

A sententious statement of this rule is made by Hogeboom, J., in *Lannen v. Albany Gaslight Co.* 46 Barb. 270, viz.: "I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, visiting the sins of the fathers upon the children to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."

The uncontradicted proof in this record is that at the time of the accident the child was seated in a place provided for passengers, with his right hand holding to the guard attached to the seat. He was not leaning out, or standing on the seat or floor, or committing any other negligent or

incautious act, even if negligence might be ascribed to one so immature in years. While the child was thus in the exercise of as much care as an adult could be under similar circumstances, there was a plunging of the car into the depression caused by the defective track, and he was jostled off, just as an adult might have been under like conditions. If the child was in no fault, how is the negligence of the mother to be imputed to it? There was no negligent act of the child that should have been prevented by the mother. The record shows that the mother was seated facing the child on the seat immediately opposite, where she could see all the movements of the child, and readily restrain any imprudent act on its part. So that, upon the uncontradicted proof, we fail to perceive any negligence either on the part of the mother or the child. Hence the failure and refusal of the circuit judge to charge that any proximate contribution of negligence on the part of the mother would defeat the child's right of recovery was innocuous, and not reversible error.

It is assigned as error that the court refused to charge, viz.: "When it is said that a carrier of passengers must provide for their safety, as far as human skill and foresight will go, it is not meant that he shall exercise all that care and diligence of which the human mind can conceive, or all the skill and ingenuity of which he is capable. The law only requires of it all those things necessary for the safety of the passenger that are reasonable and consistent with the business of the carrier, and proper to the means of conveyance employed by him to be provided, and that the highest degree of practical care and diligence and skill shall be adopted that is consistent with the mode of conveyance used, and that will not render its use impractical and inefficient for its intended purposes."

It suffices to say, in answer to this assignment of error, that the court did not charge that a carrier of passengers must provide for their safety as far as human skill and foresight will go, and hence there was no occasion to explain what was meant by those terms. The circuit judge might properly have charged that rule as applied to the liability of a carrier to his passengers, but as a matter of fact he only charged that "it was incumbent upon the defendant to keep its track, cars, and appliances, . . . its switches and frogs, . . . in reasonably safe order and condition." Surely there can be no reasonable ground on the part of the company to complain of this charge.

It results there is no error in the record, and the judgment will be affirmed.

PENNSYLVANIA RAILROAD COMPANY, *Appt.*,

v.

Jesse J. NAIVE.

(.....Tenn.....)

1. The jury may infer that dressed poultry was in good condition when delivered to a carrier for transportation from evidence that special pains were taken with it because of the hot weather, and that it was prepared by dressing, cooling it out, and packing it in ice, in barrels.
2. Error in permitting consignees of dressed poultry to give their opinions that nothing was omitted to be done towards the proper handling of the poultry by them after receiving it, and that delay in delivery was not caused by anything they did or failed to do, does not require reversal of a judgment against the carrier for loss caused by delay in transportation, where it appears, from uncontradicted facts in the record, that the opinions were correct.
3. One consigning goods to his agents in another city, for sale, is bound to take notice of a certain, well-established, and general custom in force there, that business will be suspended on a certain holiday, so that he cannot hold the carrier liable for failure to make delivery of the consignment on that day.
4. A custom to suspend business on the 4th of July is not unreasonable even when applied to the delivery, by a carrier, of perishable freight on that day; although the weather in the locality is usually very warm at that time of the year.
5. A custom to suspend business on a holiday does not violate the duty imposed by contract, common law, or statute, upon a carrier to transport goods delivered to it to their destination, according to its regular course of business, with all reasonable despatch, and to give prompt notice to the consignee of their arrival.
6. A carrier is not guilty of negligence in failing to notify a consignee of the arrival of perishable goods on a legal holiday, where, by general custom of the locality, all business is suspended on that day.

NOTE.—As to effect of usage to excuse carrier from notifying consignee of arrival of goods, see, in this series, *Illinois C. B. Co. v. Carter*, 36 L. R. A. 527.

For custom as affecting carrier's liability generally, see cases in *notes* to *Weyand v. Atchison*, T. & S. F. R. Co. 1 L. R. A. 650, and *Missouri P. R. Co. v. Fagan*, 2 I. R. A. 76; also *Beard v. Illinois C. B. Co.* 7 L. R. A. 280.

As to effect of custom on liability of baggage transfer companies, see *note* to *Arniston Transfer Co. v. Gurley*, 34 L. R. A. 137.

For usage and custom as part of contract generally, see *notes* to *Smith v. Clewa*, 4 L. R. A. 392; *MacCulsky v. Klosterman*, 10 L. R. A. 785; and *Conestoga Cigar Co. v. Finke*, 13 L. R. A. 438; also *Baltimore Base Ball & Exhibition Co. v. Pickett*, 22 L. R. A. 690; *Fairly v. Wappoo Mills*, 29 L. R. A. 215; *Kauffman v. Raeder*, 54 L. R. A. 247; and *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 62 L. R. A. 922. 64 L. R. A.

7. The court will assume, in the absence of evidence to the contrary, that the law of another state is the same as that established by a local statute permitting the suspension of business on legal holidays.

8. The liability of a railroad company for goods in its possession for transportation as a common carrier does not cease, and its liability as warehouseman begin, until the goods are deposited in the depot or warehouse.

9. When a shipper has shown that the property was delivered to the initial carrier in good condition, any carrier against which suit is brought for negligent injury to the property has the burden of showing that the injury was not caused by its negligence.

10. Refusal to give to the jury a requested instruction which is not strictly correct is not reversible error.

11. The liability of a carrier for neglect to give prompt notice of the arrival of perishable goods is not destroyed by the failure of the consignee to make inquiries for them, although he has reason to believe that they are overdue.

12. That a bill of lading admitted in evidence in an action to recover damages for a carrier's delay in delivering goods received by it for transportation was not actually read to the jury will not justify the court's refusal to give instructions based upon its terms.

13. It is not error to refuse to give instructions which have no bearing upon the real case before the court.

14. When perishable freight in possession of a railway company for transportation reaches its destination in the evening before a general holiday, when all business will be suspended, too late for delivery that night, at a time of year when, unless cared for, it will be likely to spoil before it can be delivered, the company is bound to use the facilities at hand to prevent that result, and it will be liable for loss occasioned by its failure to do so.

(January 11, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Sumner County in favor of plaintiff in an action brought to recover damages for injury to dressed poultry while in defendant's possession for transportation. *Affirmed.*

Statement by **Neil, J.:**

The plaintiff below was a dealer in eggs, poultry, and produce, having places of business at Gallatin and Nashville, this state.

On Saturday, the 29th day of June, 1901, he consigned to Wm. Soeder & Son, at Philadelphia, Pennsylvania, a shipment consisting of 25½ barrels of dressed poultry. A reasonably prompt transportation of the goods would have put them into Philadelphia on Wednesday afternoon, which was

July 3, 1901; and the consignment, if in good condition, and properly packed in ice, would have been in a sound and merchantable condition on its arrival in Philadelphia.

The shipment was sent over the Star Union Line, going from Nashville and Gallatin to Philadelphia over the Louisville & Nashville Railroad Company to Cincinnati, and from that point over the line of the defendant railroad company to Philadelphia.

The goods arrived in Philadelphia on Wednesday afternoon, July 3, about 5 o'clock. This was after business hours, just prior to the close of business, and too late to unload during business hours of that day, and too late to notify consignees, and effect delivery.

The car containing the goods was put on the siding of the Quaker City Cold Storage & Warehouse Company about 11 o'clock P. M. of July 4th; this company being a terminal for the Pennsylvania Railroad Company's perishable freights, and acting as its agent in keeping, unloading, and delivering such freights. It is not, in terms, shown where the car was from 5 o'clock P. M. July 3d, to 11 o'clock P. M. July 4th, but no other inference can be drawn than that it was in the yards of plaintiff in error, not in cold storage, but exposed to the hot weather.

On the morning of July 5th, Geo. Soeder, one of the consignees, called at the warehouse, and was informed by the delivery clerk that he knew nothing of the shipment as yet. Shortly after this the employees of the warehouse company seemed to have looked up the property, and delivery was made about one hour later,—about 9 o'clock on the morning of July 5th. The weather at this time was extremely warm. While some of the witnesses say that the car was "good and cold," and had 2,100 pounds of ice in its ice bunkers, still, as otherwise shown, it requires at least three tons of ice to properly ice a car during such weather as prevailed on July 3d and 4th of 1901. At this time (that is, when delivery was made) the barrels containing the poultry were bare of ice. The ice had, the witnesses say, melted during the delay between the date of the arrival of the goods and their delivery to the consignees. In such weather as prevailed July 3 to July 5, 1901, dressed poultry bare of ice will spoil within a few hours.

When the poultry was unloaded and delivered to consignees, it was badly decayed. Some of it was thrown away, and the residue was immediately cleaned up, packed in finely crushed ice, and put upon the market, and within two hours thereafter was sold for the best price obtainable.

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The testimony shows that the poultry was carefully and properly packed in barrels at Nashville and Gallatin, according to the best requirements of the business.

There is no direct evidence that the poultry was in good condition when it was packed, but we infer from certain statements in the testimony of the plaintiff below, Mr. Naive, that it was in good condition; that is, that it was fresh. He shows that he took special pains with the shipment, on account of the hot weather, and packed it according to the best method known to the business; and, describing the method of preparing dressed poultry for shipment, he says: "We dress it and cool it out, and then pack it in ice, in barrels." We infer from the expression, "We dress it and cool it out," that the poultry involved in the present controversy had been freshly killed immediately before the shipment was made, and then properly cooled out and packed in the manner stated.

The record does not disclose any inquiry as to the shipment, either by plaintiff, Naive, or his agents, prior to July 5th; but it does show that Mr. Lindsey, agent of the Pennsylvania Road at Nashville, called up Mr. Naive on July 4th, and informed him that the goods had arrived on July 3d.

It is admitted that the difference in the market price of the poultry in the condition in which it was when delivered to consignees and the condition in which it was when delivered to the carrier was \$202.46.

The jury returned a verdict for this amount, with interest from July 5, 1901, amounting altogether to \$229.48.

From this judgment the railroad company has appealed and assigned errors.

The errors assigned are as follows:

(1) That there was no evidence to support the verdict of the jury, in that there was no material evidence to show that the poultry was properly packed by defendant in error, and in that there was no material evidence to show that the poultry was in good condition when delivered to the carrier.

(2) That the court erred in permitting George and William Soeder to testify that nothing was omitted to be done towards the proper handling of the poultry after it was received by them. The ground of the objection was that the question called merely for the expression of an opinion on the part of the witnesses referred to.

(3) That the court erred in permitting George and Wm. Soeder to testify that the delay in the delivery of the poultry after it arrived in Philadelphia was not caused by anything that they did or failed to do towards procuring its prompt delivery. The ground of this objection made in the

court below was the same as that stated under the preceding assignment.

(4) That the court erred in excluding the evidence as to the custom of suspending business on July 4th.

In respect of this matter, the defendant below offered to prove that July 4th was observed in Philadelphia by carriers and among business men of all classes by suspending business, and this custom of suspending business was an established one—general, certain, and uniform—in the city of Philadelphia.

The defendant offered the depositions of witnesses, showing that their answers would establish the points just indicated.

On objection of the plaintiff below, this testimony was ruled out by the circuit judge.

It was not proved that the plaintiff had any knowledge of this custom prevailing in Philadelphia when he made the shipment to that city.

(5) That the court erred in charging the law of common carriers as applicable to this case.

It is insisted that there was nothing in the case to show liability as a common carrier; on the contrary, that the liability, if any, of the plaintiff in error, was that of a warehouseman, and that the court should have charged the law regulating the liability of warehousemen.

(6) That the court erred in its charge in respect of the burden of proof. It is said that, by the court's charge, the burden of proof was thrown on the defendant to show that it was guilty of no negligence, whereas the court should have charged that the burden of proof was on the plaintiff to show negligence.

(7 to 15) It is insisted that the court erred in refusing to charge, or in failing to charge, as prepared, requests Nos. 1, 5, 6, 7, 10, 11, 12, 13, and 14, offered by the plaintiff in error in the court below.

The particulars of these requests will be stated in the body of the opinion, as far as may be deemed necessary.

Mr. Thomas H. Malone, Jr., for appellant:

Testimony as to custom of suspending business on July 4th was competent, and should have been admitted.

J. Russell Mfg. Co. v. New Haven S. B. Co. 50 N. Y. 121; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *Rushforth v. Hadfield*, 7 East, 224, 8 Revised Rep. 520; *Bowen v. Decker*, 18 Fed. 751.

The 4th of July is a public holiday in Tennessee.

Shannon's Code, § 3515.

Nothing else being shown, the statute of 64 L. R. A.

Pennsylvania will be presumed to be the same.

Gates v. Ryan, 37 Fed. 154.

The liability of the defendant, if any, was that of a warehouseman, and not that of a carrier, and the burden of proof was on the plaintiff to show negligence on the part of the warehouseman.

East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 699, 17 L. R. A. 691, 30 Am. St. Rep. 902, 20 S. W. 312.

If the carrier could not bind the consignee by attempted notice or delivery except during business hours of a business day, then no duty devolved upon it to attempt such notice or delivery.

Missouri P. R. Co. v. Wichita Wholesale Grocery Co. 55 Kan. 525, 40 Pac. 899; *J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121.

The bill of lading contained important restrictions on the carrier's liability, to which the shipper is presumed to have consented by receiving the same without objection.

Merchants' Despatch Transp. Co. v. Bloch Bros. 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Kendrick v. Cisco*, 13 Lea, 247; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092.

Messrs. Seay & Seay for appellee.

Neil, J., delivered the opinion of the court:

The first assignment of error is not well taken, and must be overruled. We think the facts set forth in the statement are sufficient to show that there was some evidence from which the jury might reasonably infer that the goods were in good condition and properly packed when delivered by the consignor to the carrier for shipment. This meets the requirements of the rule of law applicable to the subject.

The second and third assignments may be considered together. While His Honor, for the reasons set out in the objection made by counsel, committed a technical error in allowing the witnesses Geo. and Wm. Soeder to make the statement referred to, yet the error was innocuous, and there can be no reversal on such ground. The error was innocuous because it appears from the uncontroverted facts of the record that the persons referred to (the consignees) were in no wise responsible for the delay in delivering the goods, and that, upon receiving them, they exercised the utmost diligence in separating the spoiled poultry from that which was still merchantable, and also in cleaning up, preparing, and putting the latter on the market.

The fourth assignment and the fifth and

thirteenth requests all relate to the same matter,—the rights of the parties as affected by the intervention of the 4th of July. We need not specially refer to the requests, as they will be disposed of in determining the fourth assignment. The question to be decided, then, is whether His Honor erred in excluding the testimony referred to in that assignment. Our conclusion is that he did commit error in this matter.

It is true that the custom of suspending business on the 4th of July in Philadelphia was not known to the plaintiff below (that is, he had no actual knowledge of it); but when he dealt in that market, as in the present instance, through his agents, Wm. Soeder & Son, or sent goods there to his agents at that point for sale, the law visited him with constructive knowledge of a custom so certain, well-established, and general as the one referred to is shown to have been in that city. This principle is illustrated by the following cases: In *Illinois C. R. Co. v. Carter*, 105 Ill. 570, 36 L. R. A. 527, 46 N. E. 374, speaking of a custom prevailing at a particular port to waive the rule requiring carriers by water to give notice of the arrival of the goods to the consignee, the court said: "While it is a general rule that a carrier by water is required to give notice of the arrival of the goods to the consignee, it is well settled that such notice may be waived, either by the previous course of dealing between the parties or by the usual course of business of carriers in the same trade in which the carrier is employed at the locality where the goods are landed; and this whether the usage was known to the shipper or not; the rule being that every person who contracts with another for services in his particular trade is understood to contract with reference to the usage of the trade. 'The carrier may therefore show, as has been repeatedly held, the usage as to the delivery of the goods by those engaged in the carriage of goods by water in the particular port or at the particular place of delivery, and that he has acted according to it.' Hutchinson, Carr. § 366." See also, *Farmers' & M. Bank v. Champlain Transp. Co.* 18 Vt. 131, 140; same case on third appeal, 23 Vt. 186, 56 Am. Dec. 68; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264; *Turner v. Huff*, 46 Ark. 222, 55 Am. Rep. 580. In *Skiff v. Stoddard*, 63 Conn. 198, 219, 21 L. R. A. 102, 112, 26 Atl. 881, it is said: "When one employs another to deal in a particular market, he will be held as intending that the mode of performance should be in accordance with the established customs and usages of that market, as long as the custom or usage is neither immoral, unlawful, unreasonable, contrary to the express 64 L. R. A.

agreement of the parties, nor such as to change the intrinsic character of the undertaking;" citing *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499, and other cases.

This was said in respect of a custom of brokers to repledge stock bought for their customers on the New York market: "When the plaintiffs," said the court, "gave their orders to Bunnell & Scranton, they understood that the orders were for execution in the New York Stock Exchange. They knew the relation of Bunnell & Scranton to this exchange, and their mode of transacting business therein through New York houses, members thereof. They must therefore be held to have contemplated and authorized a course of dealing in accordance with the rules and customs of that market."

The same principle was, in effect, announced by this court in the case of *Sahlten v. Bank of Lenoze*, 90 Tenn. 221, 225-229, 16 S. W. 373, approving *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. ed. 37, and limiting *Dabney v. Campbell*, 9 Humph. 680; and it was expressly decided in *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338. In that case it is stated, in direct terms, in the opinion (page 339, 98 Tenn., page 339, 39 S. W.), that the foreign bank, held bound by the local customs of the banks of Nashville, to one of which it had sent a debt for collection, had no knowledge of these customs. In *Arrington v. Cary*, 5 Baxt. 609-611, the parties were allowed to prove the custom prevailing in a given city in respect of the conduct of a particular business.

The cases above cited and commented upon have reference, it is true, to customs and usages of business in places to which one ships goods, or where he deals through an agent or otherwise; but the principle must be the same as to a custom existing in such market or place of delivery which affects all business alike, by suspending all business for a definite time.

The case of *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350-354, 3 L. R. A. 273, 10 Am. St. Rep. 669, 10 S. W. 774, is not an authority to the contrary.

The custom referred to in that case was not general, uniform, and certain. The court did not have before it in that case a state of facts in any wise similar to those appearing in the present case; nor did the court in that case intend to contravene the principle that the parties are presumed to contract in view of a custom pertaining to the subject-matter of the contract, when such custom is well established and generally known and observed. Indeed, the rule is general that in all contracts, as to the subject-matter of which known usages prevail, the parties are held to have proceeded on

the tacit assumption of such usages, and to have contracted in reference to them, unless the contrary appears, and the usages form a part of the contract. *McCulsky v. Klosserman*, 20 Or. 108, 10 L. R. A. 785, 25 Pac. 366; *Union Ins. Co. v. American F. Ins. Co.* 107 Cal. 327, 28 L. R. A. 692, 694, 48 Am. St. Rep. 140, 40 Pac. 431, citing *Brown v. Howard*, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 367; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. However, a custom or usage, to be so available against a party, must be certain and uniform, and so notorious as to affect him with knowledge of it, and raise the presumption that he dealt with reference to it, or he must be shown to have had actual knowledge of it. *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103, 20 Atl. 788; *Foley v. Muson*, 6 Md. 51; *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128, 34 Am. Rep. 300; *Citizens' Bank v. Graflin*, 31 Md. 520, 1 Am. Rep. 66; *Patterson v. Crouther*, 70 Md. 125, 16 Atl. 531. The custom or usage invoked in the present case is shown to have had the requisite certainty, uniformity, and notoriety in Philadelphia; and the plaintiff below, as stated, having dealt with reference to that market, and having shipped his goods there, was bound by it, even though he had no actual knowledge of the custom at the time he shipped the goods. *Illinois C. R. Co. v. Carter*, 165 Ill. 570, 36 L. R. A. 527, 46 N. E. 374; *Farmers' & M. Bank v. Champlain Transp. Co.* 16 Vt. 52, 140, 42 Am. Dec. 491, 18 Vt. 131, same case on third appeal, 23 Vt. 186, 56 Am. Dec. 68; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264; *Turner v. Huff*, 46 Ark. 222, 55 Am. Rep. 580; *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 112, 26 Atl. 874, 28 Atl. 104; *Samuels v. Oliver*, 130 Ill. 73, 79, 22 N. E. 490; *Jefferson County Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 30 S. W. 338; *Sahlien v. Bank of Lonoke*, 90 Tenn. 221, 225-229, 16 S. W. 373.

It is true that a custom or usage will not be held binding if it be unreasonable. *Dempsey v. Dobson*, 184 Pa. 588, 40 L. R. A. 550, 551, 63 Am. St. Rep. 809, 39 Atl. 493; *Rumpel v. Oregon Short Line & U. N. R. Co.* 4 Idaho, 13, 22 L. R. A. 725, 731, 35 Pac. 700; *Warden v. Louisville & N. R. Co.* 94 Ala. 277, 14 L. R. A. 552, 10 So. 276; *Columbus & N. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Freary v. Cooke*, 14 Mass. 488; *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. 303, 39 Am. Rep. 785; *Central R. & Bkg. Co. v. Anderson*, 58 Ga. 393; *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234, 237, 26 S. E. 397.

But we see nothing unreasonable in sus-
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pending business for one day in commemoration of the greatest event in our national history. The fact that the weather is usually very warm at this time of the year, and that perishable freight may decay in a few hours, cannot alter the conclusion. The same thing might be said in respect of a delivery on Sunday at that time of the year. Such a peril should be guarded against either by so timing the shipment as that the goods will not, in due course of transportation, encounter a nonbusiness day when ready for delivery, or by superior precautions in the packing or preparation of the property for shipment, or by adequate care on the part of the carrier, pending the delay. Where dressed meat was being carried, and, owing to a delay of the vessel, the ice in which it was packed melted away, it was held that the carrier was liable for the damage resulting from its failure to supply ice, it appearing that it was practicable to have done so. *Sherman v. Inman S. S. Co.* 26 Hun, 107; *Peck v. Weeks*, 34 Conn. 145. When, in the course of transportation, certain furs became wet through an accident to the boat, it was held that it was the carrier's duty to unpack them and allow them to dry immediately, and for a failure to do so the carrier was liable for the damage which such attention would have averted. *Chouteau v. Leech*, 18 Pa. 224, 57 Am. Dec. 602. So where coffee was wet. *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470. In *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594, cited in *Lamont & Co. v. Nashville & C. R. Co.* 9 Heisk. 66, the principle is stated by this court to be that, in case of an accident or emergency endangering goods in the hands of a carrier, it "is bound to use such means as would suggest themselves to, and be within the knowledge and capacity of, well-informed and competent business men in such positions, and such diligence as prudent, skilful men, engaged in that kind of business, might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care."

A custom or usage is not admissible for the purpose of varying the terms of a special contract. *Baltimore Base Ball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 22 L. R. A. 690, 692, 44 Am. St. Rep. 304, 28 Atl. 279; *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L. R. A. 215, 22 S. E. 108.

Nor is a custom or usage admissible which makes a substantial change in the rights and relations of the parties, and which violates a settled rule of law. *Geyer-Marion Gold Min. Co. v. Stark*, 53 L. R. A. 684, 690, 45 C. C. A. 467, 106 Fed. 558, citing *Irvine v. William*, 110 U. S. 499, 28 L.

ed. 225, 4 Sup. Ct. Rep. 160; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20, 39, 30 L. ed. 573, 578, 7 Sup. Ct. Rep. 460; *Robinson v. Mollett*, L. R. 7 H. L. 802, 816, 828, 836, 44 L. J. C. P. N. S. 362; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. ed. 987; *Shaw v. Spencer*, 100 Mass. 382, 393, 97 Am. Dec. 107, 1 Am. Rep. 115; *Lehman v. Marshall*, 47 Ala. 362; *Leuckhart v. Cooper*, 3 Bing. N. C. 99, 3 Scott, 521, 6 L. J. C. P. N. S. 131; *Baxter v. Sherman*, 73 Minn. 434, 441, 72 Am. St. Rep. 631, 76 N. W. 211.

And this is true whether the rule so attempted to be violated is one established by statute (*Scott v. School Dist. No. 9*, 67 Vt. 150, 27 L. R. A. 588, 589, 31 Atl. 145), or a common-law rule (*Missouri P. R. Co. v. Fagan*, 72 Tex. 127, 2 L. R. A. 75, 13 Am. St. Rep. 776, 9 S. W. 749; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 2 L. R. A. 836, 7 Am. St. Rep. 73, 5 So. 317; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Mayer v. Thompson-Hutchison Bldg. Co.* 104 Ala. 611, 28 L. R. A. 433, 437, 53 Am. St. Rep. 88, 16 So. 620). These cases are in accord with our own authorities. *Turney v. Wilson*, 7 Yerg. 342, 27 Am. Dec. 515; *Cooper v. Sanford*, 4 Yerg. 452, 26 Am. Dec. 239; *Wilson v. Knott*, 3 Humph. 475; *Mays v. Jennings*, 4 Humph. 106; *Dabney v. Campbell*, 9 Humph. 685, 686; *Bedford v. Flowers*, 11 Humph. 242; *Dean v. Vaccaro*, 2 Head, 488, 75 Am. Dec. 744; *Saint v. Smith*, 1 Coldw. 52; *Charles v. Carter*, 96 Tenn. 607, 613, 614, 36 S. W. 396; *Sands v. Southern R. Co.* 108 Tenn. 2, 12, 64 S. W. 478. Of these cases, *Dean v. Vaccaro* is specially relied upon by defendant in error. In that case an attempt was made to wholly dispense with the rule of law requiring carriers by water to give notice of the arrival of the goods, by a custom or usage at Memphis to disregard it altogether. The court held that this could not be done.

But the custom or usage under examination in the present case does not vary the terms of the contract between the parties, nor does it violate any statute or any rule of the common law. The contract and the law required that the railway company should transport the goods to their destination, according to its regular course of business in the transportation of such articles, with all reasonable dispatch, and that, on arrival of the goods, prompt notice should be given to the consignee, and that, on their demand therefor, delivery should be made to them. *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272, 276; *Butler v. East Tennessee & V. R. Co.* 8 Lea, 32. And see Shannon's Code, § 3597, as to notice to consignee. No proof being made as to law of 64 L. R. A.

Pennsylvania upon this latter subject, we must presume that it is the same as our own.

Our statute provides that "all common carriers and express companies doing business within the limits of this state shall, after the receipt of freight or merchandise for delivery at their warehouse, depot, or station, notify the consignee by written or printed notice, to be delivered to the consignee in person at his place of business, if in the city or town where received; or, if not residing or doing business in the city or town, then through the postoffice, within three days after the arrival of said goods." Acts 1870-71, chap. 17, § 1; Shannon's Code, § 3597. We understand this act to mean that prompt notice shall be given upon the arrival of the goods, and that three days is fixed as the limit allowed for delay; that is to say, the carrier would not be justified in all cases in delaying notice for the full three days, or, rather, in giving it so as to fall just within three days. The matter would be controlled to a considerable extent by the nature of the goods. For example, what would be prompt notice of the arrival of a consignment of iron would fall far short of the duty of the carrier in the case of perishable goods. But the meaning of the term "prompt notice" cannot be settled with precision, as applicable to every case. The expression is a relative one, designed to mark the degree of diligence required of the carrier; and, while a failure to comply with the rule indicated by this expression would be sufficient to charge the carrier with negligence, the rule itself—within the three-days limit—is subject to modification by custom or usage. It was held in a Pennsylvania case that the rule that a carrier must give notice to the consignee of the arrival of goods at destination is subject to exceptions growing out of special circumstances, and out of customs that have grown up for the mutual advantage of shipper and carrier. *Allen v. Pennsylvania R. Co.* 183 Pa. 174, 39 L. R. A. 535, 38 Atl. 709. So, in an Illinois case, it was held that while, ordinarily, a carrier by water must notify the consignee of the arrival of goods, before its liability as carrier terminates, yet such notice may be waived by a former course of dealing with the consignee, or by usage prevailing among carriers in the same trade at that port. *Illinois C. R. Co. v. Carter*, 165 Ill. 570, 36 L. R. A. 527, 46 N. E. 374. A custom or usage not to give notice of arrival or make delivery on the 4th of July would fall clearly within the principle governing these cases. Such a custom having been, presumptively, within the contemplation of the parties, negligence could not be predicated of the con-

duct of the railway company in failing to give notice of the arrival of the goods in the present case on the 4th of July. The following authorities also bear upon, illustrate, and support the conclusion we have reached: *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121; *Bowen v. Decker*, 18 Fed. 751; *Gates v. Ryan*, 37 Fed. 154. And in *Ely v. New Haven S. B. Co.* 53 Barb. 207, it was held that, where the consignee's place of business was closed, on account of the day being the 4th of July when the goods arrived, the carrier was excused from giving notice of arrival.

We may add that, if we are mistaken in any of the foregoing views, our statute, it seems, would place the matter beyond controversy. By § 3515, Shannon's Code, it is provided that the 4th of July and certain other days therein mentioned "shall be holidays, on which all public offices of this state may be closed, and business of every character, at the option of the parties in interest or managing the same, may be suspended; and in order to remove any impediments in the way of the observance of any of said days named as holidays, all negotiable paper falling due on either of said days, shall be due and payable the first business day preceding the same."

There being no evidence to the contrary, we must assume that the Pennsylvania law is the same as our own in this regard.

In the fifth assignment of error, it is indicated that there is nothing in the case to show liability on the part of the railway company as a common carrier; on the contrary, that the liability, if any, is shown by the facts to have been that of a warehouseman merely, and that the court below should have charged the law regulating the liability of warehousemen, rather than that pertaining to common carriers.

The facts contained in the statement indicate that the goods arrived at 5 o'clock in the afternoon of July 3d, which was within proper time to show reasonable dispatch in transportation from the initial to the terminal point; but they also show that the goods were allowed to remain in the yards of the company from the time of the arrival until July 4th, at 11 P. M., before they were warehoused,—a period of 30 hours. Conceding that the company had fully discharged its duty up till 5 o'clock P. M. of July 3d, still it remained liable as a common carrier from that time until the goods were put in the warehouse, and notice given to the consignees. We have three cases bearing upon the subject. All of them recognize as the rule that the liability of the railway company as common carrier does not cease, and its liability as warehousemen

does not begin, until the goods are deposited in the depot or warehouse. In neither of them is it denied that notice must be given, also, as a prerequisite. In *Southern Exp. Co. v. Kaufman*, 12 Heisk. 161, 165, it appeared (page 162, 12 Heisk.) that notice had been given. In *Butler v. East Tennessee & V. R. Co.* 8 Lea, 32, the duty to give notice was excused because the consignee had no fixed residence, and the company had no knowledge of his temporary stopping place. In *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 691, 30 Am. St. Rep. 902, 20 S. W. 312, no question of notice was raised, nor was the statute on that subject referred to.

The point made in the sixth assignment is that, in the charge of the circuit judge, the burden of proof was improperly cast upon defendant below to show that it was guilty of no negligence.

The charge contains two propositions. The first of these is that if the goods were delivered in good condition by the consignor to the initial carrier, the Louisville & Nashville Railroad Company, and were subsequently delivered to the consignees in bad condition by the connecting and terminal carrier, the burden rested upon the latter to show that the injury was not caused by its negligence. The second proposition is that, if the goods were delivered by the consignor to the initial carrier in good condition, and were delivered by the latter in like good condition to the connecting carrier, and the connecting carrier (being the terminal carrier) delivered them to the consignees in a damaged condition, the burden of proof would rest upon such terminal carrier to show that the injury was not caused by its negligence.

We think there was no error in either instruction. The most that can be required of a shipper is that he shall deliver his goods to the carrier in good condition, properly packed or prepared for shipment. From that time forward they are committed to the custody and management of the carriers,—the initial and connecting ones. In the nature of things, he can know nothing of their management of the business, while they—each of them as to its own relation to the matter—cannot, by means of their agents, fail to know all of the facts. It is nothing more than reasonable, therefore, that each, when sued for injury to the property, should be required to show that it has discharged its duty in respect thereto in the care of the property during transportation, and until delivery. When property has been delivered in good condition to a carrier, and it has been damaged while in possession of such carrier nothing else appearing, the necessary presumption is that there has been neg-

ligence on the part of the carrier; and the inevitable legal conclusion is that the burden is cast upon the carrier to remove this presumption.

The sixth assignment of error must, therefore, be overruled. *Merchants' Despatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392, 416, 6 Am. St. Rep. 847, 6 S. W. 881; *Memphis & C. R. Co. v. Holloway*, 9 Baxt. 188; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311.

The first request was properly refused by his honor, because there was no testimony in the record upon which to base the instruction asked. Not only was there no testimony to show that the goods, upon their arrival in Philadelphia, were promptly placed in the company's warehouse, as the request assumes, but, on the contrary, it is shown, beyond cavil or dispute, that they were allowed to remain in the company's yard, exposed to very hot weather, for thirty hours after their arrival. It is true that thereafter they were put in a cold-storage warehouse, where they remained from 11 o'clock P. M. of July 4th until 9 o'clock A. M. of July 5th, when they were delivered to the consignees; but the court below could not, upon the fact of the deposit of the goods in cold storage at the late hour mentioned, properly base an instruction as requested, to the effect that, from the time of the arrival of the goods until their delivery, the liability of the defendant below was that of a warehouseman, only, and not that of a common carrier. As we have already held, the liability of the defendant below during the thirty hours referred to was that of a common carrier, and not that of a warehouseman. An instruction requested must be strictly correct; otherwise the circuit judge cannot be put in error by his refusal to charge it.

The fifth and thirteenth requests have already been disposed of, in what we have said upon the question raised by the fourth assignment of error.

The sixth, seventh, and tenth requests raise the point that it was the duty of the consignees, as agents of the consignors, if they had reason to believe that the shipment was overdue, to make inquiry at the office of the railway company, and that any injury that might be caused by delay after they so had reason to believe that the consignment was overdue would be at their risk, and not at the risk of the railway company.

His honor, the circuit judge, declined these requests, and acted correctly in so doing. The railway company cannot in this manner shift its duties and responsibilities upon its patrons. Its duty is absolute to give to the consignee prompt notice of the arrival of goods, and the latter has the

right, until such notice is given, to rest securely in the belief that they have not arrived. Common carriers are quasi public functionaries, and those who intrust the carriage of goods to them have the right to presume, until the contrary appears, that the duties devolved upon them by law have been properly discharged.

The eleventh, twelfth, and fourteenth requests raise the point that if the injury complained of, to the goods, was caused by the operation of certain causes which were excepted from the liability of the railway company in the bill of lading, there could be no recovery; likewise, that the goods, on arrival at destination, were at the risk of consignee, and for this reason there could be no recovery. His Honor, the circuit judge, declined to charge the jury as requested, on the ground that the bill of lading had never been read to the jury or to the court. The bill of exceptions shows that the bill of lading was, in form, offered in the court below by the plaintiff therein, and that thereupon it was formally admitted without objection, but not actually read to the court and jury, or either of them; the respective counsel agreeing among themselves, in the presence of the court, at the moment, to "consider it as read." It does not appear that any of its provisions were called to the attention of the circuit judge until after he had delivered his charge to the jury. His attention was then directed to certain portions of it by the requests above referred to, which he refused, as stated.

The bill of lading having been, even under the circumstances stated, put in evidence in the cause, there would have been error in the refusal of his honor to charge the jury upon the matters pointed out and indicated by counsel in the requests referred to, if these matters had been pertinent; but there was no hurtful error, because the matters embraced in the requests clearly had no bearing upon the real case before the court,—the liability of the railway company for negligence as a carrier during the thirty hours between 5 o'clock P. M. of July 3d and 11 o'clock P. M. of July 4th, as shown *infra*. The matters of exception from liability, under a proper construction, did not refer to or cover such a case; and the same is true as to the risk on arrival, above referred to, under the circumstances set out *infra*.

It now remains to consider whether there should be a reversal for the said errors committed in respect of the matter embraced in the fourth assignment, and in the eleventh, twelfth, and fourteenth requests.

The rule has been laid down by this court

(*Oliver v. Nashville*, 106 Tenn. 273, 274, 281, 61 S. W. 89; *Jones v. Western U. Teleg. Co.* 101 Tenn. 443, 47 S. W. 699) that there can be no reversal for error in the charge of the court below where we can clearly see that a correct result was reached by the jury, and that another trial, with a proper charge could not change that result. The same rule must obtain where evidence was improperly excluded in the court below, if it be perfectly apparent to this court that the result attained was the correct one, that the excluded evidence could not have changed that result, and that, upon a new trial being granted, the jury, on that and on other uncontrovertible propositions of fact appearing in the record, could not fail to reach the same conclusion. To reverse in such a case would be, considering the whole case together, to grant a reversal for an immaterial error, and so to violate that section of the Code which provides that "no judgment, decision, or decree of the inferior court shall be reversed in the supreme court, unless for errors which affect the merits of the judgment, decision, or decree complained of," Shannon's Code, § 6351.

Now, it is shown, beyond doubt, that the goods reached Philadelphia at 5 o'clock in the afternoon of July 3d, too late for notice to the consignee, and delivery on that day; that the next day (July 4th) was a holiday, on which there could be neither notice nor delivery; that from July 3d, at 5 o'clock P. M., till July 4th, at 11 o'clock P. M., a period of thirty hours, the goods were left exposed to the hot weather, in the company's yard, without any additional icing,—protected only by such ice as remained in the bunkers of the car, left over or remaining from the ice with which the car was furnished when it started on its trip; that the amount so left over in the car was insufficient to preserve the goods, in consequence of which they, being perishable goods, suffered injury and decay; and, finally, that the company had at hand, in its terminal for perishable freights, the Quaker City Cold Storage & Warehouse Company, the means of preventing the injury, if it had chosen to use these means. These facts show a clear case of negligence on the part of the railroad company. Having reached Philadelphia with the goods on the afternoon of July 3d, too late to give notice and make delivery on that day, and knowing, likewise, that it could not give notice and make delivery on the next day, because it was a holiday, and, indeed, that it could not make delivery until the morning of July 5th, and knowing that the weather was very hot, and that the goods were perishable, and would probably spoil unless put in

cold storage, and having at hand the means of so putting them in cold storage and preserving them, it was the duty of the company to so care for and preserve them. The failure to do so resulting in injury to the goods, the carrier is liable therefor.

The judgment of the court below must, therefore, notwithstanding the errors mentioned, be affirmed, with costs.

CONTINENTAL FIRE INSURANCE COMPANY, Appt.,

v.

WHITAKER et al.

(.....Tenn.....)

1. The police power justifies legislation providing that insurance policies shall not be avoided for the falsity of representations or warranties, unless made with intent to deceive, or increasing the risk of loss; and it is immaterial that it is made to apply only to those issued by old-line companies, and not to those issued on the assessment plan.
2. Violation of a provision in a fire insurance policy that it shall be void unless an inventory and books of account are kept in a fire-proof safe is within the operation of a statute providing that false warranties shall not avoid the policy, unless made with intent to deceive, or unless they increase the risk.
3. Misrepresentation as to the state of title cannot be charged against the applicant for fire insurance where he states the title correctly, and it is erroneously written in the application without his knowledge by the agent of the insurer.
4. Misrepresentations as to encumbrances do not increase the risk, so as to avoid a policy of insurance on the property, where the statute provides that misrepresentations shall not avoid the policy, unless they increase the risk, or are made with intent to deceive.
5. A fire insurance policy is not avoided by misrepresentations as to encumbrances on the property where the applicant made no representations upon the subject, but the statement was inserted by the company's agent without knowledge of

NOTE.—For a case in this series which assumes the validity of a statute like the one considered in the case above, see *Pennsylvania Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33.

As to effect on validity of such a statute of exemption from its provisions of companies doing business on the assessment plan, see, in this series, *Fidelity & C. Co. v. Freeman*, 54 L. R. A. 680.

For conditions in insurance policies as to keeping, producing, and preserving books and papers, see also, in this series, *Connecticut F. Ins. Co. v. Jeary*, 51 L. R. A. 698, and *note*; also *Southern F. Ins. Co. v. Knight*, 52 L. R. A. 70, and *Phoenix Ins. Co. v. Schwartz*, 57 L. R. A. 752.

the applicant, and he signed the application without reading it.

6. Failure to furnish proofs of loss within the time required by a fire insurance policy does not prevent an enforcement of the policy where such failure is not, while other things are, made a ground of forfeiture by the policy, and proofs of loss are furnished before suit is brought.
7. A statute imposing a penalty upon a fire insurance company for refusal, in bad faith, to pay the amount due upon a policy, and also a like penalty upon an insured who institutes an action in bad faith, is not void as a special regulation of the business of insurance, which no differences between that and other kinds of business justify.

(January 18, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Bedford County in plaintiffs' favor in an action brought to enforce payment of the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas R. Myers for appellant.

Messrs. W. B. Bates and B. D. Kingree for appellees.

Neil, J., delivered the opinion of the court:

This suit was brought by Whitaker & Dillard, the defendants in error, in the circuit court of Bedford county, against the Continental Fire Insurance Company, seeking to recover on a policy issued by that company to them on May 21, 1901, insuring a storehouse at the sum of \$100, with fixtures therein at \$100, and a stock of merchandise therein at \$1,500; in all \$1,700.

The property was destroyed by fire on September 9, 1903.

The case was tried at the August term, 1903, of Bedford circuit court, when the jury rendered a verdict of \$1,700, the full amount of the policy, and for the additional sum of \$250 attorneys' fees, under Acts 1901, p. 248, chap. 141.

The insurance company has appealed and assigned errors.

The first error assigned is that there is no evidence to sustain the verdict. Under this are comprehended the following points, viz.: That the defendants in error warranted that they owned the legal title to the property, whereas the testimony shows that they did not; that they warranted that the storehouse was unencumbered, when in fact it was heavily encumbered; that the policy contained what is known as the "iron-safe clause," and the testimony shows that this was not complied with; that the policy provided that the proofs of loss should be furnished within sixty days from the date 64 L. R. A.

of the fire, and that this provision was not complied with. It is insisted that all of these were warranties by the terms of the policy, and a failure to comply with either of them avoided the policy.

Another assignment raises the question of the constitutionality of § 22 of the Tennessee insurance act of 1895 (chapter 160, p. 332, of the Acts of that year). This section is reproduced as § 3306 of Shannon's Code of Tennessee.

Other assignments raise the question of the constitutionality of chapter 141, p. 248, Acts 1901.

We shall consider these objections in the following order:

1. As to the constitutionality of § 22, chap. 160, p. 332, Acts 1895 (Shannon's Code, § 3306).

This section reads as follows:

"No written or oral misrepresentation or warranty therein made in the negotiation of a contract or policy of insurance, or in the application therefor by the assured, or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

This section has been twice approved and applied in reported cases. *Light v. Greenwich Ins. Co.* 105 Tenn. 480, 58 S. W. 851, and *Hartford L. Ins. Co. v. Stalling* (Tenn.) 72 S. W. 960. In both of these cases the validity of the legislation was tacitly assumed, but in neither of them was the question of constitutionality directly raised. Some presumption of constitutionality, of course, arises from the above-mentioned decisions applying the law as a valid one; but this does not relieve us of the duty of considering and determining the question when directly made.

The section quoted is assailed on the ground that it is vicious class legislation. It is said that the classification is improper, in the first place, because the rule laid down limiting the power to make binding warranties capable of forfeiting the contract is confined to insurance companies alone; and, in the second place, that it does not apply to all kinds of insurance companies operating upon the assessment plan.

The title of the act of which § 22 is a part (Acts 1895, chap. 160, p. 332) indicates that it was passed for the purpose of laying down rules "to govern and regulate the business of insurance" "other than life and casualty insurance upon the assessment plan." The act applies to both foreign and domestic companies. The generality of the title, nothing else appearing, would justify

the conclusion that it was intended to embrace all kinds of insurance except life insurance upon the assessment plan and casualty insurance upon that plan; thus apparently including within its scope fire insurance companies upon the assessment plan. An attentive examination, however, of the body of the act discloses the fact that its scope is not so broad. This clearly appears from the provisions of §§ 9 and 10, fixing the terms on which foreign fire insurance companies may do business, from which it appears that the act had in contemplation only companies possessing a capital stock. The same appears, in respect of domestic fire insurance companies, from § 13. Moreover, as to the latter the same result is reached by a comparison of the act with chapter 220, p. 443, Acts 1895, which makes provision for the business of mutual or assessment fire insurance companies organized or incorporated under the laws of this state. It does not appear that any provision is made in either of the acts for the business of foreign fire insurance companies of this character; that is, those operating on the mutual or assessment plan. The business of life and casualty companies operating upon this plan is provided for by Acts 1887, chap. 178, p. 303, and Acts 1893, chap. 6.

It seems, therefore, that the classification made by chapter 160, p. 332, Acts 1895, is of all insurance companies other than those operating on the mutual or assessment plan. We have, then, on the one hand, nonassessment companies; on the other, assessment companies. To the first class the provisions of § 22, above copied, apply; to the second class they do not apply. Is there a good reason underlying the classification? We think there is. It is obvious, without going into the particulars of the matter, that the two classes of companies operate on principles so radically different that different and distinct regulations are required for their management. Is there a good reason why the provisions of § 22 should be made to apply to the one class, and not to the other? A sufficient reason seems to be found in the diverse relations which the policy holders of the different classes bear to their respective companies. In the assessment companies each policy holder is an integral part of the whole. The members mutually insure each other. In them are vested the control and regulation of the affairs of the company. There is, therefore, in those companies not so great a tendency to oppression, and to the abuse of power, as in stock companies organized for the profit of their stockholders, who need not be policy holders. It may be well supposed that temptations to the abuse of power

er, so likely to arise in companies of the latter class, either would not arise at all in those of the former, or, if arising, would be corrected by the organization itself, the interest of each being, in a sense, that of all.

But, aside from this, if, upon the second division of the subject, it be found that § 22 is justified under the police power of the state, it would be immaterial that the legislature had determined to impose it upon policies issued by nonassessment companies, and had not chosen to do the same thing in respect of policies issued by assessment companies. If an act falls under the police power, the legislature must judge of the objects upon which the statute shall operate. The court cannot declare it void on the ground that there are, in its opinion, other objects equally deserving of the attention of the legislature, which it has omitted to notice.

That legislation of this character is justifiable under the police power, there can now no longer be any doubt.

There was a similar statute passed in Pennsylvania on June 23, 1885 (P. L. 134), reading as follows: "Whenever the application for a policy of life insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." Speaking of this statute, in *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, pending in the circuit court of appeals for the sixth circuit, Taft, J., said: "That such statutes are remedial in their nature, and are quite within the police power of the legislature, is no longer a debatable question;" citing *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Wall v. Equitable Life Assur. Soc.* 32 Fed. 273; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. ed. 778, 14 Sup. Ct. Rep. 868; *Reilly v. Franklin Ins. Co.* 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45, 24 N. E. 1072; 4 Thomp. Corp. §§ 5491, 5524. In commenting upon a similar statute in Missouri, Dillon, J., said: "The legislature of Missouri conceived, and, we think, wisely, that the promises held forth to the assured in the policies in general use were but too

often a delusion and a snare, and, as the courts were powerless to correct the evil, it ought to be corrected by statute." *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 182, Fed. Cas. No. 17,545. In speaking of a similar statute existing in New Hampshire, the supreme court of that state, through Foster, Ch. J., said: "The policy and purpose of the law were to promote honest and open fair dealing, to do equal justice, to protect the confidence reposed by the insured in those with whom he may contract, and (especially disclaiming any reference to this defendant company), to spring the traps concealed in the mass of rubbish before the unwary traveler shall have put his foot in them, to prevent and prohibit, in short, the farce and fraud by which it has too often been found that the party apparently insured by the stipulations written upon one side of a piece of paper was uninsured by the conditions involved in the 'insurance typography' indorsed upon the other side of the same piece of paper." [*Chamberlain v. New Hampshire F. Ins. Co.* 55 N. H. 264]. See also *Hermany v. Fidelity Mut. Life Assn.* 151 Pa. 17, 24, 24 Atl. 1064; *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, Overruling *Farmers' & D. Ins. Co. v. Curry*, 13 Bush, 312, 26 Am. Rep. 194; *White v. Providence Sav. Life Assur. Soc.* 163 Mass. 108, 27 L. R. A. 398, 39 N. E. 771; *Hogan v. Metropolitan L. Ins. Co.* 164 Mass. 448-450, 41 N. E. 663.

For the reasons stated, we hold that the section of our insurance act quoted above is not unconstitutional.

2. As to the iron-safe clause.

This clause in the policy reads as follows: "The following covenant and warranty is hereby made a part of this policy: (1st) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from this date, and, upon demand of the assured, the unearned premium from such date shall be returned. (2d) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transactions, including all purchases, sales, and shipments, both for cash and credit, from date of inventory as provided for in the 1st section of this clause, and during the continuance of this policy. (3d) The assured will keep such books and inventories, and also the last preceding inventory, if such has been taken, securely locked in a fire-

proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a bar to any recovery thereon."

The same thing appears, in substance, in the application, and is therein also denominated a "warranty."

If the foregoing provisions of the policy were binding as a warranty, and that warranty should be strictly construed, it would necessarily follow that the complainant could not recover, inasmuch as the testimony fails to show that the provisions referred to were fully complied with. It becomes pertinent, therefore, to pass upon the validity of the said provisions.

We are of the opinion that the said provisions fall directly within the terms of § 22, chap. 160, p. 332, Acts 1895. It is not insisted that the representations contained therein were made with actual intent to deceive. It is also clear that the warranty, so called, purporting to be contained within the clauses above mentioned, could not increase the risk of loss. The provisions referred to could be useful only in preserving for the insurance company, and for the insured as well, accurate evidence of the amount of the goods on hand at the date of the fire. Such evidence is no doubt highly desirable in all cases, and so far the provisions of the iron-safe clause are commendable; and it cannot be doubted that in every case a failure to preserve books and papers, if not satisfactorily explained, would be a circumstance of great weight against the insured in estimating the amount of the loss. It cannot be said, therefore, that the requirements contained in the said iron-safe clause are wholly ineffectual or unimportant. It is true that under the terms of § 22 of the statute above referred to they cannot be treated as warranties, and as avoiding the policy for failure to comply therewith. The statute must be read into the policy, and so much of the latter as is in conflict with the law so laid down must be held as entirely nugatory as if never written. Still, after expunging so much of the language quoted as undertakes to create a warranty, making void the policy for failure to comply therewith, there yet remains a rational and valid agreement, failure to substantially comply with which imposes upon the insured the duty of mak-

ing a satisfactory explanation; and a total failure to comply arouses such grounds of suspicion in the mind of the court as to require proof of a high degree of certainty to establish the amount of the loss. This was, in substance, the view taken by this court in the case of *Valensky v. Conn. F. Ins. Co.* (decided at Knoxville during the year 1901).

In the present case it appears there was a reasonable compliance with the terms contained in the iron-safe clause, and the testimony clearly shows that the loss was as great as the recovery allowed in the court below.

3. As to misrepresentations concerning the legal title.

The application states that the legal title was in the firm of Whitaker & Dillard, the assured. The testimony, however, shows that Mr. Whitaker stated the matter truly to the agent of the company,—that is, that he owned the property, and not the firm; but the agent who wrote the application put it down in the manner stated, and this application was never read over by either Whitaker or Dillard. On the contrary, trusting to the correctness of the agent, whom they knew well, they signed it without reading it. It has been held in this state that it is competent to introduce such testimony, notwithstanding the application, and that, upon such facts being proved, the insured is exonerated from the charge of misrepresentation. *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352, 25 Am. Rep. 780; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *McCarthy v. Catholic Knights*, 102 Tenn. 345, 352, 52 S. W. 142, and authorities cited. See also *Light v. Greenwich Ins. Co.* 105 Tenn. 480, 58 S. W. 851, and *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L. R. A. 915, 82 Am. St. Rep. 892, 62 S. W. 149.

4. As to the encumbrance upon the storehouse.

The application states that there were no encumbrances, but the testimony shows that the storehouse and the lot on which it was situated were heavily encumbered.

The policy was not avoided by this conflict between the application and the facts as existing at the time, for the reason stated in the preceding division, namely, because it appears that the application was written by the company's agent, and was not read over by the applicants; and, further, that they did not in fact make any statement to the agent that the property was unencumbered. Moreover, it was held in the two cases last cited that a misrepresentation as to encumbrances would not avoid the policy, because such liens do not

increase the risk, as the secured debt would remain after the destruction of the property. *Light v. Greenwich Ins. Co.* 105 Tenn. 480, 58 S. W. 851, and *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L. R. A. 915, 82 Am. St. Rep. 892, 62 S. W. 149.

5. As to the proofs of loss.

The policy contains the following: "The sum for which this company is liable pursuant to this policy shall be payable sixty days after notice, ascertainment, estimate, satisfactory proof of the loss having been received by this company in accordance with the terms of the policy. . . . If fire occur the insured shall, . . . within sixty days after the fire, unless such time is extended in writing," make proofs of loss. "The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company," etc. "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

No forfeiture is provided for in the policy for failure to furnish the proofs of loss within sixty days next after the fire, although there are many other acts referred to in the policy and omissions also referred to therein, for which forfeitures are provided.

In the present case the proofs of loss were furnished within sixty-nine days after the fire, but not within sixty days. The suit was not brought until the expiration of sixty days from the filing of the proofs of loss, and it was brought within twelve months after the fire.

The rule laid down in *Joyce on Insurance* applicable to this state of facts is as follows: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose a forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some other time prior to commencing the action upon the policy. And this has been held to be true, even though the policy provide that no action can be maintained until after a full compliance with all the requirements thereof."

We regard this as a sound statement of the law, and adopt it. It is supported by

numerous authorities. *Steele v. German Ins. Co.* 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514; *Hull v. Concordia F. Ins. Co.* 90 Mich. 403, 51 N. W. 524; *Tubbs v. Dwelling House Ins. Co.* 84 Mich. 646, 48 N. W. 296; *Rynalski v. Insurance Co.* 96 Mich. 395, 55 N. W. 981; *German Ins. Co. v. Brown*, 16 Ky. L. Rep. 601, 29 S. W. 313; *Vanginder-taelen v. Phenix Ins. Co.* 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; *Flatley v. Phenix Ins. Co.* 95 Wis. 618, 70 N. W. 828; *Kahnweiler v. Phenix Ins. Co.* 57 Fed. 562; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 882; *Coventry Mut. Live Stock Ins. Asso. v. Evans*, 102 Pa. 281; *Taber v. Royal Ins. Co.* 124 Ala. 681, 26 So. 252; *Rheims v. Standard F. Ins. Co.* 39 W. Va. 672, 20 S. E. 670; *Shell v. German Ins. Co.* 60 Mo. App. 644; *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162, 13 S. W. 1016.

We are of opinion, therefore, that the case of defendants in error was not barred by their failure to furnish the proofs of loss.

6. As to the constitutionality of chapter 141, p. 248, Acts 1901.

This act, so far as necessary to be quoted, reads as follows:

"Sec. 1. The several insurance companies of this state, and foreign insurance companies, and other corporations, firms, or persons doing insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding 25 per cent on the liability for said loss: Provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy: and, Provided, further, that such additional liability within the limit prescribed shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed.

"Sec. 2. In the event it shall be made to appear to the court or jury trying the cause that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms, or persons in a sum not exceeding 25 per cent of the amount of loss claimed under said policy: Provided, that such liability, within the limits prescribed, shall, in the discretion of the court or jury trying

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the cause, be measured by the additional expense, loss, or injury inflicted upon said insurance companies, corporations, firms, or persons by reason of said suit."

It is insisted that the foregoing act is unconstitutional, because no other business except that of insurance is operated in a similar manner. This objection assumes that there is no such difference between insurance business and other kinds as would justify a different regulation in respect of the former; and, furthermore, that there can be no burden placed by law upon one business which is not at the same time imposed upon all other kinds. Both assumptions are unsound, — understanding by the use of the term "burdens" in the latter assumption matters in the nature of regulations. We need not discuss the second division of the inquiry. It seems clear that there is a sufficient difference between insurance contracts and others to authorize the provisions of the statute. No one would carry insurance except for the indemnity that contracts of this character provide. The burden is a heavy one, and an enormous tax upon individual incomes and upon the whole country as well. This heavy sacrifice is endured through long series of years, with the just expectation that upon the maturity of the contract insurance companies will promptly and honestly comply with their agreement to pay the indemnity; and this payment is usually of very great importance to policy holders, not only in the respect of the amount involved, but also in the promptness of the payment. The maturity of these contracts most generally arrives when the beneficiaries of them are in dire need. A man's dwelling house has been destroyed, and he has no means of providing shelter for his family. His storehouse and goods have been consumed by fire, and his business is ruined unless he can promptly recover his insurance. The head of a family dies, and his widow and little ones are left without the means of support unless they can promptly obtain the relief which the husband and father provided for them through long years of toil and sacrifice in paying insurance premiums. When people, under such conditions, are met by heart-breaking delays induced by the attempt of the companies to enforce upon them through litigation the technical defenses crouched in the jungle of fine print with which these policies are overgrown, and they are compelled to employ counsel and undergo other expense to enable them to maintain their rights and secure a just settlement on a fair and reasonable basis, it is neither unconstitutional, nor improper from any point of view, that the legislature should pass a law one of the purposes of which is to

protect the policy holder from the expenses so made necessary by the action of the insurance company when it shall be made to appear that the defense is not made in good faith. Even-handed justice is dispensed to the companies in the 2d section, which provides for a similar recovery of expenses in their favor against the policy holder if it shall appear that he has not brought suit in good faith.

Statutes even more stringent than our own, in that they do not contain the compensating provisions of the 2d section of our act, have been sustained as constitutional by the Supreme Court of the United States. These statutes are set out and discussed in the following cases: *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

We shall refer especially to only the latest of these cases. In that case the Supreme Court had before it a statute of Nebraska the 45th section of which was as follows: "The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs." Comp. Stat. 1903, chap. 43.

Speaking to this section, the court, through Mr. Justice White, said: "All the grounds relied upon to demonstrate that the statute allowing a reasonable attorney's fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the 14th Amendment are embraced in the following proposition: First, because it arbitrarily subjects insurance companies to a liability for attorneys' fees when other defendants in other classes of cases are not subjected to such burden; second, because, whilst the obligation to pay attorneys' fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically con-

sidered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately, depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 955, 21 Sup. Ct. Rep. 535; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. In the *Orient Case* a statute of the state of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren Case* a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance companies. In the *Mettler Case* a statute of the state of Texas was sustained, applicable alone to life-insurance-company policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of 12 per cent damages after demand, in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts, or to authorize a classification of insurance contracts so as to subject one character of such contracts, when put in one class, to one rule, and other varieties of such contracts, when placed in another class, to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss. This, it is elaborately argued, takes this case out of the rule established by the previous cases, and causes the statute to be repugnant to the 14th Amendment. But, as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification."

We are of opinion, therefore, that the act referred to is a constitutional and valid law.

As previously stated, under this act the jury allowed \$250 as attorneys' fees, and this verdict was approved by the court below, and judgment rendered thereon. There was no error in this action of the court.

None of the assignments of error being well taken, and no error being found in the action of the court below, *the judgment must be affirmed, with costs.*

T. L. LANIER, Admr., etc., of Arthur E. Justice, Deceased, *Plff. in Err.*,

v.

M. O. BOX, Admr., etc., of Bettie W. Justice, Deceased.

(.....Tenn.....)

1. The contingent interest in the proceeds of a life insurance policy, which are payable to the wife of the assured, should she survive him, otherwise to his "executors, administrators, or assigns," is vested in him, and not in his representatives, as a special class, for the benefit of his heirs, so that he can dispose of it by assignment prior to the death of his wife.
2. The assignment by a man to his wife of his contingent interest in a policy of insurance on his life, which is payable to her should she survive him, but to his personal representatives or assigns in case she dies before he does, divests him of all interest in the policy, so that, in case he survives her, he will acquire a right to the proceeds of the policy, if at all, by virtue of his right as surviving husband, and not under the terms of the policy.
3. A parol assignment, accompanied by delivery of the policy, is sufficient to transfer the right to the proceeds of a life insurance policy.
4. The common-law right of a man to succeed to the property of his wife, upon her death, does not operate in favor of one who murders his wife.
On Rehearing.
5. A finding that one committing murder was, at one time, desperate, does not require the inference that he was insane.
6. A holding that the common-law right of succession to property does not operate in favor of one who wilfully takes the life of his ancestor does not violate a constitutional provision that conviction of crime shall not work a forfeiture of estate.
7. All English statutes in force in Tennessee prior to the adoption of the Code of 1858 were repealed by that enactment.

NOTE.—As to effect of killing of insured by beneficiary, see, also, in this series, *Holdon v. Ancient Order*, U. W. 31 L. R. A. 67, and *Schmidt v. Northern Life Assn.* 51 L. R. A. 141.

As to killing of insured by assignee of policy, see *New York L. Ins. Co. v. Davis*, 44 L. R. A. 305.

For a case in this series holding that assignees of a policy of insurance cannot recover 64 L. R. A.

8. The incapacity of a man's administrator to receive the proceeds of a policy on his life which had been assigned to his wife, because he wilfully took her life, does not cause their escheat to the state, but they will pass to her distributees, as though the husband had never been in existence.

(*Wilkes, J., dissents.*)

(March 19, 1904.)

ERROR to the Court of Chancery Appeals to review a decree reversing a decree of the Chancery Court for Humphreys County in favor of defendant in a suit to determine the title to the proceeds of a policy of insurance on the life of A. E. Justice, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. F. Shannon, Robert T. Shannon, John B. Bowman, and J. E. Tubb, for plaintiff in error:

Under the law the husband is, upon the wife's death, entitled to all her personalty, though the same be her separate estate.

Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. 869; *D'Arcy v. Mutual L. Ins. Co.* 108 Tenn. 567, 69 S. W. 768; *Hays v. Bright*, 11 Heisk. 325; *Hamrico v. Laird*, 10 Yerg. 222.

The said court erred in holding that the devolution of property under the law was changed by the fact that the husband killed the wife, and, because of said fact, that neither the husband nor his estate could take or succeed to the wife's personal estate, under the law.

Owens v. Owens, 100 N. C. 240, 6 S. E. 794; *Deem v. Millikin*, 6 Ohio C. C. 357, *Affirmed* in 53 Ohio St. 668, 44 N. E. 1134; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Carpenter's Appeal*, 170 Pa. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637.

All the choses in action of the wife, not reduced to possession during the joint lives, pass to the husband upon her death.

Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. 869; *D'Arcy v. Mutual L. Ins. Co.* 108 Tenn. 567, 69 S. W. 768; *Hays v. Bright*, 11 Heisk. 325; *Hamrico v. Laird*, 10 Yerg. 222.

A life insurance policy is a mere chose in action.

Handwerker v. Diermeyer, 96 Tenn. 619,

thereon where insured is executed for crime, even though he is innocent, see *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393.

As to rights of person killing ancestor to obtain estate, or those claiming under him, see, in this series, *Riggs v. Palmer*, 5 L. R. A. 340; *Shellenberger v. Ransom*, 10 L. R. A. 810, 25 L. R. A. 564, and *Carpenter's Appeal*, 20 L. R. A. 145.

36 S. W. 869; *D'Arcy v. Mutual L. Ins. Co.* 108 Tenn. 567, 69 S. W. 768.

The devolution of property under the law is not affected by murder for the purpose of succeeding to the property.

Upon the death of the ancestor the property vests immediately in those designated by law as his heirs or the ones who shall succeed to the same under the law.

9 Am. & Eng. Enc. Law, 2d ed. p. 400, note 1; 21 Am. & Eng. Enc. Law, 2d ed. pp. 238, 239; 24 Am. & Eng. Enc. Law, p. 361; *Leach v. Cooper*, Cooke (Tenn.) 253; *Lasseter v. Turner*, 1 Yerg. 422; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Millikin*, 6 Ohio C. C. 357, Affirmed in 53 Ohio St. 668, 44 N. E. 1134; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; Overruling 31 Neb. 61, 10 L. R. A. 810, 28 Am. St. Rep. 500, 47 N. W. 700; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637.

Under acts declared by Congress to be treasonable, the court of last resort finally decided that the fee or reversion remained in the offending owner, and descended from him to his heirs.

Illinois O. R. Co. v. Bosworth, 133 U. S. 92, 33 L. ed. 550, 10 Sup. Ct. Rep. 231; *Shields v. Schiff*, 124 U. S. 351, 31 L. ed. 445, 8 Sup. Ct. Rep. 510; *Jenkins v. Col-lard*, 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; *United States v. Dunnington*, 146 U. S. 338, 36 L. ed. 996, 13 Sup. Ct. Rep. 79.

Attainder, in a strict sense, means an extinction of civil and political rights and capacities.

Cooley, Const. Lim. 7th ed. p. 368, 6th ed. p. 314; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

Cummings v. Missouri, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366. See 4 Bl. Com. 259.

Conviction and judgment of death are prerequisite to the attainder.

4 Bl. Com. pp. 380-382, 386, 387.

The consequences of attainder are forfeiture and corruption of blood.

4 Bl. Com. p. 381.

Messrs. H. C. Carter and Thomas & Thomas, for defendant in error:

The wife has the right, under the common law, to insure the life of her husband.

Metropolitan L. Ins. Co. v. Smith, 53 L. R. A. 817, note thereunder, 22 Ky. L. Rep. 868, 59 S. W. 24; 11 Am. & Eng. Enc. Law, p. 319.

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And a wife who loans money to her husband has an insurable interest in his life, both as a creditor and by reason of the marital relation, which will support the issue or assignment of a policy of insurance upon his life to her.

Sheets v. Sheets, 4 Colo. App. 450, 36 Pac. 310.

The legal effect of the transaction in this case was a procuring by her of the insurance, and, such being the case, it becomes her separate property.

Southern L. Ins. Co. v. Booker, 9 Heisk. 606, 24 Am. Rep. 344; *Metropolitan L. Ins. Co. v. Smith*, 22 Ky. L. Rep. 868, 53 L. R. A. 819, 59 S. W. 24; *Jacob v. Continental L. Ins. Co.* 1 Cin. Sup. Ct. Rep. 519; *Thompson v. American Tontine Life & Sav. Ins. Co.* 46 N. Y. 674; *Felrath v. Schonfield*, 76 Ala. 199, 52 Am. Rep. 319; *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83; *Harvey v. Harrison*, 89 Tenn. 470, 14 S. W. 1083.

Where a married woman is named as beneficiary in a policy of insurance on the life of her husband, she is entitled to the proceeds of the policy, notwithstanding a divorce obtained by her before his death.

Overhiser v. Overhiser, 50 L. R. A. 552, and notes, 63 Ohio St. 77, 81 Am. St. Rep. 612, 57 N. E. 965.

A clear intent upon the part of the donor to give, acted upon by the donee, constitutes a valid gift.

8 Am. & Eng. Enc. Law, p. 1317, note; *Whitford v. Horn*, 18 Kan. 455; *Ector v. Welsh*, 29 Ga. 443; *Ivey v. Owens*, 28 Ala. 641; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 243.

A gift of an insurance policy is valid. *Lord v. New York L. Ins. Co.* 95 Tex. 216, 56 L. R. A. 597, 93 Am. St. Rep. 827, 66 S. W. 290; *Malone's Estate*, 13 Phila. 313; 8 Am. & Eng. Enc. Law, p. 1323; *Donnell v. Donnell*, 1 Head, 268; *Sheegog v. Perkins*, 4 Baxt. 281; *McEwen v. Troost*, 1 Sneed, 190.

In order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary.

1 Am. & Eng. Enc. Law, pp. 834, 835.

It is lawful for one who has his life insured by a policy payable to himself, to sell or dispose of it as any other chose in action.

Murphy v. Red, 64 Miss. 614, 60 Am. Rep. 68, 1 So. 761; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518.

It may be assigned by indorsement and delivery, and a mere verbal assignment with delivery is good.

Bushnell v. Bushnell, 92 Ind. 503; *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *New York L. Ins. Co. v. Flack*,

3 Md. 341, 56 Am. Dec. 742; *Chapman v. McLurath*, 77 Mo. 38, 46 Am. Rep. 1; *Manning v. Bowman*, 3 N. S. Dec. 42; Bacon, Ben. Soc. 297, 298, 452; 1 Phillips, Ins. § 80; 1 Biddle, Ins. 273; *Hancock v. Fidelity Mut. L. Ins. Co.* (Tenn. Ch. App.) 53 S. W. 181; *Chicago Bldg. & Mfg. Co. v. Barry* (Tenn. Ch. App.) 52 S. W. 458; *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192; *Greene v. Republic F. Ins. Co.* 84 N. Y. 572; *Hobbs v. Memphis Ins. Co.* 1 Sneed, 444; *Scobey v. Waters*, 10 Lea, 561; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269; *Tennessee Lodge, No. 20, K. of H. v. Ladd*, 5 Lea, 721; *Otis v. Beckwith*, 49 Ill. 121; *Chamberlain v. Williams*, 62 Ill. App. 423; *James v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, 26 Atl. 138; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338.

Where a person takes out a policy of life insurance on his own life, designating, on the face of the policy, a third person as beneficiary, the latter takes a vested interest in both the policy and the money to become due under it.

Block v. Valley Mut. Ins. Asso. 52 Ark. 201, 20 Am. St. Rep. 166, 12 S. W. 477; *Re Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; *Yore v. Booth*, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808; *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Carpenter v. Knapp*, 101 Iowa, 712, 38 L. R. A. 128, 70 N. W. 764; *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, 14 Pac. 449; *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

Justice, during his life, had no interest in the policy, and could not have reduced it to possession as a chose in action or the personal property of the wife, because, by his assignment and gift of the policy to her, and the designation of her on the face of the policy as the beneficiary, he was divested absolutely of all future control or disposition in any way of said policy, and his administrator can stand upon no higher ground in law than he stood while living.

Central Nat. Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

A direct gift of personalty by a husband to his wife, during coverture, creates in her a separate estate by necessary implication, and without express words.

Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; *Snodgrass v. Hyder*, 95 Tenn. 576, 32 S. W. 764.

No wrong can be the foundation of a 64 L. R. A.

right, and no one can profit by his own iniquity.

Kelton v. Millikin, 2 Coldw. 413; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Mallins v. Freeman*, 4 Bing. N. C. 399; 1 Hale, P. C. 482; 2 Hale, P. C. 386; Co. Litt. 148; *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616; *Hedderich v. State*, 101 Ind. 571, 51 Am. Rep. 768, 1 N. E. 47; *Case v. Johnson*, 91 Ind. 477; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Rowland v. Martin* (Pa.) 4 Cent. Rep. 760, 6 Atl. 223; *Prole v. Wiggins*, 3 Bing. N. C. 230, 3 Scott, 607, 2 Hodges, 204. 6 L. J. C. P. N. S. 2; *Gaslight & Coke Co. v. Turner*, 5 Bing. N. C. 666, 7 Scott, 779, 9 L. J. C. P. N. S. 75; *Groves v. Slaughter*, 15 Pet. 471, 10 L. ed. 808; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742; *Thompson v. Collins*, 2 Head, 443; *Rhodes v. Summerhill*, 4 Heisk. 207; *Allen v. Dodd*, 4 Humph. 132, 40 Am. Dec. 632; *Senter v. Bowman*, 5 Heisk. 14; *Richardson v. Brown*, 9 Baxt. 242; 1 Legal Rep. 349; 2 Shannon Cas. 317.

Where the assured kills the beneficiary, he cannot recover.

Schreiner v. High Court, O. O. of F. 35 Ill. App. 576; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Holdom v. Ancient Order, U. W.* 159 Ill. 619, 31 L. R. A. 67, 50 Am. St. Rep. 183, 43 N. E. 772; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 152-160, 42 L. ed. 697-700, 18 Sup. Ct. Rep. 300; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Supreme Commandery, K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Amicable Soc. v. Bolland*, 4 Bligh N. R. 194, 2 Dow. & C. 1; *Moore v. Woolsey*, 4 El. & Bl. 242, 3 C. L. Rep. 207, 24 L. J. Q. B. N. S. 40, 1 Jur. N. S. 468, 3 Week. Rep. 66; *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139.

No stronger answer can be made to the contention that murder does not affect the rights of the murderer than that of the note to the case of *Shellenberger v. Ramsom*, 25 L. R. A. 564.

Beard, Ch. J., delivered the opinion of the court:

This is a contest between complainant, as administrator of Mrs. Bettie W. Justice, deceased, and the defendant, who is administrator of her late husband, A. E. Justice, over the proceeds of an insurance policy upon the life of the husband. These proceeds were paid over to the defendant administrator upon an agreement between

him and the complainant that this was to be without prejudice to the rights of the latter, and that they were to be held by him to await the determination of this suit.

The facts out of which this controversy grows are that on the 8th of February, 1900,—about two years after the marriage of the two deceased parties,—the husband obtained an insurance policy on his life in the sum of \$10,000, which was made "payable to the wife of the assured should she survive; otherwise to his executors, administrators, or assigns." Immediately after its issuance the husband delivered the policy to his wife, with the statement that it was her policy, and that she must pay the premiums accruing on it. This was done by her, so that out of her own estate all of the premiums were paid by her, and the policy, from the time it was so delivered to her until her death, was in her possession and under her exclusive control.

The court of chancery appeals finds that the assured took out this policy for the benefit of his wife in view of her means received and used by him and "with the intention that she should keep it alive, . . . and that it should belong to her." As confirmatory of the purpose of the husband, both with regard to the issuance and delivery of the policy to the wife, that court finds that the husband, on different occasions and to different parties, said that it belonged to his wife, and that these declarations, "coupled with the delivery to and the payment of all premiums by her at his request, clearly indicated an assignment by him of the policy to her; so as, under our authorities, to constitute it thereafter her separate estate."

Subsequently to these transactions, to wit, in May, 1902, so obnoxious had the husband, by reason of his conduct, become to his wife, she filed in the chancery court of Humphreys county, in this state, a bill for divorce, alleging as ground thereof cruel and inhuman treatment, drunkenness, and unfaithfulness to his marriage vows. It was also averred by her that he had squandered large sums of money belonging to her estate in immoral dissipation, and an injunction was prayed restraining him from disposing of certain property of which he had then possession, and also from coming to her home, or in any way interfering with her.

This bill was filed during the temporary absence of the husband from the town of Waverly, where the parties resided. On his return, and after the service of process, he made ineffectual efforts at a reconciliation with his wife. Disappointed in these efforts, on the 19th of May, 1902, having armed

himself with a pistol, he entered a place of concealment near the home of his wife, where he remained until he saw her come out, when, rushing upon her, he shot her to death, and then turning the pistol upon himself, he inflicted a mortal wound, from the effect of which he died some four hours later.

Upon this state of facts the present controversy arises. The complainant, for the estate of Mrs. Justice, insists that the policy in question was a right existing in his intestate at the time of her death, and that while, under ordinary or normal conditions, it would have vested in her husband surviving, *jure mariti*, yet, inasmuch as this survivorship was brought about by his felonious act, his estate will not be permitted to make profit out of it, but the policy or its proceeds will be preserved to the representative of her estate, for the benefit of her children, who are her distributees.

On the other hand, it is contended by the defendant that the representative of the husband had, by the words of the policy, a fixed right in the same, defeasible only upon the wife surviving and, if this is not so, then the husband's right accrued to him *jure mariti*, and that this right should not be forfeited by the murder of his wife.

Before considering these respective contentions, it is proper to arrive at a true interpretation of the policy with the view of ascertaining the respective rights of these parties at the time of the commission of the felony in question. As has already been stated, the policy was upon the life of the husband, payable to the wife upon condition that she outlived him; in other words, the title to the proceeds of the policy, if kept alive by the payment of the premiums, would have been the property of the wife in the event she outlived her husband. This right was defeasible alone upon her dying first. It was only upon the happening of this contingency that either he or his assigns or representatives would be entitled to those proceeds. It is insisted, however, that no interest by the terms of the policy accrued to the husband, but that his administrators or executors, as a special class, were to take in the event the contingency happened, in the interest of his estate, but independent of him. This contention, we think, is unsound.

Mr. Biddle, in volume 1, § 287, of his work on Insurance, says: "Usually a policy taken by the insured, payable to the insured's heirs, executors, administrators, and assigns, goes to the estate of the insured, and, of course, may be assigned by him in his lifetime." In support of this context the author cites the following cases which more or less go to sustain it: *Rawson v.*

Jones, 52 Ga. 458; *Swift v. Railway Pass. & F. C. Mut. Aid & Ben. Asso.* 96 Ill. 309; *Pilcher v. New York L. Ins. Co.* 33 La. Ann. 322; *New York L. Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742; *Winchester v. Stebbins*, 16 Gray, 52; *Wason v. Colburn*, 99 Mass. 342; *Connecticut Mut. L. Ins. Co. v. Ryan*, 8 Mo. App. 535; *Edington v. Ætna L. Ins. Co.* 13 Hun, 543; *Williams v. Corson*, 2 Tenn. Ch. 269.

In *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, it seems that an endowment policy was issued upon the life of one Armstrong, in which it was agreed that the company should pay to the assured or his assigns, on the 8th of December, 1897, or, if he should die before that time, to his legal representatives, the amount of the policy. It was issued at the instance of one Hunter, who paid the premium upon it, and took an assignment thereof from the assured. Soon after its issuance, Armstrong was murdered. Suspicion falling upon the assignee, Hunter, as the perpetrator of the murder, he was indicted and convicted. Subsequently he was hung. The administratrix of Armstrong instituted suit upon the policy. Upon the trial of the case, upon the assumption that the insurance money was payable, in case that death occurred before the expiration of the endowment term, to the legal representatives of the assured, and that the policy was not assignable by him, certain evidence was rejected by the court, and its action in that respect was assigned as error in the Supreme Court of the United States. With regard to this that court said: "The ruling cannot be upheld. The position that the assignment did not take effect because the assured died before the expiration of the policy is untenable. The provision for payment in such case to his legal representatives was intended to meet the contingency of his dying without having disposed of his interest, and not to limit his power over the contract during his life, and pass the insurance to those who should represent him after his death."

We think, upon the authorities, there can be no doubt of the absolute control of the assured over this policy to the extent, at least, of the contingent interest which he had in it, and that an assignment made by him, or a disposition of it by his will, would convey to his assignee or to his legatee whatever interest might accrue to him from this policy; and we are further satisfied his assignment by parol of the policy to his wife divested him of all contingent interest in it, and vested this interest, in addition to that she already had by its terms, in his wife, and that upon her death, leaving him surviving, he would take, not under the

terms of the policy, but by virtue of his right as surviving husband.

That a parol assignment accompanied by delivery of the policy to the wife was sufficient to vest her with the sole interest in this policy is settled by the authorities. In *Chapman v. Mallorath*, 77 Mo. 38, 46 Am. Rep. 1, it appears that the policy was made payable to the assured, his executors or his assigns. After his marriage he said to his wife that it was taken out for her benefit, and he delivered it to her, saying that it was his purpose to vest her with the title, to her sole and separate use. After this delivery it was kept by the wife in her possession until her husband's death. In a contest between the creditors of the husband and the widow it was held that this was a good assignment.

Mr. Phillips, in volume 1 of his work on Insurance, 4th ed., § 880, says: "Policies are usually assigned in writing; but a mere verbal assignment and delivery of the policy gives to the assignee an equitable right to the proceeds, where the policy itself contains no provision to the contrary." To the same effect is *Bliss on Life Insurance*, 546. Many cases may be found announcing the same doctrine, not only with regard to policies of insurance, but also as to other choses in action, among which are: *Lein-kauf v. Calman*, 110 N. Y. 50, 17 N. E. 389; *Thompson v. Emery*, 27 N. H. 269; *Charleston Ins. & T. Co. v. Neve*, 2 McMull. L. 237; *Marcus v. St. Louis Mut. L. Ins. Co.* 68 N. Y. 625; *Jones v. Gibbons*, 9 Ves. Jr. 407, 7 Revised Rep. 247.

So it is we are satisfied that after this parol assignment of the husband to his wife, supplementing, as it did, the provision of the policy which made the proceeds primarily payable to her in the event she outlived her husband, that it stood at the time of her murder exactly as if it had provided originally that it should be payable to her unconditionally upon her husband's death, and that whatever right or interest accrued thereafter to him was as surviving husband.

The right of the husband to the choses in action of the wife by reason of his survivorship rests upon a rule of the common law of this state, and not upon any statutory enactment. It is impossible to concede, however, that the common law ever contemplated that this rule was to be applied in favor of her husband who makes himself a survivor by the felonious homicide of his wife. If, instead of paying the policy, the insurance company had resisted, and the husband or his representatives were undertaking to enforce payment upon the ground that the contract did not provide for a forfeiture of his rights on account of his felonious act, there can be no doubt, upon rea-

son and authority, that his or their contention could not be maintained.

In the recent case of *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139, a question akin to the one just stated was considered and determined. The facts of the case were that a policy was issued to Wm. E. Burt upon his own life, payable to his wife if living at the time of his death, otherwise to his executors, administrators, or assigns. Subsequently the assured was, upon indictment, convicted of the murder of his wife, and was afterwards hung in pursuance of the judgment of a court of competent jurisdiction.

During the lifetime of the wife one half interest of this policy was assigned by her and her husband to the plaintiffs in the action, and after her death the assured conveyed to the same parties the remaining interest in the policy. These assigns were also the sole heirs of the assured, and as such were entitled to the full benefit of the policy, and, claiming as assigns as well as heirs, they instituted suit upon the policy. The court said the question was, "Did insurance policies insure against crime?" The court added: "The researches of counsel have found but one case directly in point (*Amicable Soc. v. Bolland*, decided by the House of Lords in 1830, Bligh, N. R. 194-211, 2 Dow & C. 1.) The Lord Chancellor, delivering the opinion, after stating the question, answered it in the following brief, but cogent, words: 'It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against,—that is, that the party insuring had agreed to pay a sum of money year by year upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assigns shall receive a certain sum of money,—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy?'

Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion which, if expressed in terms, would have rendered the policy, so far as that condition went, at least, altogether void?"

The Supreme Court of the United States, in an opinion embodying this quotation from the English case, and after a review of the authorities, held that the suit of the assigns was not maintainable.

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It is true in the present case that the insurance company made no contest, but, conceding its liability, paid over the proceeds of the policy, and they await the determination of this suit. But can it be successfully contended that a claim resting upon a felonious act, which might have been resisted by the insurance company, has acquired more virtue when it is now asserted by the representative of the murderer to the proceeds of that policy? Can those who represent the husband, who, first, by the felonious destruction of the life of his wife, and then as a *felo de se*, has accelerated the maturity of the policy, take the fruits of his crime under the doctrine of *jure mariti*? It is true no case has been called to our attention where such a claim has been either asserted or repelled. The courts have been called on to consider cases where statutory rights have been insisted on, though they rested on the felony of the several parties setting them up, or by others claiming through them. *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188, is one of the earliest of the cases in the United States in which this question was considered, and by a majority opinion of certainly great moral force it was held that the intention of the legislature in the general laws passed for the devolution of property by will or descent was that they should not operate in favor of one who murdered his ancestor or benefactor in order speedily to come into possession of his estate, either as devisee, legatee, or heir at law. As against this view, however, are the cases of *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Millikin*, 6 Ohio C. C. 357, Affirmed in 53 Ohio St. 668, 44 N. E. 1134; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637.

It will thus be seen that the weight of judicial authority is against the holding of the New York court, and it may be conceded that the better legal reasoning is to be found in the opinions dissenting from the views of that court. We do not think, however, that any of these cases meet or control the question with which we are now dealing, and we do not rely upon either one of them for support of conclusion in this case. For it may be true that it would be a stretch of judicial authority to hold that an unambiguous statute providing a line of devolution of property should be interpreted to mean that this line was to be broken upon the felonious homicide of the ancestor or testator by the one next in succession, but is this equally true as to

one who rests his claim on this common-law rule?

It is universally conceded that the fundamental principles of the common law are unchangeable, yet the courts recognize the necessity of flexibility in the application of old rules to new cases, so as to enable them to adapt these rules "to the ever-varying conditions and emergencies of human society." Thus, in *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321, it is said: "The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise, and the law has expansive and adaptive force enough to respond to the demands thus made of it, not by subverting, but by forming new combinations, and making new applications out of its already established principles; the result produced being only 'the new corn that cometh out of old fields.'"

This court, in *Jacob v. State*, 3 Humph. 493, announces the same general doctrine in these words: "The common law of the country will therefore never be entirely stationary, but will be modified and extended by analogy, construction, and custom so as to embrace new relations springing up from time to time from an amelioration or change of society. The present common law of England is as dissimilar from that of Edward III. as is the present state of society. And we apprehend that no one could be found to contend that hundreds of principles which have, in more modern times, been examined, argued, and determined by the judges, are not principles of the common law because not found in the books of that period. They are held to be great and immutable principles, which have slumbered in their repositories because the occasion which called for their exposition had not arisen. The common law, then, is not like the statute law, fixed and immutable, but by positive enactment, except where a principle has been adjudged as the rule of action."

It has been well said that there are certain general and fundamental maxims of the common law which control laws as well as contracts. Among these are: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy, and have their foundation in universal law administered in all civilized countries." These maxims embodied in the common law, and constituting an essential part of its warp and woof, are found announced both in text-books and in reported

cases. Without their recognition and enforcement by the courts, their judgments would excite the indignation of all right-thinking people. The first of these maxims is applied in order to prevent one from taking the benefit of his own fraud. Why should not the last be enforced so as to forbid a party receiving the fruits of his own crime?

The last of these maxims cannot be reconciled with the rule insisted on by the administrator of A. E. Justice. This rule, he insists, gives to him, as a matter of law, the proceeds of this policy. Though steeped in crime, and without reference to whether the prior death of Mrs. Justice came naturally or was the result of the felonious assault of her husband, yet his contention is that the policy, with its proceeds passed *jure mariti* to this husband, and, upon his death, to himself as the legal representative. If this be true, it logically follows that, if he had killed the wife for the purpose of setting in motion this rule, and under it becoming the absolute owner of her choses in action, his common-law right would be enforced. Such a result, if essential, we think would be a reproach to the jurisprudence of the country, and should arouse the legislative conscience to speedy corrective legislation.

But we do not think that it is essential. The rule in question, though statutory in England, is a common-law rule of property with us, administered by reason of the relation of husband and wife and of the respective rights and obligations growing out of this relation. Carried to the length now insisted upon, it necessarily encounters, among others, the fundamental maxims already referred to, that no man shall found a claim upon his own iniquity, or acquire property by his own crime. The rule thus contended for, and these underlying principles of the common law, cannot stand together. They are utterly irreconcilable if the present contention is sound. But we do not think it sound. To the contrary, we are satisfied that the rule and these maxims find their consistency in the flexibility of the common law and its power of adapting itself to new conditions and new cases. The present is one calling for a limitation on the rule in question, to wit, that it shall not apply where it is called into being by the crime of the husband. Thus qualified, there is perfect reconciliation between the rule and these maxims. Nor do we regard this as an enunciation of a new principle just called into life, but rather, as is said in *Jacob v. State*, 3 Humph. 515, one of those "great and immutable principles which have slumbered in their repositories

because the occasion which called for their exposition had not arisen" heretofore.

As was said by the court in *Mutual L. Ins. Co. v. Armstrong*: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired." In *Cleaver v. Mutual Reserve Fund Life Assn.* [1892] 1 Q. B. 147, 61 L. J. Q. B. N. S. 128, 66 L. T. N. S. 220, 40 Week. Rep. 230, 56 J. P. 180, there was a controversy over a policy taken out by James Maybrick, a member of the association, upon his life, payable to Florence E. Maybrick, his wife, if living at the time of the death of the husband; otherwise to his legal representatives. The assured died in 1889, and after his death Florence E. Maybrick assigned by deed to Cleaver all of her interest in the policy. The controversy in the case was between the assignee, the insurance company, and the administrators of the deceased. The association undertook to resist recovery on this policy upon the fact established in the criminal prosecution against the surviving wife that the assured had died from poison feloniously administered by her. This defense, so far as the legal representatives of the deceased was concerned, was held not maintainable, but, in so far as the surviving wife and her assignee, the court held that her felonious act deprived her of all interest in the policy, as well as one claiming through her. Esher, M. R., said: "The rule of public policy in such a case prevents the person guilty of the death of the insured, or any person claiming through such person, from taking the money." Fry, L. J., in dealing with the same question in a separate opinion, used this language: "It appears to me that no system of jurisprudence can, with reason, include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor. It may be that there is no authority directly asserting the existence of the principle; but the decision of the House of Lords in *Amicable Soc. v. Bolland* (*Fauntleroy's Case*), 4 Bligh N. R. 194, 2 Dow. & C. 1, appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied, without reference to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's Case* . . . it was held to prevent the assignees of a forger from claiming the ben-

efit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a *cestui que trust* asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy; and it must be so far regarded in the construction of acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it."

We think, if it is a sound holding that one named as payee of a policy by the felonious homicide of the assured is, with his assignee, cut off from receiving the benefit of that policy, notwithstanding its expressed terms, that with much more force it can be insisted that one who claims under the common-law rule invoked in this case must be disappointed of a recovery.

This view of the case relieves us from considering the contention that to deprive the surviving husband of this chose in action by reason of his felony, is to enforce a forfeiture of estate against him in the face of §12 of article 1 of the state Constitution. The application of the principle, which we hold to be fundamental and controlling in this case, intervenes between him and the property, so that he never acquired an estate, and therefore forfeited nothing in it.

The result is that *the decree of the Court of Chancery Appeals is affirmed.*

A petition for rehearing having been filed, the court handed down the following response:

In this case there has been presented to the court a petition for rehearing, in which we are urged to reverse the decree giving the proceeds of the insurance policy in question to the complainant. The counsel for the petitioner misapprehends the basis of the court's former opinion, in that he assumes the court treated the present suit as in the nature of a bill of interpleader, and put the defendant in the attitude of asking active interposition of the court, when, by an agreement between himself and the complainant, he was already in possession of the fund. This assumption would not have been made if counsel had had before him, at the time he prepared his petition, the opinion delivered by the court. In that opinion, in a mere historic way, it was stated that the insurance company had paid over the proceeds of the policy to the defendant administrator upon an agreement between him and the complainant that this was to be without prejudice to the rights of the latter. No point was made upon this, nor did the respective attitudes of the two parties to this suit, or the fact that the proceeds of this policy were in the possession of

the administrator of A. E. Justice, enter into the consideration and determination of the questions that were involved. Where the funds were at the time of the institution was regarded and treated as an immaterial fact.

It is also said that there is nothing in the opinion of the court of chancery appeals that warranted the conclusion announced by this court that the husband's contingent right in the policy was given to her. There was nothing else that he could give. The policy was delivered to her after its issuance, and immediately upon its receipt by the husband, with the intention that she should keep it alive, and that it should belong to her. The finding of that court, in language that cannot be misunderstood, was that this policy was assigned by parol to Mrs. Justice, and upon this there was nothing left open for this court to determine except the question of law, and that is whether the parol assignment of this chose in action would carry the right of the assignor to the assignee. In the third place, it is insisted that the effect of the finding of the court of chancery appeals is that the husband was insane at the time he committed the homicide upon his wife. No pretense was made in pleading, nor, so far as we can ascertain from the opinion of the court of chancery appeals in the evidence, that Justice was irresponsible at the time he perpetrated this crime. That court does find that he was desperate, but, as we understand from the use of the word, the inference that the court intended to be drawn was that finding that his wife had determined to separate herself forever from him, and withdraw her person and her estate from his protection, that he was thrown into a furious condition of mind. Evidently it was not an inference drawn from the evidence in the case that he was insane at the time of this murder.

In the original opinion it was said that it was unnecessary to consider the constitutional question raised by the administrator of Justice, for the reason that, under our application of the common-law rule of *jure mariti*, the title to the policy never vested in the surviving husband, and therefore there was nothing for him to forfeit. It is said, however, that this conclusion could not have been reached by the court, *except*, by holding the constitutional provision in question of no effect, or as inapplicable. As above indicated, we did hold it as inapplicable, and we still maintain that view. But it is insisted that such a holding violates the spirit of § 12 of article 1 of the Constitution, inasmuch as its effect is to work a forfeiture of the right to take property by devolution under the law, because of the

crime committed by the husband. We do not think that such is the effect of our holding, when we simply declined to give the surviving husband the benefit of this common-law rule where his own criminal offense has called it into being.

The provision in question is that "no conviction shall work corruption of blood or forfeiture of estate." This provision has no connection whatever with the devolution of property, but it is intended in its last clause to prevent a forfeiture of an estate of a criminal on account of his offense; but we held that, under the facts found in this record, the surviving husband never acquired an estate in this property, and therefore there was nothing upon which this constitutional provision could operate. The same answer may be made to that part of the petition which calls the attention of the court to §§ 9, 10, art. 1, of the Federal Constitution.

Again, it is said that the right of the surviving husband to take the chose in action of the predeceased wife rests, not upon the common law, but upon the statute of 29 Charles II., chap. 3, § 25, which, as we understand the petition, it is insisted is still in force in this state. This question, however, was put at rest in the case of *State v. Miller*, 11 Lea, 620. In that case it was said that all prior statutes, whether English or statutes passed in this state, or brought into it from North Carolina, were in effect repealed by the Code of 1858. It is conceded that the effect of § 41 of the Code was to repeal all statutes of this state and of North Carolina theretofore in operation in Tennessee, but it said that this repeal was confined alone to those statutes. It certainly would be an anomalous condition, if all domestic statutes were extinguished by the adoption of the Code of 1858 and antiquated foreign statutes were left in operation in this state. We do not think the revisers of the Code, or the legislature, in adopting it, intended that such a condition should exist; and, whether *dictum* or not, we are entirely satisfied with the conclusion announced by the court just referred to.

Nor do we think that the result of the opinion complained of, in incapacitating the surviving husband to take this chose in action because of the homicide, is to escheat the property to the state. Because, unquestionably, if the administrator of Justice is not permitted to take the title of the property, it became vested in the administrator of Mrs. Justice upon her death, and from him passes to the distributees of her estate. Nor is there inequity in this. She paid every premium on this policy from the time it was taken out up to her death. She was put

in possession of it, with the statement made by her husband that it was taken out for her, and was her property, to be kept alive by her with her own money, and she died with it under her dominion. We think that every legal and equitable consideration tends to support the claim of her administrator, and that, as a matter of right, as well as of sound public policy, the proceeds should pass to those of her blood who stood in closest relationship with her at the time of her death,—to wit, her children,—rather than to the representatives of one whose claim rests alone upon his felonious act.

The petition is dismissed.

Wilkes, J., dissenting in part:

I cannot agree with the result reached by the majority of the court. I agree with their holding that a policy taken out by the insured, payable to his administrators and assigns, goes to the estate of the insured, and may be assigned by him in his lifetime. To that extent the insured has control over it. But if he does not assign it in his lifetime, it passes to his estate, not by descent, but by the terms of the policy.

I am also of the opinion that the policy of interest of the assured thereunder can be assigned by parol and delivery, and such assignment will be good against the beneficiary of the policy, if so intended. But I do not understand that the husband in this case assigned his remainder or contingent interest in the policy, or the interest of his estate, to his wife; nor do I understand the court of appeals to so find. On the contrary, he assigned and delivered the policy, as issued, to her, to be held by her, and to take effect according to its terms and provisions,—that is, she took an interest in it, contingent upon her surviving her husband, and not otherwise, and he held an interest contingent on his surviving her. Waiving the question whether he could, before her death, assign this merely contingent interest, it is sufficient to say he did not do so, nor attempt to do so, and the court of chancery appeals so finds. He intended when he delivered the policy to her that she should take according to its provisions, and not otherwise. There is no indication to the contrary, and the court of chancery appeals does not so find. If there was, it could not prevail against the terms of the policy.

Now, if she had died a natural death, and he had afterwards died without assigning the policy, there can be no doubt it would have gone to his administrator or executor, by the terms of the policy, to be disposed of as the statute provides in cases of distribution. In other words, he or his ad-

ministrator would have taken under the policy, and not *jure mariti*.

The fundamental error in the opinion of the majority, as I see it, is in holding that Mr. Justice, when he delivered the policy to his wife, intended to vest in her his contingent interest under it in the event he should survive her. I do not find any warrant for this in the findings of the court of chancery appeals, nor could it have so found in the face of the provisions of the policy, and I think all the circumstances show that he did not so intend, but merely intended that she should take the policy, and hold under it according to its terms. If he had intended to vest in her an absolute interest in the proceeds, without limitation, condition, or contingency, he would have caused the policy to be so worded that in any event she would get the proceeds,—that is, he would have made it payable to her, or he would have made a written indorsement indicating his purpose to transfer his interest and invest in her the absolute and sole right to the proceeds, without condition, contingency, or limitation. He did neither of these things, but merely delivered the policy to her, and she received it according to its terms, and so held it, and could not hold it except according to its terms, and by those terms she had only the contingent interest which depended upon her surviving her husband. There is nothing to show that this contingent interest was cut off, or intended to be cut off, by the delivery of the policy to the wife. The logical inference is to the contrary, and so is the finding of the court of chancery appeals.

The naked question involved in this case is whether the fact that Mr. Justice killed his wife can change the terms of this policy and the statute which provides how the proceeds shall go; not whether he could recover from the insurance company. The company has already paid the money to his administrator, without contest or question.

Now, it is true that it shocks the sense of mankind that a person shall become a beneficiary or hasten a beneficial interest by means of the crime of murder. It may be that the legislature should provide against such a contingency, but I am of the opinion the courts cannot do so.

It is an old maxim that hard cases make bad law, and I fear that the truth of the maxim is illustrated in the result reached in this case, as was done in the case of *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188, cited and relied on in the opinion of the majority, but which was afterwards modified in *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540, and which had been disapproved and repudiated by the later and

better-considered cases of *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Milliken*, 53 Ohio St. 668, 44 N. E. 1134; *Shelenderger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Carpenter's Case*, 170 Pa. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637.

I agree with the majority in its view that the rules of the common law are flexible, and adapt themselves to the new and changing conditions and emergencies of society; but they cannot and did not go to the extent of overriding, repealing, and nullifying the provisions of our statutes, or changing the laws of descent and distribution.

The devolution and distribution of personal property are a matter which is regulated by statute, and the statute cannot be set aside to meet hard cases, or to administer a higher and moral law in its stead.

But it is evident that no such great outrage upon our sense of natural justice can result from allowing the law to take its course in this case as is intimated in the opinion of the majority.

Mr. Justice, the murderer, is not suing in this case, and he can in no event be benefited personally by the proceeds of this policy. He has eliminated himself from the whole transaction by his own suicide. The proceeds of the policy do not go to him. They go to his administrator, to his next of kin, or, in default of next of kin, under the statute, to his creditors. Neither the next of kin nor the creditors were *particeps criminis* with him in the commission of his crime, and in thereby bringing the policy to maturity. There is no ground, in law or morals, why they should be punished for his criminal act. Their hands are not stained with the blood of Mrs. Justice. They should not be punished for her death. In this connection, it may be well to remark, also, that Mr. Justice did not kill his wife to obtain the insurance. No such thought was in his mind. He killed her in sheer reckless, it may be insane, desperation over her attempt to procure a divorce.

I do not think the cases of *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, and *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139, cited by the majority, are controlling, or even in point, in the present case.

In those cases the contest and question were between the insurance companies and the beneficiaries under the policies, as to whether the companies could be made to pay the policies.

In this case the insurance company has made no contest, but has paid the proceeds into the hands of the administrator; and the question now is not whether the par-

ties entitled shall be allowed to recover, but whether, having the fund in possession, it shall be confiscated and taken away from them.

In the *Armstrong Case* it appears that the policy upon Armstrong's life was assigned to Hunter, who was a creditor of Armstrong. Hunter also procured insurance upon Armstrong's life in other companies, and afterwards murdered him in order to obtain the insurance. The insurance company refused to pay the policy on account of the fraud perpetrated upon it in obtaining the insurance for the purpose of killing the insured and obtaining the money. It was held that Armstrong's administrator could not recover, because, in order to secure its immediate payment, the beneficiary murdered the insured. This was, as before stated, a contest between the administrator of the assured and the insurance company as to whether the company could be made to pay.

In the latter case of *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. Rep. 139, the contest was also between the assignee of the murderer and the insurance company as to whether the latter could be required to pay the policy by the beneficiary, who had accelerated the maturity of the policy, or his assignee; the assignment being made after the killing had been done.

The insured was legally executed for the killing of his wife, and the holding of the court was that the policy did not insure against his legal execution, and, if his death was the result of a legal execution, then the condition of natural death in the policy, upon which it was to become payable, had not accrued.

In the opinion of the majority it is asked if it can be successfully contended that a claim resting upon a felonious act, which might have been resisted by the insurance company, had acquired more vigor and more virtue when it is asserted by the murderer's representatives, to the proceeds of the policy. We answer that we think such a contention is not only entirely tenable, but wholly legal and logical. It is not the case of the murderer taking the fruits of his own crime. The administrator does not hold under the murderer, nor for his benefit. He holds under the terms of the policy, and for the benefit of the next of kin or creditors of the assured, who are not, or should not be, in any way affected by the crime of the assured. The right to the proceeds does not come to the administrators or next of kin of creditors through any assignment of the murderer, or any descent from him, but solely under the terms of the policy, and the statute applicable thereto. They

do not take and do not hold under the murderer, but under the policy, and are innocent of all crime and all bad faith.

To hold with the majority is, in truth, to visit upon the children the iniquities of the father; which human law does not do, whatever may be the rule of the divine law.

In the present case the proceeds of the policy are in the hands of the administrators of the husband, where, under the law, they should be. All defenses of the insurance company have been eliminated from the controversy. The administrators do not seek or need the aid of the court to get possession of the fund. They have it already, and the only question now is, To whom should it be paid? The statute says to the next of kin, or, in default of next of kin, to the creditors. But the opinion of the majority says: "No; we will not allow it to go as the statute says and provides, but will give it to the representatives of the murdered woman, who never took any interest in it, because the condition on which she was to acquire an interest never happened." Not only is the property taken away from the husband's estate, but it is attempted to be given to the wife, who can in no event have an interest in it.

No interest ever vested in her, except the contingent one fixed by the policy, which was extinguished by her dying before her husband. None ever vested in her husband *jure mariti*, because his wife never had a vested interest. None vested in him after her death, because he did not assign or transfer the policy, or exercise any act of ownership of it, but left it to pass by its terms to his administrators, for the use of his next of kin or creditors.

But if the majority is correct in holding that the entire interest in the policy vested in Mrs. Justice when it was delivered to her, still I am of opinion the majority is incorrect in its conclusions.

If she died the absolute, unconditional owner of the policy, and it would have passed to her husband *jure mariti* in the event of her natural death, the fact that she was killed by her husband would not cut him off from such right if he were alive. Much less will it cut off his administrator, who already has the fund in his hands, and does not need the aid of the court in any way, but simply holds it to be paid out as the law provides,—to the next of kin, if any, and, if none, then to the creditors, under statute. The marital rights of the husband are protected by the statute, 29 Charles II., chap. 3, § 25, and this statute became a part of the law of this state. This marital right is recognized also by a number of our own statutes.—notably the act of 1875, chap. 89, 64 L. R. A.

and act of 1877, chap. 79 (Shannon's Code, §§ 4237, 4238).

Can the court change the rule of the common law in regard to inheritance in order to punish a criminal offense?

The question is directly considered in the case of *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794. In that case it is said: "Is the right of the wife to share in the personal estate [of her husband] as a distributee lost or affected by the fact that he died at her hands or through her procurement? Does the child who slays a parent thereby lose his right to participate with his brothers and sisters in the distribution of the personal [estate] or to take his part of the descended real estate? Or, reversing the matter, does the husband who kills his wife impair his right under the statute of distribution to succeed to the ownership of her personal property left after payment of her debts; or, in general terms, does any one, as a consequence of an unlawful taking of human life, become thereby disabled to take a part of the estate left by the deceased, which the law gives him subject to no such conditions? . . . Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause, the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle."

No well-considered case can be found holding a doctrine contrary to this.

The language of Mr. Justice Field in *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, in which he holds that Hunter, the murderer, could take nothing under the policy, is a pure *dictum*, as neither Hunter, nor any one representing him, was before the court in that case; and it was not the question involved in the case.

It was this error in the opinion of Mr. Justice Field that misled the court in *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188. See *Shellenberger v. Ransom*, 4 Neb. 646, 25 L. R. A. 564, 59 N. W. 935.

In the latter case the question was fully considered, and the cases reviewed, and the former holding of the Nebraska court is reversed.

The case is too long to be copied, but there are so many pertinent points and suggestions in it that we refer to some of them.

In regard to *Riggs v. Palmer*, relied on by the majority, it says, in substance, that the reasoning in that case was founded very largely on that species of judicial legislation characterized as "rational construction," and was based upon the civil law

and Code Napoleon, and not in common-law rules and maxims.

But, says the court, our laws of descent contain no such provisions as the Code Napoleon or the civil law, to wit, that one cannot take property by inheritance or will from an ancestor or benefactor whom he has killed.

It was further said that this resort to the Code Napoleon was made because the result could not be reached by the rules of the common law, and that the opinion was confessedly judicial legislation.

The opinion, reasoning, and conclusion of the court were strongly condemned, and it has not been followed, even in New York.

It was further said, in commenting on that case, that it seems to have been largely prompted by the horror and repulsion with which it may be justly supposed the framers of our statute would have viewed the crime and its consequences if they had had it in mind.

"But," says the Nebraska court, "this is no justification to this court for assuming to supply legislation, the necessity for which had been suggested by subsequent events, but which did not occur to the minds of those legislators by whom our statute of descent was framed. Neither the limitations of the civil law nor the prompting of humanity can be read into a statute from which, without question, they are absent, no matter how desirable the result to be attained may be. . . . The facts of the case at bar may impress upon some future legislature the necessity of an amendment of our law of descent. From that source alone can such an amendment come."

The cases of *Riggs v. Palmer*, of *Mutual L. Ins. Co. v. Armstrong*, of *Owens v. Owens*, and of *Deem v. Milliken* are all carefully analyzed and reviewed by the Nebraska court, and the conclusion is expressed in these words: "The well-considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent. . . . The decision in *Riggs v. Palmer* is the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy."

The case of *Carpenter's Estate*. 170 Pa. 206, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637, is also directly in point. In that case it was sought to deny a son any share in his father's estate because he had murdered him in order to secure such estate. The court held that it could not be done, and the crime committed could not attain the blood or change the law of distribution. The court said, in substance: We are 64 L. R. A.

unwilling to exclude the son, because we have no power to do so. From what source is it possible to derive such a power? The law casts the estate on certain persons, and this is absolute and peremptory, and the estate cannot be diverted from these persons, and given to others, without violating the law. "It is the act of the law which casts the descent of estates, and that is not regulated or controlled by the acts, the follies, the frauds, or the crimes of any individual persons."

The authorities are all reviewed. *Owens v. Owens*, *Deem v. Milliken*, and *Shellenberger v. Ransom* are approved, while *Riggs v. Palmer* is repudiated, and *Mutual L. Ins. Co. v. Armstrong* is shown to be not in point.

I can add nothing to the reasoning and sound law of these cases, and I have no power to disregard these principles and rules of law.

If Mrs. Justice died the beneficiary in this policy, and her husband was entitled to its proceeds *jure mariti*, and the fund is in the court, in the hands of the husband's administrator, to be paid to the party entitled, it cannot be withheld from the husband's next of kin or creditors unless the law is ignored, and the rules which govern the devolution of property are disregarded; and this upon the theory that this court can in this way punish the husband for his crime.

I most respectfully dissent from such conclusion.

But, if this could be done, it still does not reach the merits of this case.

The husband is not a party to this suit. His next of kin and creditors are the persons who are interested. Upon what principle can they be punished for the crime of Mr. Justice?

The law cast the title to the property upon him, whether by statute or common law. It vested in him, and can only be divested out of him by declaring it forfeited in the hands of his innocent representatives.

A. B. RAINS, App^t,

v.

MAXWELL HOUSE COMPANY.

(.....Tenn.....)

A watch is within the operation of a statute providing that, if the guest at a hotel neglects to deposit jewels in the safe or other place provided by the hotel keeper for their custody, they shall be at his own risk.

(January 23, 1904.)

APPEAL by plaintiff from a judgment of the Circuit Court for Davidson Coun-

NOTE.—For a case in this series holding that jewelry worn by a woman need not be de-

ty in favor of defendant in an action brought to recover the value of a watch and fob lost by plaintiff while a guest at defendant's hotel. *Affirmed.*

The facts are stated in the opinion.

Mr. James A. Ryan for appellant.

Mr. Charles C. Trabue, for appellee:

A gold watch is jewelry, and the term "jewelry" in the statute was intended to include a gold watch.

Hyatt v. Taylor, 42 N. Y. 258; *Rosenplanter v. Roessle*, 54 N. Y. 285; *Stewart v. Parsons*, 24 Wis. 242; *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 756; *Meacham v. Galloway*, 102 Tenn. 419, 46 L. R. A. 859, 73 Am. St. Rep. 886, 52 S. W. 859.

Wilkes, J., delivered the opinion of the court:

This cause was commenced before a justice of the peace. It was tried before the circuit judge on appeal, on an agreed statement of facts, without the intervention of a jury.

The agreement is in the following words: "In this cause it is agreed and stipulated by and between counsel representing plaintiff and defendant that the following facts are true, and that the same are all the material facts involved in the litigation, and that the same may be treated in all respects on the trial of this case as competent and uncontradicted testimony.

"On July 13, 1902, A. B. Rains, the plaintiff in this case, accompanied by his wife and daughter, a young lady, left their home at Columbia, Tennessee, and stopped at Nashville, on their way to Bon Aqua Springs for a vacation. The party arrived at Nashville on July 13th, in the evening, and registered as guests at the Maxwell House. The Maxwell House Company, the defendant in this case, is a corporation, chartered under the laws of Tennessee, engaged in a general hotel business.

"The train for Bon Aqua Springs left Nashville at 7 o'clock in the morning, and the party left a call at the office of the defendant company for 5:30 A. M. the next morning.

"Mr. and Mrs. Rains occupied one room, and their daughter, Miss Rains, an adjoining room.

"On retiring, Mr. Rains placed his watch under his pillow, and, awakening at 4:30 o'clock on Monday morning, looked at it to ascertain the time. The bell boy in the employ of defendant company called Mr. Rains

at 5:30 A. M., according to instructions. Whereupon Mr. Rains arose and dressed, and went down to the office and settled his bill.

"Before leaving his room he told his wife that he would have a boy sent up for the hand baggage, and that he would go to the dining room and order breakfast for three, which he did, and his wife and daughter shortly thereafter joined him at the table.

"After the party had been at the table not exceeding fifteen minutes, Mr. Rains discovered that he had left his watch in his room. He went to the rotunda railing and called to the office to send the porter up for the watch. Mr. Rains then went back to the dining room, waited a few minutes, looked at the clock, and saw that it was within a few minutes of the time for the departure of his train. He hurriedly returned to his room, and found the porter in the act of looking for his watch. The watch was not found, and has not since been recovered by him. He then went hurriedly down and joined his wife and daughter, and caught a car for the depot. The bell boy who gave Mr. Rains his grips, and who heard the porter talking about it, said: 'I could not have gotten the watch, as your wife was in the room when I got the grips.' This conversation occurred when they were getting on the car. Mrs. Rains and Miss Rains both state that they were not in the room at the time the boy got the grips, but were outside in the hotel passage. The room was unlocked when the porter reached it. Mrs. Rains and Miss Rains had kept the door locked while they were in the room, as all of their valuable jewelry was in their grips. The watch was never returned or found.

"It was a watch without jewels.

"The Maxwell House Company had posted within the room occupied by Mr. and Mrs. Rains, and also in the room occupied by Miss Rains, a conspicuous notice that it had provided a safe and vault, etc., in accordance with the act of 1879, p. 185, chap. 145, being § 3593 of Shannon's Compilation of the Laws of Tennessee, which statute is as follows:

" 'Whenever the proprietor of any hotel or inn shall provide a safe in the office in such hotel or inn, or other convenient place for the safe-keeping of any money, jewels, or ornaments, belonging to the guests of such hotel or inn, or for any samples of merchandise of any kind carried by drummers or commercial travelers, and shall notify the

posited with the innkeeper in order to make him liable for its loss, see *Fay v. Pacific Improv. Co.* 16 L. R. A. 188.

As to responsibility of innkeeper as bailee generally, see *note* to *Glenn v. Jackson*, 12 L. R. A. 382; also *Coskery v. Nagle*, 6 L. R. A. 44 L. R. A.

483; *Shultz v. Wall*, 8 L. R. A. 97, and *note*; *Cunningham v. Buckley*, 35 L. R. A. 850; *Amey v. Winchester*, 39 L. R. A. 760; *Cohen v. Manuel*, 40 L. R. A. 491; *Bradley Livery Co. v. Snook*, 55 L. R. A. 208.

guests thereof by posting a notice (stating the fact that such safe or other convenient place in which money, jewels, ornaments, or "samples" may be deposited) in the room or rooms occupied by such guests, in a conspicuous manner,—if such guests shall neglect to deposit such money, jewels, ornaments, or samples of merchandise in such safe or other convenient place, the proprietor shall not be liable for any loss of such money, jewels, ornaments, or samples of merchandise sustained by such guests by theft or otherwise.'

"It is further stipulated and agreed that the value of the watch lost or stolen from Mr. Rains was \$100, which was its reasonable market value, and that the fob attached to said watch was reasonably worth \$10, its market value, making a total of \$110, for which he sues.

"It is agreed that all of the hotel officials and employees testified that they did not take the watch or fob in controversy, and knew nothing about it."

This is all the evidence in the case.

The common law, as well understood, is that an innkeeper is an absolute insurer of the property of his transient guests, and under that rule the hotel company would be liable in this case.

The sole question, therefore, is a proper construction of the act of 1879, p. 185, chap. 145, which, under the conditions named in the act, exempts the hotel keeper from liability for any money, jewels, ornaments, or samples of any kind carried by drummers or commercial travelers.

We think it very clear that none of the terms used in the statute embrace a watch, unless it be the term "jewels."

The statute, being in derogation of the common law, must be strictly construed, but, at the same time, with reference to the evident object and purpose, and only such articles as are named can be considered as coming within its provisions.

In the case of *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728, it is said: A watch and chain are not jewels within a statute relieving hotels from liability for loss of money, jewels, or ornaments of guests when they have provided a safe for the deposit of such.

The same was held in the case of *Bernstein v. Sweeney*, 1 Jones & S. 276, which quotes with approval Webster's definition of a jewel, as "an ornament of dress in which the precious stones form a principal part."

In the case of *Gile v. Libby*, 36 Barb. 77, the court held: "The watch and pen and pencil case are certainly valuables, and perhaps might be called jewels; but I think should be considered a part of the traveler's personal clothing or apparel. The legisla-

ture certainly did not expect the traveler, after retiring, to send down his ordinary clothing or apparel to be deposited in the safe."

It was also held that a reasonable amount of money for traveling expenses and articles for personal use and convenience, though within the terms of the statute, are not within its spirit, and that a guest, by retaining such articles in his own possession, instead of depositing them with the innkeeper, does not absolve the innkeeper from his common-law liability. See also 16 Am. & Eng. Enc. Law, 2d ed. p. 543.

In the case of *Maltby v. Chapman*, 25 Md. 310, it was held that a guest was not bound to deposit with the innkeeper, for safe-keeping, a watch or a sum of money amounting to \$80.

Under a Georgia statute which specifies "valuable articles," it was held that a guest cannot be required to deposit a watch of reasonable value worn by him, and a reasonable sum of money had by him for the purpose of paying his traveling expenses. *Murchison v. Sergeant*, 69 Ga. 207, 47 Am. Rep. 754. And the court in that case said: "Even if notice had been published to him, according to law, to deposit valuables in another place, it would not apply to traveling money and a watch of reasonable amount and value."

In the case of *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728, the court, construing the words of the statute, which are the same as the words of our statute, said: "The words of the statute must be taken in their ordinary sense, in the absence of any indication that they were used either in a technical sense or a sense other than that in which they are properly used. A watch is neither a jewel nor ornament, as these words are used and understood either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a timepiece or chronometer,—an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the day time. It is carried for use and convenience, and not for ornament. But it is enough that it is neither a jewel nor ornament in any sense in which these words have ever been used."

In the case of *Gile v. Libby*, 36 Barb. 77, the facts were that the plaintiff's watch, pencil, pencil case, and \$25 in money were stolen. The court said, in construing the first section of the act: "We must look at the whole of it. Doing so, I think it plain that the exemption was intended to apply only to such amount of money and to such jewels, ornaments, or valuables as the land-

lord or hotel keeper himself, if a prudent person, and traveling, would put in a safe, if convenient, when retiring at night. Can anyone suppose that it was the intention of the act to exempt the hotel proprietor from his common-law liability unless the traveler emptied his pockets of every cent of money and deposited it, with his watch and pencil case, in the safe, both of which last-mentioned articles he might have occasion to use after retiring to his room? This would be not only exempting hotel keepers from their common-law extraordinary liability, but requiring extraordinary prudence of their guests. . . . In my opinion, at this day, the traveler putting up at a respectable hotel, who, on retiring at night, should think of taking from his pockets and depositing in a safe such a sum as \$25 only, or his watch and gold pen and pencil case, would be considered not only extraordinarily, but ridiculously, prudent."

In the case of *Maltby v. Chapman*, 25 Md. 310, the plaintiff's watch, watch guard, pocketbook, and \$90 in money were stolen during the night. The Maryland statute then in force provided that guests should deposit money, plate, and jewelry for safe-keeping. The plaintiff recovered judgment for all of the property. The court said: "The evidence here shows that the articles stolen from the room of the appellee, while a guest of the appellant, were a watch, watch guard, pocketbook, and \$90 in money; and, looking to the purpose and terms of these provisions of the Code, it is manifest that a compliance with them could not relieve the appellant from liability for the loss thus shown. All of these articles, with the exception of the money, were of a class not within the statutory provisions referred to, and the appellant could not, even by complying with their requirements, exempt himself from liability for their loss."

These cases, by their reasoning, indicate that the innkeeper, even under the provisions of a statute such as our own, would still be held liable for the loss of a watch, although it was kept by the guest in his room and about his person. But the authority of these cases is very much shaken, if not entirely overthrown, by subsequent cases from the New York courts.

In the case of *Hyatt v. Taylor*, 42 N. Y. 258, there was a suit to recover certain money, two gold studs, and two gold pens. The lower court instructed the jury that, notwithstanding the statute, the guest would be entitled to retain such articles as were of ordinary use and convenience, and it was left to the jury to apply this rule. The verdict was in favor of the plaintiff for \$190. The loss occurred in New Jersey, the law of which state was identical with that of

New York, and covered "money, jewels, and ornaments." The appellate court reversed the case, and in its opinion said: "If the legislature of New Jersey intended to relieve innkeepers from responsibility for the loss of any money, or jewels, or ornaments, in what words was it possible more clearly to express that intention? . . .

It would have been mere tautology [to have added the words]—'for any money, without any exception.' . . . The presumption [that some money was to be exempt] is derived solely from the alleged inconvenience of requiring the guest to conform to the requirement. . . . And when it is asked, Could the legislature have intended that, on entering a hotel, the guest should strip himself of all money, jewels, and ornaments, or be without protection? it may be answered: The guest walks the streets, he visits places of public resort or amusement, or the places to which his business calls him, and he enters his own abode, and he takes with him to each, without any special guaranty of safety, so much money, and so many jewels and ornaments, as he sees fit, and the hardship is not great if his entrance or his stay at a hotel places him in no worse condition. . . . No rule of public policy, no necessity, no violation of right, no evidence of intent derivable from the terms of the statute or from its design, permits in this case a restriction of its plain and explicit language."

In the case of *Rosenplanter v. Roessle*, 54 N. Y. 265, the court, commenting upon the cases of *Gile v. Libby*, 36 Barb. 77, and *Hyatt v. Taylor*, 42 N. Y. 258, said: "The law is thus settled in this state that if a guest, on retiring to bed at night, removes a watch or jewelry from his person, or leaves money in his pocket, and neglects to deposit the same in the safe provided for that purpose, he cannot hold the landlord liable for the loss of the same, provided the notice required by the statute has been posted in his room. However inconvenient or troublesome it may be to make the deposit, it must be made, or else the landlord has the protection of the statute. . . . The true rule undoubtedly is as above stated: That it is the duty of the guest to make the deposit whenever he has time and opportunity to do so. This rule may be inconvenient to guests; but the statute was not intended for their benefit. It was manifestly enacted for the protection of the hotel-keepers."

In *Stewart v. Parsons*, 24 Wis. 242, a gold watch and chain had been lost. The lower court followed the early New York cases, and held the innkeeper liable; but the supreme court reversed the lower court, saying: "The court below doubtless thought

that the law was not intended to apply to and include a watch and chain worn by a guest upon his person. It seems to us, however, that there is no satisfactory reason for saying that the property lost does not come fully within the language and intent of this enactment. The statute provides, in substance, that 'no innkeeper in this state who shall constantly have in his inn an iron safe in good order, and suitable for the safe custody of money, jewelry, and articles of gold and silver manufacture and of the like, . . . shall be liable. . . . The object of this law is very manifest. It is intended to limit and restrict the liability of an innkeeper at common law or by custom for the loss of the goods of his guests, committed to his care.'

In this case the case of *Gile v. Libby*, 36 Barb. 77, is criticised, and the case of *Hyatt v. Taylor*, 42 N. Y. 258, is approved.

The case of *Murchison v. Sergeant*, 69 Ga. 207, 47 Am. Rep. 754, did not involve a construction of a statute at all, since it was expressly found that no notice had been given the guest as required by law. The court said, *obiter*: "Even if notice had been published to him, according to law, to deposit valuables in another place, it would not apply to traveling money and a watch of reasonable amount and value;" citing the Maryland and earlier New York cases, to which we have adverted.

In *Meacham v. Galloway*, 102 Tenn. 419, 46 L. R. A. 319, 73 Am. St. Rep. 886, 52 S. W. 859, this court said: "It was conceded on the trial that the watch and chain should have been deposited in the safe in compliance with notices to that effect posted in the room, and that no recovery could be had for the loss of the watch and chain."

The question at issue in this case, however, was not adjudged in that.

We think that the watch and fob must be

considered as embraced in the terms "jewels and ornaments."

Mr. Webster defines the word "jewel" as an ornament of dress, usually made of a precious metal, having enamel or precious stones as a part of its design; but we are of the opinion that the sense in which it was used by the legislature is the common meaning attributed to it as an ornament, or useful article of value, and embraces a watch used for a timekeeper or chronometer, and in which precious stones may or may not form a part. The fob is evidently an article kept and worn both for use and ornament.

If a guest sees proper to keep his watch and his fob and money upon his person or in his room, he does so at his own risk, just as he keeps it about his own person and in his possession when not in the hotel or inn. If he desires, for his own safety or convenience, to place the responsibility for its safekeeping upon the hotel company during his stay in the hotel as a guest, then he must place it in the safe which the statute requires to be provided by the innkeeper for that purpose. We can put no other construction upon the statute without nullifying wholly, or to some extent, its provisions.

It may be inconvenient to deposit small sums of money and pieces of jewelry of little value in the safe of a hotel, and it may be inconvenient to do without their use in the room during the stay of the guest; but this is a condition, under the statute, upon which the hotel keeper can alone be made liable for their safety as an insurer.

If the guest desires to avoid these inconveniences, he may retain possession of his money and his jewelry, just as if he were not a guest of the hotel.

We are of the opinion, therefore, that there is no error in the judgment of the trial court, and it is affirmed, with costs.

TEXAS SUPREME COURT.

Emil BEKKELAND

v.

J. A. LYONS.

(96 Tex. 255.)

Acquittal of a criminal charge is not

evidence of want of probable cause, in an action by accused against the prosecuting witness to recover damages for malicious prosecution.

(February 19, 1903.)

NOTE.—Acquittal or discharge on a criminal charge as evidence of want of probable cause.

I. Acquittal and discharge.

a. Generally, 475.

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II. Discharge by an examining magistrate.

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d. Soundness of *res* questioned, 484.

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V. Failure to indict, 488.

VI. Finding in criminal proceeding that the prosecution was malicious and without probable cause, 489.

VII. Summary, 490.

CERTIFICATION by the Court of Civil Appeals for the Second Supreme Judicial District for the opinion of the Supreme Court of questions which arose upon appeal by defendant from a judgment of the Bosque County Court in plaintiff's favor, in an action brought to recover damages for alleged malicious prosecution. *Answers returned favorable to appellant.*

The facts are stated in the opinion.

Mr. J. A. Gillette, for appellant:

The making and filing in the county court of the complaint described in appellee's petition, he not having been arrested under a *capias* thereon, did not entitle him to a recovery against appellant in this cause.

Johnson v. King, 64 Tex. 226; *Ward v. Sutor*, 70 Tex. 343, 8 Am. St. Rep. 606, 8

S. W. 51; *Cooper v. Armour*, 8 L. R. A. 47, 42 Fed. 215.

The verdict of the jury, and the judgment of the court showing appellee's acquittal of the charge complained of, were not evidence against appellant of malice or want of probable cause, and should have been considered by the jury, but for one purpose, *viz.*: That said prosecution had terminated in appellee's favor.

Cook v. Carroll Band & Cattle Co. 6 Tex. Civ. App. 326, 25 S. W. 1034; *Jackson v. Jones*, 74 Tex. 104, 11 S. W. 1061; *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461; *Estill v. State*, 38 Tex. Crim. Rep. 255, 42 S. W. 305; *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Heldt v. Webster*, 60 Tex. 208. No brief was filed for appellee.

1. *Acquittal and discharge.*

a. *Generally.*

In actions for malicious prosecution the cases hold, with substantial unanimity, that an acquittal is not *prima facie* evidence of a want of probable cause. In some cases this was held on the ground that the presumption arising from the act of the magistrate in binding the accused over to appear at trial gave such a strong presumption of guilt, showing that the prosecutor had ample cause, that it could not be overcome by a verdict of acquittal.

In the following cases an acquittal on a trial of a criminal prosecution was held not *prima facie* evidence of the want of probable cause for the prosecution. *Adams v. Lisber*, 3 Blackf. 445; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505; *Scott v. Simpson*, 1 Sandf. 601; *McBean v. Ritchie*, 18 Ill. 114.

And the acquittal of the defendant after a full investigation of the case, and an examination of all the testimony on both sides, was held not *prima facie* evidence of the want of probable cause for the prosecution. *Eastman v. Monastes*, 32 Or. 291, 67 Am. St. Rep. 531, 51 Pac. 1095.

So, it was held that an acquittal by a jury on a trial of a prosecution by information, brought by the prosecuting attorney at defendant's instance, against the plaintiff, did not tend to establish want of probable cause in moving that prosecution. *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223.

Referring to this case, the court, in *Christian v. Hanna*, 58 Mo. App. 37, says: "It is stated that an acquittal does not tend to establish want of probable cause. In support of this statement of the law, a reference is made to *Williams v. Vanmeter*, 8 Mo. 339, 41 Am. Dec. 644, but an examination of that case will show that the question there decided was whether the discharge of an examining magistrate was presumptive evidence of want of probable cause, and it was held that it was not such evidence. Judge Scott, who delivered the opinion, states the rule to be that 'an acquittal is evidence of want of probable cause to go to the jury, but, of itself, and unaccompanied with any circumstances, would not be sufficient. So in *Townshend on Slander & Libel*, § 426, referred to in *Boeger v. Langenberg*, 97 Mo. 397, 10 Am. St. Rep. 322, 11 S. W. 223, it is stated that an acquittal,

alone, is not evidence of the want of probable cause. So that we must think that what was intended to be said in *Boeger v. Langenberg* was that an acquittal, without more, was insufficient to justify the inference of want of probable cause, or, in other words, that, while the production of the record of an acquittal is evidence of the want of probable cause, standing alone and without other circumstances being shown, it is not sufficient to authorize the inference of want of probable cause." The court concludes: The production, therefore, of a verdict of acquittal is not, *per se*, sufficient to originate the inference of want of probable cause. The conclusion of the criticizing opinion does not seem to differ from the expression criticized.

Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644, *supra*, evidently was a case of an acquittal on the merits, rather than a discharge by an examining magistrate. This case was reported in 1844, and arose from a prosecution under the vagrant act, which was probably the same as Mo. R. C. 1845, p. 1070 (see *White v. Walker*, 22 Mo. 435), and Mo. Rev. Stat. 1870, p. 1355, authorizing an investigation before a justice of the peace and a trial before him by a jury, and a sale, under his warrant, of the vagrant for the term of six months. In this case an instruction was given for the plaintiff, "that the discharge of the plaintiff by the examining magistrate was presumptive evidence of want of probable cause," and for the defendant, "that the acquittal of the plaintiff by the justice of the peace is not sufficient in itself to show a want of probable cause." It was held that the instructions, taken as a whole, contained a correct exposition of the law, and were not contradictory. The court said: "It was contended by the defendant that the second instruction, given at the instance of the plaintiff, was erroneous, inasmuch as it conveyed the idea that the bare acquittal of the plaintiff by the justice was evidence from which the jury might infer a want of probable cause. It cannot be maintained that, in an action for a malicious prosecution, proof that the defendant instigated it, and a production of the record of acquittal, will entitle the plaintiff to a verdict. However, but a slight evidence of the want of probable cause is exacted of the plaintiff, as it involves a negative; but we are not aware that the bare production of the judgment of acquittal has ever been held sufficient for

Gaines, Ch. J., delivered the opinion of the court:

This case comes to us upon the following certificate:

"The above styled and numbered cause is now duly pending before us on appeal from the county court of Bosque county, upon facts and pleadings as hereinafter substantially stated; to wit: The action is for damages for an alleged malicious prosecution. Appellee, who was the plaintiff below, pleaded that appellant voluntarily appeared before a justice of the peace and instituted a criminal prosecution against him by falsely and maliciously charging him with theft, and with cutting and hauling timber from the land of another, etc. That a capias was duly issued by the said magistrate

upon said charge, and the appellee arrested and placed in the county jail of Bosque county; that he had violated no law of Texas, as appellant well knew, and that appellant prosecuted him wilfully, maliciously, and without probable cause; that appellee was duly tried in the county court of Bosque county upon said charge and acquitted, and he prayed judgment against appellant for his damages. Appellant in defense pleaded the general denial. Judgment for appellee. The evidence establishes the institution and result of the criminal prosecution as alleged, and there was also evidence tending to prove that appellant acted maliciously and without probable cause. The preponderance of the evidence, however, tends to show that such prosecution was neither malicious nor

that purpose. The acquittal, together with the circumstances under which it was effected, may be sufficient, as in the case put, where, upon the calling of the cause, the prosecutor, who was in court, absented himself. It was left to the jury to infer the motives of his withdrawal, and they were charged that they might infer the want of probable cause for such conduct. An acquittal is evidence of the want of probable cause to go to the jury, but of itself, and unaccompanied with any circumstances, would not be sufficient."

In *Inclendon v. Berry*, 1 Campb. 203, note, which was an action for malicious prosecution in indicting the plaintiff for perjury, the plaintiff produced the record of acquittal, and proved that the defendant had abandoned the prosecution, and also gave in evidence some expressions of the defendant indicative of malice, and there closed his case. *Le Blanc, J.*, required him to go farther, and negative the existence of probable cause.

And the defendant's acquittal by the verdict of a jury was held not to raise the presumption of want of probable cause. *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85. In this case *Wheeler, J.*, quoting from *Greenleaf, Starkie*, and *Phillips on Evidence*, said: "The discharge of the plaintiff by the examining magistrate is prima facie evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary. But in ordinary cases it will not be sufficient to show that the plaintiff was acquitted of an indictment by reason of the nonappearance of the defendant, who was the prosecutor; nor that the defendant, after instituting a prosecution, did not proceed with it; nor that the grand jury returned the bill 'not found.'" In this case the man had been arrested and brought before a justice on the charge of stealing a negro, and of having been an accessory to the stealing of a horse. Afterwards the defendant abandoned the charge of horse stealing, and caused the plaintiff to be indicted and prosecuted on the charge of stealing a negro, and by the verdict of the jury the plaintiff was acquitted. In this case the trial court instructed that "a verdict of not guilty and a discharge of the defendant from the prosecution raise the presumption that there was no probable cause." This was held to be erroneous.

In *Chubb v. Griffin*, 13 Tex. 392, where evidence of acquittal (offered to prove that the prosecution was at an end) had been excluded

on a trial of malicious prosecution, *Wheeler, J.*, said: "All this, with other evidence, proposed by the plaintiff for the purpose of proving the groundlessness of the prosecution, and the expenses incurred by the plaintiff in conducting his defense therein, being objected to by the defendant, was excluded by the court." It was held that the rejection of this evidence was error.

This was a different case from *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85, *supra*, which was not referred to in the opinion. The exclusion of the judgment of acquittal may have been held erroneous on the sole ground that it was offered to prove that the prosecution was ended,—otherwise the cases would conflict.

In *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321, an action for malicious prosecution, an instruction that the verdict of acquittal was no evidence to be considered in this case was held to have been properly refused on the ground that the plaintiff was bound to prove that the prosecution was at an end. The court said that in the case of *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85, "it was held that a verdict of not guilty did not raise a conclusive presumption that there was no probable cause for the prosecution; and the rule was followed in the subsequent case of *Heldt v. Webster*, 60 Tex. 207. But in the latter case the court says: 'Whether there was a want of probable cause for the jury to determine under the facts in evidence, and they might consider, in making up their verdict, the fact that the appellee had been discharged by the examining court.' So, also, a verdict of not guilty is to be considered under the same circumstances."

In some cases the rule is stated in a general way, in effect, that, in an action for malicious prosecution, the record of acquittal is no evidence of the want of probable cause. This was held in *BEKKELAND v. LYONS*. Such a rule would exclude consideration of the acquittal as prima facie evidence.

In the following cases it was held that an acquittal is not evidence of the want of probable cause:

A discharge of the defendant in a criminal prosecution for embezzlement was held not to be evidence of the want of probable cause. *Thompson v. Beacon Valley Rubber Co.* 56 Conn. 493, 16 Atl. 554. The court said: "Three things are essential to the maintenance of actions of this character: (1) The discharge of

without probable cause. The appellant upon the trial prepared and requested the court to submit to the jury the following special charge, which the court refused, and to which ruling he has assigned as error: 'You are instructed by the court, at the request of defendant, that the fact of plaintiff's acquittal upon the charge complained of cannot be considered by you for the purpose of showing malice or want of probable cause, but you can consider said fact for the purpose of showing that the prosecution in said cause had ended in plaintiff's favor.' In view of the apparent conflict among the decisions and text writers, and of the fact that the members of this court are not wholly agreed upon the subject, we deem it advisable to certify to your honors for an-

swer the following question, viz.: Upon the facts above stated, was the action of the court in refusing the requested instruction of appellant erroneous? Among the authorities apparently bearing upon the question we cite: *Cook v. Carroll Land & Cattle Co.* 6 Tex. Civ. App. 326, 25 S. W. 1034; *Jackson v. Mumford*, 74 Tex. 104, 11 S. W. 1061; *Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461; *Estill v. State*, 38 Tex. Crim. Rep. 255, 42 S. W. 305; *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85; *Thompson v. Beacon Valley Rubber Co.* 56 Conn. 493, 16 Atl. 557; *Bell v. Percy*, 33 N. C. (11 Ired. L.) 233; *Bigelow, Torts*, ed. 1891, 63; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Sutor v. Wood*, 76 Tex. 407, 13 S. W. 321; *Heldt v. Webster*, 60 Tex. 207; *Raleigh v.*

the plaintiff; (2) that the prosecution was without probable cause; (3) that it was malicious. The acquittal of the plaintiff proves the first, but it has no tendency to prove the second or third. The want of probable cause must be shown by facts and circumstances existing, and information which came to the defendant, at the time the prosecution was instituted. Facts subsequently transpiring, and information subsequently received, could not, from the nature of the case, influence his action at that time."

In *Skidmore v. Bricker*, 77 Ill. 164, where it was held that the trial court erred in permitting the record of acquittal in the county court on a charge of riot to be read in evidence by the plaintiff in an action for malicious prosecution and false imprisonment, it was said: "The question in this case is not whether the accused was guilty or innocent, but whether the prosecuting witness had probable ground for believing the accused guilty. If the record of acquittal was permitted to be read in evidence on the trial of this class of cases, a recovery could be had in almost every case of acquittal."

In *Winn v. Peckham*, 42 Wis. 493, the court said: "The cases cited by the learned counsel for the defendant against the admissibility in evidence of the judgment of acquittal, with a single exception, fail to sustain his position. The exceptional case is that of *Skidmore v. Bricker*, 77 Ill. 164, in which such testimony was held inadmissible. The decision in that case is based upon the decision of the same court in *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98. The latter case was an action for slander. The alleged slander consisted in charging that the plaintiff had committed a certain crime. The defendant pleaded the truth of the words spoken. It was held that the record of the trial and acquittal of the plaintiff for the alleged crime was not competent evidence. Undoubtedly *Corbley v. Wilson* was correctly decided; but what the doctrine of that case has to do with an action for malicious prosecution, to maintain which the facts of a prosecution and its termination must be proved, is beyond our comprehension. As at present advised, we cannot concur in the doctrine of *Skidmore v. Bricker*."

In *Comisky v. Breen*, 7 Ill. App. 369, where an attempt was made to explain the *Skidmore* case, the court said: "Considering the opinion in *Skidmore v. Bricker*, under the light of all the authorities and the uniform practice here-

tofore existing in this state, of counsel offering, and the court admitting, in evidence the record of the prosecution and acquittal of the plaintiff for the purpose, only, of showing a legal termination of the prosecution, we are all of the opinion that the case then before the court was one where the record was allowed to go to the jury as evidence of the innocence of the plaintiff and proof of the want of probable cause." It was further said: That "an acquittal or discharge of the plaintiff is no proof of the want of probable cause is fully sustained by the former decisions of the same court."

In *Winn v. Peckham*, 42 Wis. 493, the court said: "Whether a judgment of acquittal is any evidence of want of probable cause for the prosecution is a question we are not required to determine on this appeal. If it is not, and the defendant feared that the jury might give it that effect, he should have prayed a proper instruction in that behalf. No such instruction was asked. However, the learned circuit judge instructed the jury that want of probable cause for the prosecution 'cannot be inferred from the mere fact that the plaintiff was acquitted in the perjury case.'"

In some cases the expressions are used that an acquittal does not "show," or does not "prove," and is not "evidence" of, want of probable cause. These expressions are often used in a general way, without much regard to clearly defined distinctions. Probably the court intended in all of the cases simply to assert that the plaintiff in the malicious prosecution case could not offer the record of acquittal and rest there, on the ground that the record of acquittal was not prima facie evidence of the want of probable cause, and that such evidence, without other proof, would not shift the burden on the defendant.

In *Britton v. Granger*, 13 Ohio C. C. 281, which was an action for malicious prosecution in causing an arrest for disorderly conduct, of which offense the defendant had been acquitted, it was held that evidence was improperly excluded. In discussing the necessity of proving the negative, the court said: "The acquittal is not sufficient to show want of probable cause, because the guilt or innocence of the accused is not equivalent of the want of probable cause."

And in *Godfrey v. Soniat*, 33 La. Ann. 915, it was held that the acquittal of the accused, whose conviction must rest upon evidence proving his guilt beyond a reasonable doubt, did

Cook, 60 Tex. 438; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Womack v. Circle*, 32 Gratt. 347; *Whitfield v. Westbrook*, 40 Miss. 317; *Wright v. Fansler*, 90 Ind. 494; *Williams v. Norwood*, 2 Yerg. 336; *Smith v. Ege*, 52 Pa. 421, 2 Greenl. Ev. 455."

In *Griffin v. Chubb*, 7 Tex. 603, 58 Am. Dec. 85, the trial court instructed the jury that "a verdict of not guilty and discharge of the defendant from prosecution raises the presumption that there was no probable cause." This court held that the charge was erroneous, and in deciding the question the court says: "The defendant's acquittal did not raise the presumption of the want of probable cause." In *Heldt v. Webster*, 60 Tex. 207, a similar charge was held erroneous, and in course of the argument the

court says: "Whether there was want of probable cause was for the jury to determine under the facts in evidence, and they might consider, in making up their verdict, the fact that the appellee had been discharged by the examining court; but the charge of the court was incorrect as matter of law, and gave to that fact a prominence to which it was not entitled." It seems to us, however, that the question whether, save for the purpose of showing that the prosecution had ended, the fact of acquittal or discharge has any probative force whatever, was not involved in that case. The same may be said as to the remarks in the course of the opinions in subsequent cases. *Raleigh v. Cook*, 60 Tex. 438; *Sutor v. Wood*, 76 Tex. 403, 13 S. W. 321. In each of the cases re-

not prove malice or want of probable cause in the prosecutor. The court said: "If the acquittal of all persons accused of crimes or misdemeanors should subject the complainants to actions in damages for malicious prosecution, it is easy to perceive that litigation of that character would absorb and monopolize the attention of courts of justice to the exclusion of all other business." In this case the accused had been tried on a charge of trespass in cutting down timber, and had been acquitted. It was held that there was ample probable cause for the prosecution.

Following this case, it was held, in *Staub v. Van Benthuyssen*, 36 La. Ann. 467, that a discharge of the defendant by a city recorder in a criminal prosecution for libel, on the ground that the publication was not malicious, was no proof of want of probable cause. In this case the defendant established a counterclaim for damages arising out of the libel for which the criminal prosecution had failed, and a judgment was granted in the action for malicious prosecution in favor of defendant against plaintiff. This discharge must have been an acquittal on the trial, the jurisdiction of the recorder not being stated. This view is supported by the fact that the case followed and cited was based on an "acquittal," and by the further fact that in *Bornholdt v. Soullard*, 36 La. Ann. 103 (*infra*, II.), the "discharge" by an examining magistrate was held *prima facie* evidence of the want of probable cause.

A charge that the bare fact that the plaintiff was arrested and liberated in the police court gave her a cause of action was held to be erroneous, on the ground that the court determined that the fact mentioned established conclusively the want of probable cause. *Rogers v. Mahoney*, 62 Cal. 611. The case does not disclose whether there was a trial on the merits, or on a hearing; but it simply states that she was "arrested and liberated" in the police court. The court said: "The rule as laid down by the court would certainly simplify the trial of this class of actions. If correct, the law might be thus formulated: First, where the plaintiff has been arrested, charged with an offense, and convicted, his action for malicious prosecution will not lie; second, where he has been arrested, charged, and discharged, and these facts are proved to the satisfaction of the court, the case of plaintiff in an action for malicious prosecution is made out, because malice may be inferred 64 L. R. A.

from want of probable cause. It needs but to state the second position to show that it cannot be successfully maintained."

And, a judgment of nonsuit for violating a city ordinance was held not to conclude the defendants, or to prove that, in so far as it related to one of the defendants (*Prados*), he acted without probable cause. *Gerber v. Vlosca*, 8 Rob. (La.) 150. In this case *Prados* was the market policeman, who, at the instance of the agent of the farmer of the butchers' market, arrested an occupant of a stall for committing a disturbance. The principal and the policeman were sued in the action for malicious prosecution. The court said: "The ordinance of the 20th of July, 1840, provides, that, if any person shall, in the daytime, commit any noise or disturbance at any public place, he shall be fined not more than \$20, nor less than \$3 for each offense. The plaintiff, it appears, was prosecuted before one of the city judges under the ordinance, in the name of the municipality, and judgment of nonsuit entered, and a record of the proceedings was read in evidence. That judgment clearly does not conclude the defendants, much less does it prove that, as it relates to *Prados*, he acted without probable cause."

And in *Hurd v. Shaw*, 20 Ill. 354, it was said: "But even if a verdict of acquittal on the merits be pronounced, it is not sufficient evidence of a want of probable cause, which is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."

The production in evidence of a verdict of acquittal was held not to establish the plaintiff's *prima facie* case in an action for malicious prosecution. *Christian v. Hanna*, 58 Mo. App. 37. The court said: "Nor was this supplemented by such facts and circumstances as showed the prosecution was commenced and carried on without probable cause. If the evidence failed affirmatively to show, as we think was the case, want of probable cause, the plaintiff's action must fail, no difference what the motive prompting the prosecution was."

In *Cooper v. Utterbach*, 37 Md. 282, which was an action for malicious prosecution, the court, in reviewing and sustaining the instructions given in the trial court, said: "These imposed upon the appellee the burden of proving that the prosecution (the ground of the pres-

ferred to, the question was as to the propriety of a charge which made either the discharge by a magistrate, or the acquittal by a jury of the party charged, presumptive evidence of the want of probable cause. It seems to us, therefore, that neither of these cases can be considered as having decided the question. We think, however, that the principle which should govern its decision was involved in the case of *March v. Walker*, 48 Tex. 372. That was a suit by the children of a deceased person to recover damages against the slayers of their father. During the course of the trial the defendants offered evidence to show that the defendants had been acquitted upon a trial for murder growing out of the same homicide. For the reason, evidently, that the evidence

was without probative force, it was held that it was properly excluded. In case of a suit for malicious prosecution, it is proper to introduce in evidence the fact of the acquittal in order to show that the prosecution is at an end. But if the fact of acquittal was without probative force in the case last cited, for a stronger reason it would have no tendency to prove anything in a case like the present, except that the prosecution was at an end. In the criminal case against March, and in the civil suit, one issue was the same (that is to say, Was the homicide justifiable?), it being necessary in the former for the state to prove the negative beyond a reasonable doubt, whereas in the latter it was incumbent upon the plaintiff to show justification

ent action) was instituted or prosecuted without probable cause and with malice, by the appellant, before he could claim a verdict. They declared that the acquittal of the appellee by the criminal court of Baltimore was only 'prima facie' evidence of his innocence of the charge, notwithstanding which he might be found guilty of the offense charged in this case, and submitted to the jury the inquiry, whether the appellee had obtained of the appellant money or stock by false pretenses. The whole ground in controversy was covered by these instructions."

This conclusion of the court as to the "prima facie" effect of an acquittal is not sustained by the instructions set out in the report of the case. An instruction to this effect may have been given, but, if so, it was not discussed by either party on appeal, and no question seems to have been made in regard to the same.

In *Sherwood v. Reed*, 35 Conn. 450, 95 Am. Dec. 284, the plaintiff was acquitted before a justice, and then brought suit for malicious prosecution, and requested a charge to the jury "that the trial and acquittal of the plaintiff before the justice was prima facie evidence of the want of probable cause." The court charged that, "in determining whether the defendant had acted without probable cause, they should take into consideration the facts of the trial and acquittal of the plaintiff before the justice, in connection with the other testimony offered upon that point." This was approved, as it appeared that the defendant offered evidence to prove that the acquittal was owing to the rejection of legal evidence. The court said: "If this was true, we think the fact of acquittal by the justice was not entitled to that consideration upon the question of a want of probable cause that it otherwise should have had, for the judgment of the court acquitting the accused was final."

In some few cases set out below, where the court held, as in the preceding cases, that an acquittal was not evidence of the want of probable cause, the rule was confirmed by the fact that the accused had been bound to appear, by an examining magistrate, or had been indicted, or that the petit jury had hesitated. These reasons are not deemed necessary, according to the rule established by the preceding cases, where no attention was paid to these matters.

So, an acquittal by the *venue* was held not evidence of malice in the prosecutor, or of the want of probable cause in an action for malicious prosecution. *Garrard v. Willet*, 4 J. J. 64 L. R. A.

Marsh, 628. This was on the ground that, an indictment having been found, the presumption was prima facie that the prosecutor had reasonable ground for the prosecution; and therefore the final acquittal did not, *per se*, prove a want of probable cause.

And a verdict of not guilty was held not to show a want of probable cause in an action for malicious prosecution. *Grant v. Deuel*, 3 Rob. (La.) 17, 38 Am. Dec. 228. In this case the court said: "It appears, the grand jury not only found a true bill, but that the petit jury deliberated for ten or fifteen minutes as to their verdict. These are strong circumstances of probable cause for the prosecution, in the absence of any proof of fraud or perjury to produce such results."

In *Hale v. Boylen*, 22 W. Va. 234, where the plaintiff had been discharged by habeas corpus after having been committed by an examining magistrate, and the discharge was treated as an acquittal, and it was held that the action of the justice gave a weak presumption of probable cause, the court said: "But, slight as the evidence is, that is necessary to prove, in the first place, a want of probable cause; yet there are many cases which hold that the acquittal of the plaintiff by a jury will not even amount to prima facie evidence of such want of probable cause, though some have said such acquittal would amount to prima facie evidence of a want of probable cause, and thus throw the burden of showing that there was probable cause on the defendant. It is obvious, therefore, from the decisions, that, if the acquittal of the plaintiff is any evidence at all on the question of whether there was or was not probable cause, it is entitled to very little weight. See *Vinal v. Core*, 18 W. Va. 42. The final conviction of the plaintiff is, however, obviously conclusive of probable cause, and therefore precludes, necessarily, an action for malicious prosecution."

And, where the accused was recognized by the magistrate to answer to the charge of hog stealing, and on the trial was acquitted by the county court, the jury were instructed, in the malicious prosecution case, that the warrant and recognizance furnished sufficient evidence of probable cause to induce the prosecution on which this action was founded. This was held to be proper, and that it did not exclude from the jury other evidence which might have been offered to disprove probable cause inferable from the proceedings before the magistrate. *Maddox*

by a preponderance of evidence. Upon a trial for a criminal offense the question is, Does the evidence show beyond a reasonable doubt that the offense has been committed? but upon the trial of a suit for malicious prosecution of such offense the issue is, Was there probable cause to believe that an offense had been committed? The fact that a verdict of not guilty is returned in the former case neither shows, nor does it reasonably tend to show, that there was no probable cause for the prosecution. Besides, we fail to see how, in a suit to recover damages for the malicious prosecution of a criminal charge, the verdict or judgment upon the trial of the charge should in any manner affect the prosecutor when he is not a party to the suit.

We recognize, as does the court of civil appeals, the conflict of authority upon the question, but we are of the opinion that the weight of authority and the better reason are in favor of the proposition that in such a case the acquittal of the plaintiff of the criminal charge is not evidence tending to show the want of probable cause. We cite some of the recent cases: *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Allen v. Codman*, 139 Mass. 139, 29 N. E. 537; *Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480; *Eastman v. Monastes*, 32 Or. 291, 67 Am. St. Rep. 531, 51 Pac. 1095. See also note to *Ross v. Hixon*, 26 Am. St. Rep. 155.

We answer the question in the affirmative.

v. Jackson, 4 Munf. 462. In this case it was admitted on the trial of the malicious prosecution case that the accused had been acquitted. Neither court nor counsel discusses the effect of the acquittal on the evidence, but evidently assumes that such acquittal showed want of probable cause, and the discussion was only upon the effect of the preliminary proceeding which established a prima facie case of probable cause.

In *Womack v. Circle*, 32 Gratt. 352, in an exhaustive discussion of the *Maddox* Case, *Staples, J.*, dissenting, says: "According to this decision the judgment of the judges was merely prima facie liable to be rebutted by other testimony."

In *Hinson v. Powell*, 109 N. C. 534, 14 S. E. 301, where there had been two prosecutions and acquittals in each case on a charge of disposing of mortgaged property, it was held, in an action for malicious prosecution, that, if the evidence in the second prosecution was the same as that produced in the first, it showed that there was a want of probable cause.

In *Watts v. Clegg*, 48 Ala. 561, it was held that the judgment of acquittal in a prosecution for perjury was competent evidence to establish the fact of the acquittal.

In *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116, which was an action for malicious prosecution for wrongfully instituting bankruptcy proceedings, the court said: "In every case of an action for malicious prosecution, or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. *Cloon v. Gerry*, 13 Gray, 201." This expression in the Federal case has been construed in *BEKKELAND v. LYONS*, and in some text books, as holding that an acquittal of a "criminal charge is not evidence tending to show the want of probable cause." This proposition is correct; but the statement of the Federal court, that the failure of the proceeding "has never been held to be evidence of want of probable cause," should not be regarded as applicable to a discharge by an examining magistrate. The *Cloon* Case, 13 Gray, 201, held that a conviction by a magistrate having jurisdiction to try the case would entitle the defendant in an action for malicious prosecution to a nonsuit, although the accused was acquitted on appeal, and 64 L. R. A.

the express ruling was that the conviction was proof of probable cause.

b. On appeal.

In most of the cases of malicious prosecution where the acquittal was on appeal there is not much discussion about the effect of such acquittal in evidence. In some cases the prior conviction is regarded as so conclusive of probable cause as to overcome the effect of the acquittal. Cases which discuss only the conviction are authorities on the question of the effect of the conviction as evidence, rather than on the question of the effect of the acquittal.

An instruction "that the acquittal and discharge of the appellant was prima facie evidence that the prosecution was begun without probable cause" was held to have been properly refused where the accused had been convicted and sentenced to state's prison, although the conviction had been reversed and the defendant finally acquitted. *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505. The court said: "It has been held sufficient evidence of probable cause to show that the plaintiff was convicted of the offense before a justice of the peace who had jurisdiction, although he was afterwards acquitted on an appeal."

In *Womack v. Circle*, 32 Gratt. 324, the accused had been bound over by a justice to keep the peace and on appeal was acquitted, and the recognizance quashed by reason of the prosecution being abandoned by the commonwealth's attorney, who afterwards acted as attorney for the plaintiff in the malicious-prosecution suit. It was held that the judgment in the criminal case, so abandoned, not upon evidence, but upon abandonment of the prosecution by the commonwealth's attorney, could not establish the innocence of the plaintiff in this suit, and lay the foundation for this action.

In *Hale v. Boylen*, 22 W. Va. 234, the court said: "I desire here to call attention to a misuse of language sometimes fallen into by judges. They sometimes speak of the judgment of the justice committing the accused for trial as prima facie evidence of probable cause, subject to be rebutted by other testimony. This, for instance, is the language used by Judge *Staples* in *Womack v. Circle*, 32 Gratt. 352. He should have said that such judgment of a justice was sufficient evidence of probable cause, and strengthened the weak presumption, which al-

ways exists in the absence of all evidence,—that every public prosecution is founded on probable cause (see *Vinal v. Core*, 18 W. Va. 41); but that this prima facie presumption, strengthened as it is by such a judgment of a justice, can, nevertheless, be rebutted by other testimony." Staples, J., was a dissenting judge, and the language criticized was his view of *Maddox v. Jackson*, 4 Munf. 462, by which he was trying to demonstrate to his associates that, if a holding over by a magistrate was prima facie evidence of probable cause, although the opinion of the justice was unreversed, it ought not to be held conclusive evidence where the judgment of the justice was reversed.

In *Griffis v. Sellars*, 19 N. C. (2 Dev. & B. L.) 497, 31 Am. Dec. 422, 20 N. C. (4 Dev. & B. L.) 176, where the accused was convicted in the county court, and, upon appeal, had been acquitted in the superior court, and brought an action for malicious prosecution, it was held that probable cause was judicially established by the conviction, and that no evidence was competent to disprove it. In this case the plaintiff attempted to show that the conviction was obtained by false testimony, but to this the court replied that, if such evidence was admissible, the defendant could offset this by showing that the evidence offered by the plaintiff in the present case was false and perjured, and the result would be an interminable prosecution of the same litigation. In the former hearing the court said: "A verdict and judgment of acquittal certainly do not imply a want of probable cause; because such a verdict may be given, notwithstanding strong suspicion, because there is not full proof of guilt." The refusal in this case to allow the plaintiff to show that the conviction had been obtained by false testimony seems to be unsupported by other cases.

And where it was alleged that plaintiff was convicted of a criminal charge before the trial justice, but upon appeal to the superior court was there acquitted, it was held that this did not show want of probable cause, but, on the contrary, was conclusive evidence of probable cause, and would defeat the action. *Dennehey v. Woodsam*, 100 Mass. 195.

In *Witham v. Gowen*, 14 Me. 362, the plaintiff read in evidence a copy of a record showing a conviction of an offense before a justice of the peace, but that on appeal to the court of common pleas the accused was acquitted. To an offer of further evidence to support the action, it was ruled that the conviction was conclusive proof of probable cause, unless the plaintiff could prove that it was obtained exclusively, or mainly, by false testimony.

A conviction was had before a justice of the peace for illegally selling liquor. On appeal to the court of common pleas an acquittal was had. In an action for malicious prosecution it was held that such conviction constituted sufficient proof that the prosecution was with probable cause, and would defeat an action for malicious prosecution, although such judgment had been reversed on appeal. *Cloon v. Gerry*, 13 Gray, 201.

And where a party was convicted, but was acquitted upon appeal, and brought suit for malicious prosecution, it was held that "if, upon a full and fair trial, the evidence against the plaintiff was sufficient to satisfy the court of his guilt, that circumstance will afford strong presumptive evidence of probable cause, exist-

ing at that time, although upon a subsequent trial, and perhaps upon other and further testimony, a jury might be of opinion that it was not sufficient to justify a conviction." *Goodrich v. Warner*, 21 Conn. 433.

The hesitancy of the trial jury has been held to favor the presumption of probable cause.

A justice of the peace found the accused guilty of cutting wood without the consent of the owner, and on appeal to the court of common pleas the accused was acquitted. In an action for malicious prosecution it was held that, as the jury on the final trial in the criminal case were out some fifteen or more minutes before they agreed on a verdict of acquittal, the evidence of probable cause for the prosecution of plaintiff seems to have been sufficient, and a nonsuit was affirmed. It was said that the convictions in the lower court have been adjudged to be conclusive evidence of probable cause. *Payson v. Caswell*, 22 Me. 212. See *Flickinger v. Wagner*, 46 Md. 581, *infra*, II.

II. Discharge by an examining magistrate.

The weight of authority and of reason is that a discharge by an examining magistrate is prima facie evidence that there is a want of probable cause for the prosecution. There is a clear distinction between such a discharge and an acquittal by a jury. It would be the duty of the jury to acquit the defendant, if on all the evidence there was a reasonable doubt of his guilt, even though they might believe he was probably guilty of the crime. But the magistrate would violate his duty if he discharged the accused, when the evidence produced the belief that he was probably guilty of the crime. He acts directly on the question whether there is a probable cause for the prosecution; and, if he discharges him, it must be because, in his judgment, there is no probable cause for the prosecution.

But in some cases the discharge by an examining magistrate, when offered in evidence as showing want of probable cause, was held to depend on the nature of the evidence at the hearing before the magistrate, *i. e.*: If the hearing was *ex parte*, and the discharge was on the evidence of the prosecutor alone, then it would be prima facie evidence of a want of probable cause. In other cases it was held that it was not prima facie evidence, if the discharge was on conflicting evidence. In one case it is held that weight should be given to the oath of the prosecuting witness, made before the magistrate.

And in quite a number of cases the courts squarely refuse to adopt the rule that a discharge by an examining magistrate is prima facie evidence of want of probable cause.

a. As prima facie evidence of want of probable cause.

In the following cases it was held that a discharge by an examining magistrate was prima facie evidence of the want of probable cause in actions for malicious prosecution. *Eggett v. Allen* (Wis.) 96 N. W. 803; *Bigelow v. Sickles*, 80 Wis. 98, 27 Am. St. Rep. 25, 49 N. W. 106; *Vinal v. Core*, 18 W. Va. 1; *Orr v. Seiler*, 1 Pennyp. 445; *Barhight v. Tammany*, 158 Pa. 545, 38 Am. St. Rep. 853, 28 Atl. 135; *Madison v. Pennsylvania R. Co.* 147 Pa. 509, 30 Am. St. Rep. 756, 23 Atl. 764; *Straus v. Young*, 36 Md. 246; *Bornholdt v. Souillard*, 36 La. Ann. 103;

Brown v. Vittur, 47 La. Ann. 607, 17 So. 193; *Plassan v. Louisiana Lottery Co.* 34 La. Ann. 246.

In the latter case it was also held that the presumption was rebutted, and the plaintiff failed to make out a cause of malicious prosecution.

And the burden of proving that there was probable cause was held to be on the defendant, in an action for malicious prosecution, where there had been a dismissal of a state's warrant by the magistrate. This was held to be prima facie evidence of the want of probable cause. *Williams v. Norwood*, 2 Yerg. 336.

And the same was held where the discharge was on a charge of larceny. *Bernar v. Dunlap*, 94 Pa. 329. In this case the court said: "In an action against the prosecutor, if the plaintiff proves he was discharged by the examining magistrate, the burden of proof that there was probable cause, as a general rule, is cast on the defendant. If, however, the plaintiff's own testimony shows the existence of probable cause, it lifts that burden from the defendant. Such was the case here."

A party had been arrested for murder, and discharged by the examining magistrate. In a suit for malicious prosecution it was held that, after the discharge by the magistrate, the burden of showing affirmatively that there was probable cause rested upon the defendant. *Smith v. Ege*, 52 Pa. 419. In this case the record showed that probable cause for the prosecution had been shown.

So a discharge was held to be prima facie evidence of want of probable cause, sufficient to throw upon defendant the burden of proving the contrary, in an action for false imprisonment, where the plaintiff had been arrested on the charge of using threatening behavior, and locked up in the station house over night, but was discharged by the police justice. *Rosenkranz v. Hass*, 1 Misc. 220, 20 N. Y. Supp. 880.

In *Whaling v. Wells*, 50 La. Ann. 562, 23 So. 447, where it was held that the commitment by the magistrate was but prima facie evidence of the existence of probable cause, it was said: "It has frequently been held that the discharge of an accused person by a committing magistrate is prima facie evidence of the want of probable cause, and shifts the burden of proof on the defendant sued for malicious prosecution."

And a discharge on a hearing before a justice, together with the evidence that neither of the defendants had taken counsel, was held to cast upon them the burden of showing want of probable cause, in an action for malicious prosecution. *Mann v. Cowen*, 8 Pa. Super. Ct. 30.

The declaration in the damage suit should state that the plaintiff was discharged from the prosecution. This must be proved. The proof of this was held in *Johnston v. Martin*, 7 N. C. (3 Murph.) 248, to make a prima facie case, and to cast upon the prosecutor the burden of proving that there was probable cause.

And this was also held in *Bostick v. Rutherford*, 11 N. C. (4 Hawks) 83. In this case the court said: "I am not disposed to disturb the case of *Johnston v. Martin*, in 7 N. C. (3 Murph.) 248. In the incipient stage of a prosecution before an examining magistrate much less grounds of suspicion will induce him to bind over the accused for further trial than will warrant either the grand jury to find a true bill, or the petit jury to convict; and, when

the accused is discharged because a sufficient ground of suspicion has not been established against him, I can see no reason why such discharge should not furnish prima facie ground for an action against the prosecutor. If there was probable cause for the prosecution, and, owing to any unforeseen accident, it had not been made to appear before the magistrate, he may show it in his defense. I therefore think a new trial should not be granted on account of the first exception taken to the judge's charge."

These two decisions *supra* seem to be the foundation for the text in 2 Greenleaf on Evidence, § 455, stating "that the discharge by the examining magistrate is prima facie evidence of the want of probable cause;" which proposition is so vigorously attacked and denied in *Israel v. Brooks*, 23 Ill. 575, *infra*.

In *Johnson v. Chambers*, 32 N. C. (10 Ired. L.) 287, *infra*, a later case, this rule was stated and adopted as the law; but it was held that the prosecutor was entitled to the benefit of his oath used before the justice.

In *Griffin v. Sellars*, 19 N. C. (2 Dev. & B. L.) 494, 31 Am. Dec. 422, it was said: "It is settled in this state that a discharge by the examining magistrate imports that the accusation was groundless. *Bostick v. Rutherford*, 11 N. C. (4 Hawks) 83."

In *Costello v. Knight*, 4 Mackey, 65, James, J., who delivered the opinion of the court, speaking for himself, said: "I might add a single remark in regard to a matter that was outside of the record, but was discussed. It was claimed that the discharge ordered by the police judge was not prima facie evidence of want of probable cause. There has been some conflict of authority on that point, but there is very good authority for saying that it is prima facie evidence, the principle being very well laid down by Hall, J., in the case of *Bostick v. Rutherford*, 11 N. C. (4 Hawks) 83."

Proof that the plaintiff was discharged by an examining magistrate for want of probable cause to believe him guilty of passing counterfeit money was held to make a prima facie case for the plaintiff, in an action for malicious prosecution, upon the question of want of probable cause. *Frost v. Holland*, 75 Me. 108. The court said: "In an action for malicious prosecution the want of probable cause will not be inferred from the mere failure of the prosecution, nor from a mere acquittal upon trial; but the weight of authority seems to be in accordance with the ruling that proof that the plaintiff was discharged by the examining magistrate, for want of probable cause to believe him guilty, makes a prima facie case for the plaintiff in this respect, so that the defendant is called upon to offer proof to the contrary."

In *Cooney v. Chase*, 81 Mich. 203, 45 N. W. 833, there was an attempt to convict for larceny, and, by mistake of the recorder, the complaint made the wrong charge, and was dismissed, and the respondent was rearrested for the same offense on the charge of embezzlement, and was discharged on examination. It was held, sustaining an instruction, that, if the discharge of the defendant from the first complaint was because the recorder concluded there was no probable cause to suspect the plaintiff had been guilty of any offense, this fact, with other facts in the case, would be considered in determining whether there was or was not probable cause for the prosecution; but, if the discharge upon the first complaint was because

of the opinion of the recorder or prosecuting attorney that the complaint did not set forth the offense with legal accuracy, then the discharge did not tend to prove that there was or was not probable cause. The court said: "This certainly was putting the defendant's case to the jury in as favorable light as he was entitled to."

In *Cooper v. Hart*, 147 Pa. 594, 23 Atl. 833, which held that there was a complete defense to the charge that there was not probable cause, it was said: "In an action against the prosecutor if the plaintiff proves he was discharged by the examining magistrate the burden of proving that there was probable cause, as a general rule, is cast on the defendant."

And in *Jones v. Finch*, 84 Va. 204, 4 S. E. 342, which held that the complaint stated a good cause of action, it was said: "That the judgment of the justice dismissing the complaint is prima facie evidence of the want of probable cause for the prosecution has never been doubted."

There are some cases, however, that do not unqualifiedly adopt the rule of the preceding cases.

b. Qualification of rule.

In *Chapman v. Dodd*, 10 Minn. 350, Gil. 277, there were two prosecutions before two examining magistrates. In the case before magistrate Reppy the defendant in the malicious prosecution case was not present, and it was held, in regard to that prosecution, that the discharge of the plaintiff could not have been evidence of want of probable cause, or of any other fact than the institution and termination of the prosecution. The court said: "On an examination before a magistrate who has power only to commit or discharge, if it appears that there is probable cause to believe that an offense had been committed, and that the party charged therewith is guilty, it is the duty of the magistrate to hold the party to trial, or commit; otherwise he must discharge. In case of a discharge, therefore, the inference is that there is not probable cause to believe, either the commission of the offense, or the guilt of the party charged. In the case of an acquittal on a trial by jury it is altogether different; there the guilt of the defendant must be established beyond all reasonable doubt. All the authorities agree that an acquittal by a jury is not evidence of want of probable cause, and the same rule obtains where a defendant is discharged by a magistrate for want of prosecution, as in the case before Reppy." In regard to the prosecution before the other justice, it appears that the defendant had personally witnessed the commission of the crime charged against plaintiff, and the circumstances were stated as of his personal knowledge, and testified to positively. He was examined before the magistrate, and was the only witness for the prosecution. It was held that, under such circumstances, the discharge of the defendant by the magistrate was prima facie evidence of want of probable cause. The court said: "But the authorities differ as to whether a discharge by a magistrate after examination is prima facie evidence of want of probable cause. There are certainly respectable authorities which hold that a discharge under such circumstances is prima facie evidence of that fact. . . . Without going to the extent that in all cases a discharge by a magistrate is to have this effect, we are of opinion that where, as in this case, all the facts in regard to

the commission of the crime charged are stated as within the personal knowledge of the defendant, and he is examined before the magistrate by whom the party charged with the crime is discharged, such discharge is prima facie evidence of want of probable cause."

But where the witnesses for the defense in a criminal prosecution, including the defendant himself, were examined on the hearing, and the facts upon which the prosecution was based were not peculiarly within the knowledge of the prosecutor, it was held, in an action for malicious prosecution, that the discharge of the plaintiff by the examining magistrate was not, *per se*, prima facie evidence of want of probable cause. *Cole v. Curtis*, 16 Minn. 182, Gil. 161. In this case the conclusion was reached that where, on examination before the magistrate, the evidence on the side of the prosecution alone was examined, and the proceeding was *ex parte*, it might be presumed that the facts upon which the prosecution relied as probable cause were communicated to the magistrate upon the hearing, and that upon such facts he determined; there was not probable cause to believe the defendant's guilt. But where the facts were not within the personal knowledge of the prosecutor, and the facts established by him have been explained by the defendant's witnesses, or the defendant himself, the discharge by the justice was not prima facie evidence of want of probable cause for the prosecution.

In *Johnson v. Chambers*, 32 N. C. (10 Ired. L.) 287, it is said: "The dismissal of the state's warrant raised a presumption of the want of probable cause, but it did not also raise a presumption of malice." The plaintiff had been arrested on a warrant for stealing, and was "discharged by the examining magistrate at the costs of the prosecutor." In this case it was held that there was probable cause, and that the trial court should have given this defendant the benefit of his oath before the justice, the court saying: "The good sense of the rule cannot be doubted; for in many cases the facts which make out probable cause are known to the prosecutor only, and to exclude his oath in relation to them would be to hand him over to the mercy of the person charged, whenever there happened not to be a conviction; and all who escaped the whipping post would turn around and bring an action for malicious prosecution."

In *Flickinger v. Wagner*, 46 Md. 581, the court instructed the jury that, if the justice of the peace, in examining a charge of perjury, discharged the plaintiff, and such acquittal and discharge were the result of deliberation and hesitation; and that, if the evidence at hand was so conflicting and doubtful that such justice was not able to decide, and gave the prisoner the benefit of the doubt, —then the magistrate's judgment was not sufficient evidence to prove that the defendant had not probable cause for instituting the prosecution. The court said: "The fact that the defendant had dismissed the charge of perjury against the plaintiff was not, of course, in itself sufficient evidence to prove that the defendant had not probable cause for instituting the prosecution before the magistrate." See *Payson v. Caswell*, 22 Me. 212, *supra*, I. b.

c. Discharge held "persuasive evidence" of want of probable cause.

In Missouri it is held that the discharge

by an examining magistrate is persuasive evidence that the prosecution is groundless. This seems to have originated in a *dictum* in *Brant v. Higgins*, 10 Mo. 728, which was an action for malicious civil arrest, the court holding an instruction erroneous because it confounded an action for malicious arrest with an action for malicious prosecution, saying: "The verdict of a jury, upon the trial of a civil action, is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in a criminal proceeding the final acquittal of the accused can have but little weight as evidence of probable cause, compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and the grand jury have the very question of probable cause to try; the evidence on the side of the prosecution is alone examined, and the proceeding is entirely *ex parte*. Under such circumstances, the refusal of the examining tribunal to hold the accused over to trial must necessarily be very persuasive evidence that the prosecution is groundless. But this would not be the case with a verdict of acquittal, after a full investigation of the case, and an examination of the testimony on both sides; much less would it be so in a civil proceeding."

In *Sappington v. Watson*, 50 Mo. 83, it was held that the discharge of the plaintiff by the committing magistrate on a charge of misdemeanor was evidence going to show the want of probable cause. But the instruction given in that case, which was approved, is not as broad as the language in the opinion, for the jury were instructed that, if the defendant wilfully, maliciously, and without probable cause charged the plaintiff with having committed a misdemeanor, and without probable cause had procured and caused the arrest of the plaintiff upon the warrant, and the plaintiff appeared and was discharged, the jury should find for the plaintiff.

In a prosecution on an affidavit in a court of criminal correction the defendant was discharged, and subsequently an indictment was found in the criminal court for the same offense. In an action for malicious prosecution, based on the prosecution and discharge, it was held that the refusal of the committing magistrate to bind the defendant over was very persuasive evidence that the prosecution was without probable cause. *Sharpe v. Johnston*, 59 Mo. 557, 76 Mo. 660. In the former hearing the court said: "If the plaintiff were discharged by the court of criminal correction, exercising the powers, only, of a committing magistrate, not on account of any technical informality, but on an examination of the merits of the charge, under the authority of *Brant v. Higgins*, 10 Mo. 730, such discharge would necessarily be considered very persuasive evidence that the prosecution was without probable cause. It is true that the grand jury, as well as the committing magistrate, have the very question of probable cause to try, and the fact that a true bill may have been found by the one, on the same state of facts which was held by the other to warrant a discharge, would appear to present a case of some difficulty, the prosecutor being sued for both prosecutions; but it is not necessary to discuss this point, as there are no instructions raising the question."

In *Christian v. Hanna*, 58 Mo. App. 37, it was said: "A discharge by a committing mag-

istrate is very persuasive evidence that a prosecution was without probable cause;" citing *Brant v. Higgins*, 10 Mo. 728; *Sharpe v. Johnston*, 59 Mo. 557.

And in *Thomas v. Smith*, 51 Mo. App. 605, it was said: "It is true that the plaintiff, having been discharged upon preliminary examination, by the committing magistrate, could not, under the rule stated, *arguendo*, in *Brant v. Higgins*, 10 Mo. 728, and approved in *Casperson v. Sproule*, 39 Mo. 39, be nonsuited; but that discharge raised no question of fact. Its effect as evidence was a mere question of law; and whether certain other facts, if shown, had the legal effect to overcome plaintiff's *prima facie* case, made out by his discharge on preliminary examination, was a pure question of law."

d. Soundness of rule questioned.

In *McRae v. Oneal*, 13 N. C. (2 Dev. L.) 160, on an appeal by plaintiff, the court said: "It has been decided in this court, in *Johnston v. Martin*, 7 N. C. (3 Murph.) 248, that the discharge of the plaintiff from the prosecution, by competent authority, after full examination, is *prima facie* evidence of the want of probable cause; and the burden of proving the probable cause is then thrown upon the defendant. This decision has been confirmed by this court in the case of *Bostick v. Rutherford*, 11 N. C. (4 Hawks) 83. The correctness of this position is questionable; the innocence of the plaintiff does not prove the absence of probable cause, and the decision conflicts with English authorities, as appears from *Purcell v. Macnamara*, 9 East, 381, 1 Campb. 199, 9 Revised Rep. 578. But the expediency of interfering at this time with the subject, and thus unsettling that which has long been considered settled, is very doubtful. The inquiry is not necessary in this case; the defendant does not complain of the verdict, and he alone could have been injured by the application of the principle."

e. Cases refusing to adopt rule.

But quite a number of cases refuse to adopt the rule that a discharge is *prima facie* evidence of the want of probable cause. In Illinois the courts are inclined to protect the prosecutor, and the cases in that state seem generally to reject the inference of want of probable cause, some of the cases being very emphatic.

In *Stone v. Crocker*, 24 Pick. 81, where the plaintiff had been discharged on a prosecution for theft before a justice of the peace, the trial court held that the discharge was *prima facie* evidence of want of probable cause. On appeal the court said: "The want of probable cause is the essential ground of this action. Other things may be inferred from this. But this cannot be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the *onus probandi* is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no ground for commencing the prosecution." The court further said: "The plaintiff here properly introduced a copy of the complaint made by the defendant, and

of the trial and acquittal of himself. No objection is made to their admissibility, but the defendant's counsel supposed that the court overestimated its importance. The judge held that they were *prima facie* evidence of a want of probable cause. One respectable authority to this effect was produced on the trial, and adopted without an opportunity to examine its soundness. But it does not seem to be supported by other authorities, nor to accord with the principles which govern the action. We therefore entertain doubts whether it can be sustained. But we do not think it necessary to decide the question." This case does not show, positively, whether the discharge was after an examination, or was an acquittal. The defendant's brief insisted "that the discharge of the plaintiff after trial was not *prima facie* evidence of want of probable cause, for the magistrate to whom a complaint is made would not bind over unless there were proof sufficient to convict." This would seem to indicate that it was an examining trial. *Mass. Rev. Stat. p. 723*, gave jurisdiction to a justice of the peace to try cases of larceny where the value of the goods does not exceed \$15, and referred to the previous section which included a book of accounts. In this case the value does not appear, and the accused had been charged with stealing an account book.

And where the examining magistrate, on a complaint charging hog stealing, discharged the defendant, it was held that the want of probable cause was not shown by the acquittal of the accused. *Anderson v. Friend*, 85 Ill. 135. The court said: "If the defendant acted in good faith, on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused was guilty of the offense, he is protected."

And the discharge of plaintiff by an examining justice was held not *prima facie* evidence of the want of probable cause, but that to establish that fact something more must be proved. *Thorp v. Baillett*, 25 Ill. 339.

So, in *Israel v. Brooks*, 23 Ill. 575, it was held that an instruction: "That the discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, and sufficient to throw upon the defendant the burden of proving the contrary,"—did not state the law, and announced a principle of the most dangerous character. The court said: "As stated on the argument, this instruction is copied verbatim from 2 Greenleaf's Evidence, § 455. He cites *Secor v. Babcock*, 2 Johns. 203. That case decides no such principle. It is a *per curiam* opinion, and is as follows: 'The justice had power, on examination of a charge of suspicion of felony, or of having stolen goods, to dismiss the plaintiff below, if he was satisfied there was no ground for the suspicion. The acquittal was lawful, and there was a sufficient ground for a suit for a malicious prosecution. The judgment below must be affirmed.' The court does not presume to say that, by the discharge of the accused by the examining magistrate a sufficient ground for a malicious prosecution was established as showing a want of probable cause. The court does not say that, by reason of the discharge, a want of probable cause is to be inferred, nor anything like it. Greenleaf also refers to *Johnston v. Martin*, 7 N. C. (3 Murph.) 249, and *Boatwick v. Rutherford*, 11 N. C. (4 Hawks) 83, where the doctrine is there distinctly stated. L. R. A.

ed, in the language of this instruction. No authority or good reasoning is adduced to support it, and these cases stand alone, justifying such a principle."

And an instruction "that the plaintiff's discharge by the examining magistrate is *prima facie* evidence of the want of probable cause for the charge, and the burden is upon the defendant to prove to the satisfaction of the jury the existence of probable cause," was held to be erroneous. *Harkrader v. Moore*, 44 Cal. 144. In this case the court said: "If the court was of the opinion that the discharge of the plaintiff, under the undisputed circumstances appearing, established the want of probable cause, the jury should have been so instructed. If, however, there were other and disputed facts, the ascertainment of the truth of which by the jury in one way or in the other would affect the question of probable cause, the disputed facts should have been called to their attention, and the legal effect of those disputed facts, when found either way as bearing upon the question of probable cause, should have been explained to them."

In *Vanderbilt v. Mathis*, 5 Duer, 304, where an examining magistrate discharged the accused, who was charged with perjury, and an action of malicious prosecution was brought, the trial court instructed the jury that the discharge before the magistrate "shows *prima facie* that there was no probable cause for the arrest, and shifts the burden of proof from the plaintiff to the defendant." On appeal it was held that "in such an action it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that alone is not *prima facie* evidence of the want of probable cause. *Gorton v. De Angelis*, 6 Wend. 418." This statement—that an acquittal was not *prima facie* evidence—was not necessary, as the plaintiff had not been tried, and the case cited to support it was a civil case. The chief ground of reversal, however, was upon the instruction relating to malice.

And an instruction "that the discharge of the appellee [accused] by the magistrate was *prima facie* evidence of his innocence of the charge against him, but that it was not evidence that the person who made it did it without probable cause," was held to be as favorable to the plaintiff as he had any right to ask. *Wright v. Fansier*, 90 Ind. 494. The court said: "The only question in our minds is whether it was not more favorable than he had a right to have given the jury." In this case the terms "trial" and "acquittal" are used without regard to their true meaning, and as synonymous with an examination before a justice. The plaintiff was discharged on an examination for larceny, of which offense evidently a justice of the peace had only jurisdiction to examine, and not to try, and the acquittal referred to in the statement of the case and opinion was only a discharge on the hearing, which distinction is not disclosed in the case.

And in *Heldt v. Webster*, 80 Tex. 208, an instruction that, if the plaintiff was discharged by the examining magistrate, then the presumption of law was that there was no probable cause, was held to be erroneous. The court said: "This question was decided in the case of *Griffin v. Chubb*, 7 Tex. 614, 58 Am. Dec. 85; and it was there, in accordance with authority, held that a verdict of 'not guilty,'

and the discharge of the defendant in a criminal prosecution instituted by the defendant in the suit, who had testified in the criminal prosecution, did not raise a presumption of the want of probable cause." This decision in *Heidt v. Webster* fails to distinguish between a discharge by an examining magistrate and an acquittal. In *BEKKELAND v. LYONS* referring to this, the court says: "It seems to us, however, that the question whether, save for the purpose of showing that the prosecution had ended, the fact of acquittal or discharge has any probative force whatever, was not involved in that case."

1. Conclusiveness of presumption.

A discharge of the defendant before an examining justice, in a prosecution for robbery, was held not, of itself, to constitute conclusive evidence of want of probable cause. *Perry v. Suller*, 92 Mich. 72, 52 N. W. 801. The court said: "Otherwise every person arrested, charged with crime, and discharged upon the examination, would in every such instance have an action for false imprisonment or malicious prosecution;" citing *Hamilton v. Smith*, 39 Mich. 226.

And where a corporation was sued for malicious prosecution it was held that the discharge by an examining magistrate ordinarily cast upon the defendant in a civil action the burden of showing probable cause; but where the prosecuting witness was not authorized to make the complaint in the interest of the corporation, it was held that this rule would not apply. *Pownall v. Lancaster & W. Turnp. Co.* 16 Lanc. L. Rev. 411.

In *Brelet v. Mullen*, 44 La. Ann. 194, 10 So. 865, which held that a dismissal on a charge for breaking and entering a building did not amount to an acquittal, the court said: "It is not always that malice and want of probable cause can be inferred from the dismissal of a charge against an accused before a committing magistrate, and that, if the discharge be prima facie evidence, the presumption may be rebutted."

III. Where there was a want of jurisdiction.

A magistrate, having no jurisdiction to try an offense of selling liquor, acquitted the accused. It was held that the record of the prosecution and acquittal were of no legal force or validity, and afforded no basis to sustain an action for malicious prosecution. *Bixby v. Brundige*, 2 Gray, 129, 61 Am. Dec. 443. In this case the record of acquittal was offered in evidence, and in ruling thereon the court held that there was no cause of action.

And where a discharge from arrest on a charge of obtaining money under false pretenses was made by a magistrate, for the reason that he believed he had no jurisdiction, and a *nolle prosequi* in another county was entered on the ground of want of jurisdiction as to venue, it was held that neither discharge was a fact from which either want of probable cause or malice could be inferred. *McClafferty v. Philip*, 151 Pa. 86, 24 Atl. 1042.

IV. Failure to prosecute.

In cases where the failure of the prosecution was on account of matters over which the complainant had no control, which distinction, 64 L. R. A.

however, is not made in all the cases, it seems that the discharge of the accused was held not to be prima facie evidence of the want of probable cause. There is some conflict of authority as to the presumption of the want of probable cause on the abandonment of the prosecution by the complaining witness and the discharge of the accused, but the weight of authority seems to hold that the presumption does not arise. In one of the cases this was controlled by the fact that the accused had been recognized by the magistrate to appear at the court, and this gave rise to the presumption of guilt, which was not overcome by the subsequent abandonment.

A discharge from prosecution by a *nolle prosequi* was held not prima facie evidence of malice or want of probable cause. *Yocum v. Polly*, 1 B. Mon. 358, 36 Am. Dec. 583. In this case the court said: "The evidence strongly conduces to prove that any agency which the defendant may have had in the prosecution, so far as the plaintiff was concerned, was wholly in subordination to the commonwealth's prosecuting attorney for the district; . . . and that the plaintiff, etc., would not have been prosecuted had not the commonwealth's attorney, upon information not derived from the defendant, directed the constable who was acting in the business to procure a warrant against the plaintiff and others."

And in *Lipford v. McCollum*, 1 Hill, L. 82, the solicitor entered a *nol. pros.* on the ground that the oath was extra-judicial, for which a warrant for perjury had been issued, and thereupon the accused was discharged. It was held that this did not show want of probable cause, and a motion for nonsuit was granted.

And in *Boeger v. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223, where the warrant of arrest had been improperly incorporated in a search warrant, and the examining justice, at the request of the prosecuting attorney, discharged the accused, it was held that such discharge was not of itself evidence of want of probable cause. In this case the prosecuting witness assisted the magistrate in writing out the warrant, and the subsequent action was for false imprisonment.

In *Hurd v. Shaw*, 20 Ill. 354, where no verdict had been rendered, and the state's attorney entered a *nolle prosequi*, it was held that there had been no trial on the merits. The court said: "We are inclined to the opinion that an action for a malicious prosecution, unless actual malice be proved, should not prevail in any case where the merits have not been tried, and a verdict pronounced." See *supra*, I. a.

In *Langford v. Boston & A. R. Co.* 144 Mass. 431, 11 N. E. 697, and some other cases cited, it was held that there was no cause of action where the discharge of the plaintiff was on account of a *nolle* entered by the district attorney of his own motion. On this subject the cases are not all agreed. Inasmuch as the matter of evidence is not discussed, these cases are not included in this note, although the rulings on demurrer to the complaint, or that there is no cause of action, would indicate that such a discharge would be of no avail as evidence of probable cause in an action for malicious prosecution.

In *Appar v. Woolston*, 48 N. J. L. 57, it was held that a discharge under N. J. Rev. p. 279, Crim. Proc. § 65, providing for a discharge if

trial is not had at a certain term, did not authorize an action for malicious prosecution. It was also held that the failure of the proceeding against plaintiff was not evidence, either of the defendant's malice, or of the want of probable cause.

And in *Frowman v. Smith*, Litt. Sel. Cas. 7, 12 Am. Dec. 265, where the accused was discharged from the indictment "for reasons which appeared to the court, and not acquitted of the charge by a trial on the merits," it was held, in an action for malicious prosecution, that it was not incumbent upon the defendants to show probable cause, but that it was essential to support the action that express malice in the defendants should have been proved.

But in *Messman v. Ihlenfeldt*, 89 Wis. 585, 62 N. W. 522, which was an action for malicious prosecution and for false imprisonment for poisoning cattle, which prosecution was dismissed by the district attorney because one of his witnesses failed to testify as he had on a previous occasion, the court said: "The burden of proof, upon the whole case, to show that there was no probable cause, is upon the plaintiff. *Newell, Malicious Prosecution*, 282, § 17. The weight of authority seems to be that the abandonment of the criminal prosecution is prima facie evidence of the absence of probable cause. *Id.* 290, and cases cited; *Bigelow v. Sickles*, 80 Wis. 98, 27 Am. St. Rep. 25, 49 N. W. 106. There are many cases to the contrary. 14 Am. & Eng. Enc. Law, p. 64, and cases cited in note 4. It may be assumed that the abandonment of the prosecution put upon the defendant the onus of overcoming with proof this prima facie presumption. This was done if, by the preponderance of the whole testimony, the jury was legitimately satisfied of the defendant's entire good faith and reasonable belief."

In the following cases a discharge for want of prosecution was held not to be prima facie evidence of the want of probable cause:

This was held in *Frederick v. Halberstadt*, 14 Rich. L. 41. In this case the prosecuting witness did not have time to go to the country for his witnesses and reach court, and the trial court said: "There was scarcely time for him to have returned to the mayor's court on Monday morning." On appeal it was insisted that the failure to prosecute entitled a verdict for the plaintiff in a malicious prosecution case. This was denied.

In *Purcell v. Macnamara*, 1 Campb. 202, 9 East. 361, 9 Revised Rep. 578, which was an action for malicious prosecution on a charge of perjury, the plaintiff showed that the prosecutor did not appear on the trial of the cause, and that he was acquitted. It was held that this was insufficient, the court saying: "If they were to hold that the mere circumstance of the defendant's nonappearance at the trial was sufficient, it must follow that every person who institutes a prosecution, and sees reason to drop it, is prima facie a malicious prosecutor,—a supposition extremely dangerous to the criminal justice of the country, as well as perfectly unfounded, since the prosecution might have been both commenced and abandoned from the purest and most laudable motives."

In *Pharis v. Lambert*, 1 Sneed, 228, where the magistrate bound the defendant to appear in court, and the prosecutor failed to appear, and the defendant was discharged, it was held that such acquittal did not raise the presump-

tion of want of probable cause, in an action for malicious prosecution. This was on the ground that, as the magistrate had bound the accused to keep the peace, the presumption, if any, would be that there was probable cause, and this was not overcome by the failure to follow up that prosecution. The court said that this discharge "cannot be regarded as an acquittal so as to have the force of raising the presumption of want of probable cause."

In *Campbell v. O'Bryan*, 9 Rich. L. 204, a peace warrant had been executed, after which the complaining party told the magistrate that he was willing the accused should be released as he had satisfied the complainant he need not dread him; but the accused declined to be released, and remained in jail several hours. The magistrate doubted the propriety of releasing the accused, and required him to execute a recognizance to keep the peace. In an action for malicious prosecution it was held that a nonsuit was properly granted, and that some proof was necessary, other than the facts in this case, to show that legal process had been abused without probable cause.

Plaintiff was recognized on a charge of felony, but the warrant was void, and the prosecution was abandoned at the first term of court, and no indictment was found. It was held, in an action for malicious prosecution, that the defendant had reasonable cause to believe that the plaintiff had committed the felony, and it was also held that the abandonment of the prosecution did not raise an implication of want of probable cause. *Braveboy v. Cockfield*, 2 McMull. L. 270, 39 Am. Dec. 123. The court said: "The only cases where that is implied are when the grand jury find no bill, or the defendant is acquitted by the petit jury, and the presiding judge orders a copy of the indictment. From the statement in the report, it would seem that the plaintiff relied on 'the letting fall the prosecution' as evidence of want of probable cause. This was not enough. But we would not now nonsuit the plaintiff on this ground, if, in the progress, there was a semblance of want of probable cause shown. But it was plain there was not."

And where there was a voluntary discontinuance of the prosecution it was held, in an action for malicious prosecution, that an instruction, "the burden of proof was on the defendant to show probable cause," was properly refused. *Joiner v. Ocean S. S. Co.* 86 Ga. 238, 12 S. E. 361. In this case the court said: "An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust."

The following cases seem to hold that a voluntary discontinuance of the prosecution is prima facie evidence of the want of probable cause; but a close examination of these cases indicates that the question was evaded in some cases, in others assumed, and in others stated as a *dictum*. It may be said that not many cases hold that such a discontinuance is prima facie evidence of the want of probable cause.

An information was filed, and an indictment found, for maliciously entering upon and destroying property. The prosecutor was allowed to enter a *nolle* on payment of costs. In an action against him for malicious prosecution, holding that a *nolle* was such an ending as would entitle the plaintiff to maintain the action, it was said that such abandonment

was "prima facie evidence of the acknowledgment of the fact that he had no sufficient cause for prosecution." *Murphy v. Moore* (Pa.) 10 Cent. Rep. 92, 11 Atl. 665.

In *Eagleton v. Kabrich*, 66 Mo. App. 231, an instruction to the effect that the dismissal before an examining magistrate of a prosecution for a felony by the prosecuting witness, and the discharge of the defendant, is evidence "tending to show" that there was no probable cause, was approved. It was also held that evidence that a criminal prosecution was commenced for the purpose of enforcing a property claim was proof of the want of probable cause, and that this was conclusively proved in this case. The court said: "It has been repeatedly decided in this state that the discharge of the plaintiff by the committing magistrate, or the refusal of the grand jury to find an indictment, was evidence of a want of a probable cause. *Casperson v. Sproule*, 39 Mo. 39; *Callahan v. Caffarata*, 39 Mo. 136; *Sappington v. Watson*, 50 Mo. 83. Whether the same effect should be given to the voluntary dismissal of a prosecution is not quite clear, and the case of *Smith v. Burrus*, 106 Mo. 94, 13 L. R. A. 59, 27 Am. St. Rep. 329, 16 S. W. 881, leaves the question in doubt. Where, as in this case, the affidavit upon which the arrest is made is fatally defective, and the discharge of the prisoner would be the necessary result of a hearing; and where, moreover, the dismissal is not followed by a new prosecution,—it is difficult to see why the voluntary dismissal should not be some evidence of the unauthorized institution of a suit."

See *Inclendon v. Berry*, 1 Campb. 203, note, *supra*, I. a; *Womack v. Circle*, 32 Gratt. 324, *supra*, I. b; *Chapman v. Dodd*, 10 Minn. 350, 611. 277, *supra*, II.

V. Failure to indict.

The weight of authority seems to be that the failure of the grand jury to indict is not prima facie evidence of the want of probable cause. Some cases, where the accused was recognized by an examining magistrate to appear before the court having the grand jury, regard the act of the magistrate as prima facie evidence of probable cause, and hold that this is not overcome by ignoring the bill of indictment. The conflicting cases do not seem to be so well considered.

In *Ganea v. Southern P. R. Co.* 51 Cal. 140, where the plaintiff had been held to answer, by the examining magistrate, and the grand jury dismissed the charge, it was conceded that holding to answer, by the magistrate, established prima facie the existence of probable cause, and it was held that this was not overcome by the grand jury ignoring the charge. The court said: "Under the system of criminal law prevailing in this state, the deliberations of the grand jury are not, as formerly, a mere examination of the case of the prosecution. The proceeding before the grand jury is in fact a preliminary trial, and one in which the accused may appear by his witnesses and make his defense, and may himself be sworn and testify in his own behalf. The favorable result of such a trial certainly affords no evidence of want of probable cause."

In *Ambs v. Atchison, T. & S. F. R. Co.* 114 Fed. 317, the jury were instructed that the holding over and the finding by a magis-

trate that there was probable cause to believe the plaintiff guilty were prima facie evidence of that fact; but that the ignoring of the bill by the grand jury, when taken by itself, established prima facie evidence of the want of probable cause. The court further instructed, however, that the conclusion reached by the magistrate was entitled to greater consideration than the discharge by the grand jury.

In *Byne v. Moore*, 5 Taunt. 187, 1 Marsh. 12, it was contended that the rejection of an indictment by the grand jury was prima facie evidence of a want of probable cause in an action for malicious prosecution. The only evidence given by plaintiff was that the bill was returned "not found." The plaintiff was thereupon nonsuited.

And the fact that the grand jury returned "no bill" against the plaintiff was held not prima facie sufficient evidence of the want of probable cause to prevent a nonsuit, in an action for malicious prosecution. *Fulmer v. Harmon*, 3 Strobb. L. 576.

In *Wallis v. Alpine*, 1 Campb. 204, note, where the plaintiff had been arrested at the sessions on a charge of assault, and no indictment was preferred, and he was discharged, it was held that the mere nonprosecution of the charge made on oath against another was not sufficient to maintain the action for malicious prosecution.

But in *Enders v. Boisseau*, 52 La. Ann. 1020, 27 So. 546, on preliminary examination before the district judge, the accused was held to answer to the grand jury, which failed to indict. The complaining witness was not a witness before the grand jury. It was held that the defendant had probable cause and reasonable ground for making the charge. In the instructions given, the rule was laid down that "a discharge or acquittal in a criminal case is prima facie evidence of want of probable cause;" citing *Whaling v. Wells*, 50 La. Ann. 562, 23 So. 447. In the latter case this was a *dictum*, stated as applicable to a discharge by an examining magistrate.

In *Casperson v. Sproule*, 39 Mo. 39, where the accused was recognized to appear before the criminal court, and the prosecuting witness endeavored to have the grand jury indict the accused for embezzlement, but the bill was ignored, the court adopted and followed the rule of law laid down in *Brant v. Higgins*, 10 Mo. 728, to the effect that the refusal of the examining tribunal to hold the accused over till trial must necessarily be very persuasive evidence that the prosecution is groundless. The court said: "In the case of *Brant v. Higgins*, 10 Mo. 728, Judge Napton, in delivering the opinion of the court, said: 'The verdict of a jury upon the trial of a civil action is essentially different from the discharge of a supposed criminal by the examining magistrate, or upon a bill of indictment ignored by a grand jury. Even in a criminal proceeding, the final acquittal of the accused can have but little weight as evidence of probable cause compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and grand jury have the very question of probable cause to try; and the evidence on the side of the prosecution is alone examined, and the proceeding is entirely *ex parte*. Under such circumstances, the refusal of the examining tribunal to hold the accused over till trial must

necessarily be very persuasive evidence that the prosecution is groundless."

The court in the Casperson Case, in adopting the rule applicable to discharge by an examining magistrate, fails to discuss the fact that the plaintiff had not been discharged by an examining justice, but had been recognized by him to appear at the court.

The case of Brant v. Higgins was an action for false arrest where the defendant had been released on bail, and the rule laid down in that case, as to the question of probable cause and the discharge in the criminal case before the magistrate, was only a *dictum*. The difference between the rule as stated in the Brant Case and that applied in the Casperson Case is that in the former case it is stated as applying to a discharge before the examining magistrate or the grand jury. But the Brant Case does not say what the effect would be in case the magistrate found there was sufficient cause to hold the accused over, even though the grand jury did not indict, which was the fact in the Casperson Case; nor does the latter case say what effect this action of the magistrate would have; nor does it discuss it, as is done in the case of Pharis v. Lambert, 1 Sneed, 228, where the accused had been held over by the magistrate, and, on failure to prosecute, the accused was discharged, and the court refused to lay down the rule that the final discharge was *prima facie* evidence, saying: "But here the action of the magistrate was in favor of the prosecution, and, if any presumption would arise, it would be in favor of the existence of probable cause, instead of against it."

In Plummer v. Gheen, 10 N. C. (3 Hawks) 66, which was an action for slander and malicious prosecution, where the indictment for perjury had been rejected by the grand jury and indorsed "no bill," the court, in discussing the liability, said that, in order to repel the *prima facie* evidence of a want of probable cause, arising from the indictment not being found a true bill, defendant introduced several witnesses to prove that plaintiff swore falsely in the case where perjury was charged.

The rejection of a complaint by a grand jury, and the discharge of the accused, who had been bound over by an examining justice, were held to constitute *prima facie* evidence of the want of probable cause. Potter v. Casterline, 41 N. J. L. 22.

But, referring to this case, the court, in Appar v. Woolston, 48 N. J. L. 57, says: In that case "it was said that the rejection of the complaint by the grand jury is *prima facie* evidence of the want of probable cause. This observation was not necessary to the decision of the case,—evidence of facts having been given at the trial from which it might be inferred that the prosecution was without probable cause."

VI. Finding in criminal proceeding that the prosecution was malicious and without probable cause.

In some states a provision is made under the statutes for a judgment in the criminal case against the prosecutor for costs, and for a finding that the prosecution was malicious and without probable cause. Such a finding is not competent evidence, in an action for malicious prosecution, to establish want of probable cause, under the rule *res inter alios acta*. It 64 L. R. A.

appears that such a judgment was allowed in evidence in a Wisconsin case; but a subsequent case says that this decision was on general principles, and that the finding was not a controlling element.

A finding of an examining justice of the peace that the complaint of the prosecuting witness was malicious and without probable cause was held to be inadmissible in support of the claim of the lack of probable cause. Farwell v. Laird, 58 Kan. 402, 49 Pac. 518. The court said "that judgments are admissible against strangers to prove only their rendition and their legal effects, and not the facts upon which they rest."

So, in Sweeney v. Perney, 40 Kan. 102, 19 Pac. 328, the record of the trial court in a criminal case showing an acquittal and finding that the complaint was malicious and without probable cause, and stating the name of the prosecuting witness, was held to have been properly excluded. The court said: "We have found no case that goes to a greater extent than holding that the judgment of acquittal is *prima facie* proof of a want of probable cause; and it appears that the cases that hold the contrary are the most logical. It must appear that the prosecution is at an end. The record of a criminal suit is admitted in a civil action to prove that fact solely, because criminal actions are public matters, and are only disposed of in this form; and the necessities of justice require such a record to be admitted in a suit between private parties to establish the fact that the prosecution is terminated. The plaintiff in error seeks to use such a record for other purposes in this action, and it would seem to be in violation of all fundamental principles."

And an entry on a docket of a justice on a trial for assault and battery "that the complaint was malicious and without probable cause, and that Erick Sevaton pay the costs of this action," was held to be incompetent evidence in an action for malicious prosecution. Casey v. Sevaton, 30 Minn. 516, 16 N. W. 407. This entry was made under, Minn. Gen. Stat. 1878, chap. 65, § 158 (157), providing that, on the acquittal of the accused, he should be discharged; and, if the justice certifies in his docket that the complaint was wilful and malicious and without probable cause, he should enter a judgment against the complainant for the costs that have accrued to the court. The entry on the docket was held to be *res inter alios*.

And a judgment of acquittal, together with the finding of a jury that the prosecuting witness had acted maliciously, and a judgment against him in costs, was held to be incompetent, and improperly allowed in evidence, in a malicious prosecution case. Wilmerton v. Sample, 39 Ill. App. 60. The court said that it "could not fail to have a most damaging effect on him, before the jury, and no instruction of the court that such judgment was introduced for the simple purpose of showing that such suit was ended could prevent the jury from knowing that the prosecuting witness and appellant here had been deliberately adjudged guilty of malicious prosecution in another suit. The exhibition of the contents of that record was wholly unnecessary to prove that suit was ended."

In an action for malicious prosecution for perjury, where the plaintiff had been acquitted,

on the trial, it was held that there was probable cause. It was also held that, where an accusation of perjury was found upon the trial to be groundless, "this finding did not negative the existence of probable cause for making the accusation." *Kidder v. Parkhurst*, 3 Allen. 393. The court said: "That was to be judged of, not upon the actual state of the case, but upon the honest and reasonable belief of the party prosecuting." The expression that the "finding," etc., must refer simply to the acquittal, as the statement of the case shows only an acquittal, and does not show a special finding that the prosecution was groundless. In this case there had been complaints made before two grand juries. The second one indicted the plaintiff, and on trial the plaintiff was acquitted.

In *Grohmann v. Kirschman*, 168 Pa. 189, 32 Atl. 32, where it was said: "A verdict of acquittal is evidence, though it may be slight, of the want of probable cause."—It was held that the admission of testimony of what the judge said at the trial in the quarter sessions, directing the verdict of acquittal and instructing the jury to hold the prosecutor liable for costs, was erroneous, and should not have been admitted, as this was based upon a state of facts different from those which led to the arrest, and relating to the grounds for a conviction or an acquittal. The court said: "The inquiry as to the probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. It is not confined to the truth of matters which led to the prosecution, but extends to their appearance as indicating the guilt or innocence of the accused. The jury in the criminal court deals with the question of actual guilt as it appears at the trial, not with the indications of guilt as they appeared at the time of the arrest."

In *Katterman v. Stitzer*, 7 Watts, 189, under a Pennsylvania act of assembly making it the duty of the jury to decide whether the costs of the prosecution should be paid by the county, the prosecutor, or the defendant, and to name the prosecutor if they found that he ought to pay, it was held that it was conclusive evidence showing that the defendant in an action for malicious prosecution was the prosecutor in the criminal case, and it was also evidence to show that the plaintiff had been acquitted of the charge.

An instruction, "The judgment of the justice discharging the plaintiff on the examination is prima facie evidence of want of probable cause, but it is not conclusive on the subject; and you are to determine the question, considering that fact and all the other evidence bearing on the question,"—was held to be proper. *Bigelow v. Sickles*, 80 Wis. 98, 27 Am. St. Rep. 25; 49 N. W. 106. In this case the court said: "The defendant in this suit was the sole complainant who set the prosecution on foot against the plaintiff, and who had the right to produce the witnesses; and the issue was 'probable cause for charging the prisoner with the offense;' and the judgment of discharge is based upon a 'want of probable cause;' and, if 'the complaint was wilful and malicious and without probable cause,' the justice may 'enter judgment against the complainant for all the costs of the proceeding, including witness fees.' Rev. Stat. § 4791. The defendant could scarcely be treated as a stranger

to that proceeding and judgment. The justice may adjudicate the same issues that are involved in this case,—wilful and malicious prosecution without probable cause,—and enter a money judgment against the defendant."

Referring to this case, the court, in *Eggett v. Allen* (Wis.) 96 N. W. 803, said: "It is said, however, by appellant, that the *Bigelow Case* was a case where the justice made the certificate of the presence or malice and want of probable cause, and hence that it is not applicable to the present case. It is true that the *Bigelow Case* might have been decided upon the narrow ground that the certificate aforesaid was made, but the difficulty is that the court did not so treat it, but, on the contrary, after reviewing the authorities on the effect of a simple discharge upon a preliminary examination, and recognizing that there was a conflict, deliberately adopted the broad doctrine that such a discharge was prima facie evidence of want of probable cause in all cases whether the certificate aforesaid was made or not. Whatever might be our opinion upon the question as an original proposition, we do not feel called upon to overrule that decision now. It was not shaken by the decision in *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900. It has doubtless been acted upon by trial courts many times since it was made, and we do not feel that there are any considerations so weighty in character as would compel us to disregard the doctrine of *stare decisis*."

VII. Summary.

In actions for malicious prosecution the burden of proof is on the plaintiff. The judgment of acquittal is admissible to show that the prosecution has terminated, but it is not prima facie evidence that the prosecution was without probable cause, so as to shift the burden of proof upon the defendant in the malicious-prosecution case. In some few cases the ground of this rule is stated to be that the accused had been recognized by an examining magistrate, which gave such a presumption of guilt that it was not to be overcome by an acquittal when used in an action for damages. But this distinction is not made in a large proportion of the cases. The record of acquittal should not be held admissible, for the reason that in the malicious-prosecution case the question whether the accused was guilty or innocent is not on trial, but the gist of the action is whether or not the prosecutor had reasonable cause, at the time of instigating the prosecution to believe the defendant guilty. Acquittals on appeal are held not prima facie evidence of the want of probable cause. The weight of authority is that a discharge by an examining magistrate is prima facie evidence of the want of probable cause. In Missouri it seems that it is "very persuasive evidence" that the prosecution was without probable cause. In Illinois it seems that the courts refuse to accept the doctrine that it is prima facie evidence of the want of probable cause, and this view is supported by some other cases. Where there is a want of jurisdiction it seems that the discharge is of no legal force as evidence of probable cause. A discharge on failure of the prosecution for matters over which the complainant had no control is held not prima facie evidence of the want of probable cause, and the weight of authority is that the same rule

applies on the abandonment of the prosecution. The weight of authority is that the failure of the grand jury to indict is not prima facie evidence of the want of probable cause. What appears to be an inconsistency and contradiction in some cases as to the rule of evidence applicable to discharge and acquittal may be attributed to the fact that in quite a large number of the cases the court failed to distinguish between an action for malicious prosecution, based upon a criminal proceeding, and a civil action. Added to this is the fact that many courts use the expressions "discharge," "trial," and "acquittal" as synonymous, without making a distinction between a discharge by an examining magistrate and a trial of the criminal actions on the merits. I. T.

WESTERN UNION TELEGRAPH COMPANY, *Piff. in Err.*,
v.

L. G. BAREFOOT.

(.....Tex.....)

1. An agent who has made a contract for the sale of his principal's property, for which he is to receive a commission, has sufficient interest in a telegram which he sends to the principal for the purpose of having the sale confirmed, to be entitled to maintain an action for failure of the telegraph company to perform its contract.
2. The principal's directions as to delivery of a telegram, and not those given by the agent, will control in case an agent who has negotiated a sale of property sends a telegram for the purpose of securing confirmation of the sale; so that, if the delivery is authorized by the principal, but is contrary to the directions given by the agent, the agent cannot hold the company liable for losses sustained by him because the message never reaches the principal.
3. Delivery of a telegram to one authorized to receive it, who changes the address and returns it to the company to be forwarded, is a sufficient delivery to absolve the company from liability in case the message never reaches the addressee because the new address is incomplete.
4. That a telegram sent by agent to principal is not delivered to the one in whose care it was directed by the agent according to the principal's instructions, in consequence of which it never reaches the principal, will not render the company liable for nondelivery at the suit of the agent, if it was delivered to another person whom the principal had authorized to receive messages for him.

(November 30, 1903.)

NOTE.—For a case in this series as to the right of a principal to maintain an action for failure to deliver a telegram where the contract therefor was made by his agent, see *Milliken v. Western U. Teleg. Co.* 1 L. R. A. 281.

For a case holding that the question, Who

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Cooke County in plaintiffs favor in an action brought to recover damages for breach of contract to transmit and deliver a telegram. *Reversed.*

The facts are stated in the opinion.

Mr. George H. Fearons, with Messrs. Wilkins, Vinson, & Moore, for plaintiff in error:

As Fant was absent from San Antonio when the message was received there, but had authorized the Mahncke hotel, or its clerks, or both, to receive his telegrams in his absence and forward them to him at Monclova, Mexico, a delivery of said message to said hotel clerk, or to said hotel, was a good delivery, and constituted a full discharge of appellant's duty in that regard.

Western U. Teleg. Co. v. Houghton, 82 Tex. 561, 15 L. R. A. 129, 27 Am. St. Rep. 918, 17 S. W. 846; *Western U. Teleg. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279; *Western U. Teleg. Co. v. Young*, 77 Tex. 245, 19 Am. St. Rep. 751, 13 S. W. 985; *Western U. Teleg. Co. v. Wofford*, 94 Tex. 345, 60 S. W. 546; *Western U. Teleg. Co. v. Mitchell*, 91 Tex. 454, 40 L. R. A. 209, 66 Am. St. Rep. 906, 44 S. W. 274; *Joyce, Electric Law*, p. 781.

Mr. N. L. Lindsley also for plaintiff in error.

Messrs. Potter & Potter, for defendant in error:

The selection of D. Sullivan & Co. in this case as the persons to be trusted with the duty of conveying the message to Fant in the event of his absence was a necessary exclusion of the hotel.

It is wholly immaterial what reasons prompted Barefoot to select D. Sullivan & Co. in preference to, and to the exclusion of, all other persons in the city of San Antonio to receive this particular message in the absence of Fant. Whether he did so at Fant's suggestion, or because he considered them the best and the safest persons to be intrusted with this duty, is of no consequence.

Thompson v. Western U. Teleg. Co. 10 Tex. Civ. App. 120, 30 S. W. 250; *Western U. Teleg. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771.

The hotel clerk had no authority to interfere with this message, or to give any directions in reference to it.

may maintain an action for delay in delivering telegram? does not depend upon payment of the fee, nor upon whether the sender had been constituted an agent for that purpose, but upon the question who was in fact to be served, and who is damaged, see *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844.

The transmission of the message to Monclova was simply an effort to deliver Barefoot's message to Fant, and one step in the performance of its duty to use reasonable diligence in delivering the message to Fant, and, if it failed, it was as much the duty of the company to make another effort as if it had gone to Fant's office and failed to find him, and did not deliver.

One effort to deliver a message is not sufficient.

Western U. Teleg. Co. v. Russel (Tex. Civ. App.) 31 S. W. 689; *Western U. Teleg. Co. v. Birchfield*, 15 Tex. Civ. App. 426, 39 S. W. 1002; *Western U. Teleg. Co. v. Cain* (Tex. Civ. App.) 40 S. W. 624; *Western U. Teleg. Co. v. Teague* (Tex. Civ. App.) 36 S. W. 310; *Western U. Teleg. Co. v. De Jarles*, 8 Tex. Civ. App. 109, 27 S. W. 792.

Brown, J., delivered the opinion of the court:

The court of civil appeals filed the following conclusions of fact:

"Appellee, Barefoot, alleged and proved that on January 13, 1901, he was at Chickasha, Indian territory, and there delivered to the appellant company for transmission the following telegram:

"Chickasha, I. T., Jan. 13, 1901.

"D. R. Fant,

Care D. Sullivan & Co.,
San Antonio, Texas.

"Meet me at Fort Worth Monday, will close deal for steers. Answer.

"L. G. Barefoot."

"This telegram was duly transmitted and received by appellant in San Antonio at 11:18 A. M. of the day it was sent. Soon thereafter appellant's messenger took the message to the banking house of D. Sullivan & Co., the members of which firm were well-known residents of San Antonio, but found the bank closed, and thereupon took the message to the Mahneke hotel, which was the regular boarding place of D. R. Fant; but, D. R. Fant being absent in Mexico, the clerk, who had been authorized to receive and forward to Monclova, Mexico, messages and letters addressed to D. R. Fant, received the telegram in question for the purpose specified, wrote the forwarding address on the back of the envelope, and returned the whole to the messenger, who thereupon returned it to the receiving office, and appellant forwarded the message over its telegraph line to D. R. Fant at the address given by said clerk. By reason, however, of an omission on the part of the clerk in giving the address, D. R. Fant failed to receive appellee's telegram, of which latter fact appellant was informed the next day by service message from Monclova, 64 L. R. A.

Mexico. Appellant made no further effort to deliver the message, nor was the sending office notified of such nondelivery, as was provided in such cases by one of appellant's rules.

"Fant had instructed appellee to sell for him cattle owned by Fant and situated in the Indian territory, agreeing to give appellee as compensation therefor 50 cents per head for all cattle sold at the price named. Pursuant thereto appellee had contracted with J. M. Russell, a responsible buyer, for the sale of 2,500 of said cattle at the specified price; of all which appellant's agent at Chickasha was informed by appellee at the time said telegram was delivered. Had the telegram in question been received by Fant at any time within two weeks of said January 13, 1901, said sale would have been consummated and appellee paid said commissions. Had said telegram been delivered to either of the members of the firm of D. Sullivan & Co. on January 13th or at the banking house on any of the following days within reasonable time (Sundays and legal holidays excluded), said telegram would have been duly forwarded to, and probably received by, D. R. Fant. Fant learned nothing of the telegram, however, until he returned to San Antonio some two weeks after January 13, 1901, when it was too late; Russell in the meantime having made other arrangements. It further appears that on the morning of January 14, 1901, appellee went to Ft. Worth, and there remained until the night of January 15, 1901, when, not having heard from Fant, he returned to Chickasha, and on the morning of January 16th he went to the telegraph office, and informed the sending agent that he had not heard anything from Fant, and asked such agent if the message in question had been delivered. The agent replied: 'I know it has been delivered, because, if it had not been, the San Antonio office would have notified me.' Appellee thereafter made no further effort in the matter, nor did he, while at Ft. Worth, make effort to communicate with Fant."

Counsel for Barefoot claim that he had an interest in the message sent to Fant, and that he made a special contract with the telegraph company that the message should be delivered to D. Sullivan & Co. to be forwarded to Fant in case he should be absent from San Antonio. It is claimed that under the special contract the message could not be delivered to any other person, although authorized by Fant to receive it. The facts found by the court of civil appeals, and as shown by the undisputed evidence in the case, establish that the defendant in error had a pecuniary interest in the message, of which interest the telegraph company was

notified at the time the message was delivered; but the terms of the message do not constitute a special contract to deliver to D. Sullivan & Co. Barefoot testified as follows: "At the time I delivered the message I told the agent, Daniels, that I had sold Fant's cattle, and that there was \$1,250 in it for me. I told him to send the message in care of D. Sullivan & Company, as Fant had told me that he was out of San Antonio so much to always send his messages in care of D. Sullivan & Company, as they always knew where he was, and would forward the message to him." This testimony shows that Barefoot was acting as the agent of Fant in selling the cattle and in sending the telegram to him at San Antonio. The subject of the telegram was the sale of Fant's cattle, which was to be confirmed by him, and the interest of Barefoot was incidental and subordinate to that of Fant. The object in sending the message in care of D. Sullivan & Co. was to secure its delivery to Fant, and the evidence quoted proves that D. Sullivan & Co. had been selected by Fant, not by Barefoot, as the party to whom the message should be sent. The testimony of Barefoot, which is all that the record contains upon the subject, does not establish that any contract was made with the telegraph company whereby the delivery of the message was restricted to D. Sullivan & Co. in the absence of Fant himself, and we must determine the question of the proper delivery of it to another agent of Fant by the rules of law applicable to the message as it was written. This case is unlike *Western U. Teleg. Co. v. Hendricks*, 29 Tex. Civ. App. 413, 68 S. W. 720, in these important facts. In that case the contract was to deliver to a certain man, or to send to the person addressed 6 miles in the country, and the delivery was made to one not authorized to receive it by either party to the message.

It is also claimed on the part of defendant in error that the facts do not show a delivery of the message to the clerk of the Mahncke hotel. The clerk of the hotel received the message for the purpose of executing the commission left with him by Fant, indorsed upon it Fant's address in Mexico, and verbally directed the messenger boy to forward the message to Fant to the address written thereon. This proves a delivery on the part of the telegraph company to the clerk, and, if he was authorized by law to receive it, there was a performance of the contract made with Barefoot. The telegraph company might have delivered the message to D. Sullivan & Co. without making inquiry for Fant. *Western U. Teleg. Co. v. Young*, 77 Tex. 245, 19 Am. St. Rep. 751, 13 S. W. 985. But, having found the bank

closed, it was the duty of the telegraph company to seek Fant at his place of abode, and, if absent from the city, to deliver the message to any person who might be found there authorized to receive it. *Western U. Teleg. Co. v. Jackson*, 19 Tex. Civ. App. 273, 46 S. W. 279. It is not denied that a delivery to Fant in person would have discharged the contract of the telegraph company, but it is contended by the defendant in error that in Fant's absence the message should have been delivered to D. Sullivan & Co. The latter had no interest in the message, and could not have exercised any control over it except to receive and forward it. It was sent in their care merely as a medium through which to reach Fant. *Western U. Teleg. Co. v. Pearce*, 95 Tex. 578, 68 S. W. 771; *Thompson v. Western U. Teleg. Co.* 10 Tex. Civ. App. 120, 30 S. W. 250. By directing the clerk of the Mahncke hotel to forward all messages that might be brought to the hotel for him, Fant made the clerk of that hotel his agent to receive such messages as might be presented to him, upon which fact arises the question, Did Fant have the power to authorize another person to receive this message, which he had previously directed to be sent in the care of D. Sullivan & Co? There is no reason why Fant should not have two agents in San Antonio to forward messages to him, nor is there any reason why a delivery to either agent would not bind Fant. If, when the messenger went to the hotel, he had refused to deliver the message to the clerk, could there be a doubt that the company would be liable to Fant for any damage he might have sustained by the failure to deliver the message to his duly authorized agent? In this case the paramount object in sending the telegram was to serve the interest of Fant, to notify him of the making of a contract subject to his approval; and it cannot be that the authority of the principal to control such a contract would be subordinate to that of his agent, who sent it according to the direction of and in the interest of his principal.

Counsel for Barefoot rely much upon the case of *Western U. Teleg. Co. v. Turner*, 94 Tex. 304, 60 S. W. 432. In that case a cotton buyer delivered to the telegraph company a message accepting the terms of a proposed contract for the sale of cotton, and directed that his message should be delivered to a certain telephone company, which extended from a station on the line of the telegraph company to the place where the person addressed lived. The telegraph company delivered the message to the agent of another telephone company that reached the same place, which failed to deliver it in time, whereby the sender lost his bargain.

It will be seen that the facts are very different from this case. In the *Turner Case* neither the sender nor the addressee had authorized the delivery of the message to the telephone company which made the failure. The two cases are so dissimilar that the *Turner Case* cannot be considered as authority in this case.

We are of the opinion that the delivery to the clerk of the Mahneke hotel at San Antonio was a full and complete performance of the contract made between Barefoot and the telegraph company, and that Barefoot is not entitled to recover anything on account of the failure of that clerk to give the proper direction for the transmission of the telegram to Fant at Monclova, Mexico. It is therefore ordered that the judgments of the District Court and of the Court of Civil Appeals be reversed, and that this cause be remanded.

**AUSTIN & NORTHWESTERN RAILROAD
COMPANY et al., Plffs. in Err.,**

v.

John O. CLUCK.

(.....Tex.....)

1. At common law, courts have no authority to order an examination of the person of one alleged to have been injured by the negligence of another for the purpose of ascertaining the extent of the injuries.
2. The court cannot, in the absence of express legislative authority, direct the plaintiff in an action to recover for personal injuries to submit to an examination of his person, under a constitutional provision that the people shall be secure in their persons from all unreasonable seizures and searches.
3. The court is under no obligation to administer exact justice between litigants; its province being to try the issues formed by the pleadings according to the rules of procedure.
4. No court has authority to originate and introduce new process to enable parties to secure evidence in support of their cases.
5. Plaintiff in an action to recover damages for personal injuries cannot be asked as to his willingness to furnish a specimen of urine for analysis for the purpose of aiding in ascertaining his physical condition.
6. A plaintiff in an action to recover damages for personal injuries may be compelled to testify at the trial as to whether or not he has refused to submit to a physical examination by physicians to be

appointed by the court at the instance of defendants.

(December 14, 1903.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Travis County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Baker, Botta, Baker, & Lovett, with **Mr. S. R. Fisher**, for plaintiffs in error:

It was defendants' right, in the interest of justice and with the view of ascertaining the real facts, to have plaintiff submit himself to a physical examination by competent physicians to be appointed by the court, without suggestion by the defendants or their counsel.

International & G. N. R. Co. v. Underwood, 64 Tex. 463; *Missouri P. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 119, 46 L. R. A. 153, 75 Am. St. Rep. 821, 57 Pac. 367; *South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200, 60 N. E. 271; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, 35 Am. St. Rep. 561, 54 N. W. 757; *Galveston, H. & S. A. R. Co. v. Sherwood* (Tex. Civ. App.) 67 S. W. 776; *Wanek v. Winona*, 78 Minn. 98, 46 L. R. A. 448, 79 Am. St. Rep. 354, 80 N. W. 851; *Brown v. Chicago, M. & St. P. R. Co.* (N. D.) 95 N. W. 153; *Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 254; *Sibley v. Smith*, 46 Ark. 284, 55 Am. Rep. 584; 1 Thompson, Trials, § 859; *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000.

The court erred in refusing, while the plaintiff was on the stand under cross-examination by defendants' counsel, to permit defendants to show by him that they had requested him to submit himself to a physical examination.

Freeport v. Isbell, 93 Ill. 381; *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 155, 52 L. R. A. 328, 83 Am. St. Rep. 269, 58 N. E. 686; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Miami & M. Turnp.*

NOTE.—For earlier cases in this series as to power of court to compel physical examination, see *McQuigan v. Delaware, L. & W. R. Co.* 14 L. R. A. 466, and *note*; *Graves v. Battle Creek*, 19 L. R. A. 641; *Lyon v. Manhattan R. Co.* 25 L. R. A. 402; *Carrico v. West Virginia C. & P.* 64 L. R. A.

R. Co. 24 L. R. A. 50; *Hall v. Manson*, 34 L. R. A. 207; *Cleveland, C. C. & St. L. R. Co. v. Hudleston*, 86 L. R. A. 681; *O'Brien v. La Crosse*, 40 L. R. A. 831; *Lane v. Spokane Falls & N. R. Co.* 46 L. R. A. 453; *Stack v. New York N. H. & H. R. Co.* 52 L. R. A. 328; and *South Bend v. Turner*, 54 L. R. A. 396.

Co. v. Baily, 37 Ohio St. 107; *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548.

Messrs. John Dowell and H. N. Swain, for defendant in error:

In the absence of any statutory provision making such an examination compulsory, the court has no power to appoint a board of physicians and to compel plaintiff to submit to an examination by them if he objects thereto.

Galveston, H. & S. A. R. Co. v. Sherwood (Tex. Civ. App.) 67 S. W. 776; *Ft. Worth & R. G. R. Co. v. White* (Tex. Civ. App.) 51 S. W. 855, *Chicago, R. I. & T. R. Co. v. Langston* (Tex. Civ. App.) 47 S. W. 1029; *Gulf, C. & S. F. R. Co. v. Pendery*, 14 Tex. Civ. App. 60, 36 S. W. 793; *Union P. R. Co. v. Botsford*, 141 U. S. 253, 35 L. ed. 738, 11 Sup. Ct. Rep. 1000; *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 157, 52 L. R. A. 328, 83 Am. St. Rep. 269, 58 N. E. 686; *Mills v. Wilmington City R. Co.* 1 Marv. (Del.) 269, 40 Atl. 1114; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Joliet Street R. Co. v. Call*, 143 Ill. 178, 32 N. E. 389; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 227, 33 N. E. 951; *McQuigan v. Delacare, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466, 26 Am. St. Rep. 507, 29 N. E. 235; *Elfers v. Woolley*, 116 N. Y. 297, 22 N. E. 548; *Cole v. Fall Brook Coal Co.* 159 N. Y. 59, 53 N. E. 670.

The application for an appointment by the court of a board of physicians to examine plaintiff, if proper to be made under any circumstances, should have been made before announcement of ready for trial, and a sufficient time prior thereto, that the examination might be made deliberately and carefully without interference with the progress of the trial.

Miami & M. Turnp. Co. v. Baily, 37 Ohio St. 104; *Savannah, F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622; *Galesburg v. Benedict*, 22 Ill. App. 111; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 480, 46 Pac. 938; *Kinney v. Springfield*, 35 Mo. App. 97; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Chadron v. Glover*, 43 Neb. 737, 62 N. W. 62; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860.

If the court has the power, under any circumstances, to compel plaintiff to submit to such an examination, defendants' demand for such an examination is not a matter of right, but it rests within the sound discretion of the trial court to order or refuse to order the examination, which discretion will not be interfered with on appeal unless shown to be manifestly abused.

Savannah, F. & W. R. Co. v. Wainwright, 99 Ga. 255, 25 S. E. 622; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 64 L. R. A.

390; *Hill v. Sedalia*, 64 Mo. App. 495; *Marler v. Springfield*, 65 Mo. App. 301; *Owens v. Kansas City, St. J. & C. B. R. Co.* 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Sidekun v. Wabash, St. L. & P. R. Co.* 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; 16 Am. & Eng. Enc. Law, 2d ed. p. 813, § 3, note 6.

It being plaintiff's legal right to refuse to be examined by a board of physicians to be appointed by the court, it was his legal right to have such fact withheld from the consideration of the jury.

Miami & M. Turnp. Co. v. Baily, 37 Ohio St. 107.

If, under any circumstances, such a refusal can be a matter proper to be considered by the jury, then it can be proper only where plaintiff's refusal is an unreasonable one.

Union P. R. Co. v. Botsford, 141 U. S. 253, 35 L. ed. 738, 11 Sup. Ct. Rep. 1000; *Freeport v. Isbell*, 93 Ill. 381; *Pennsylvania Co. v. Neumeyer*, 129 Ind. 412, 28 N. E. 860; *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 155, 52 L. R. A. 328, 83 Am. St. Rep. 269, 58 N. E. 686.

It is not error to refuse to order an examination of the person in the absence of any showing that plaintiff had previously refused such examination, or that it had been requested of him.

Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860.

Brown, J., delivered the opinion of the court:

From the opinion of the honorable court of civil appeals we copy the following statement of the facts as found by that court:

"This is a suit for damages caused by the plaintiff's falling into a well dug, operated, and controlled by the Austin & Northwestern Railroad Company. There was a jury trial, resulting in a verdict and judgment for the plaintiff for \$2,000, and the defendants have appealed.

"The testimony shows that the Houston & Texas Central Railroad Company, since the accident occurred, has succeeded to all the rights and liabilities of the Austin & Northwestern Railroad Company, and, if one company is liable, both are. The accident occurred at night, and the verdict of the jury involves a finding that the Austin & Northwestern Railroad Company was guilty of negligence in failing to keep the well properly covered, and that the plaintiff was not guilty of contributory negligence, as charged in the answer of the defendants, and that, as a direct result of the defendants' negligence, the plaintiff was injured to the extent of \$2,000. The record contains evidence sufficient to support all of these findings, and

therefore the objections to the verdict are overruled.

"The plaintiff charged in his petition that, as a result of his falling in the well, he was permanently injured in his back, sides, kidneys, hips, hip joints, spine, bladder, stomach, and bowels. Within proper time the defendants made a motion, stating that the plaintiff had been examined by two physicians of his own selection, who would testify in his behalf; that he had not been examined by physicians selected by the defendants, or by any other physicians; and requested the trial court to appoint a committee of two or more competent physicians, and compel the plaintiff to submit to an examination by the physicians so appointed, in order that the defendants might have the benefit of the testimony of such physicians. In support of the motion it was shown that the plaintiff had refused to consent to the appointment of such committee and to the examination requested. The court overruled the motion, and that ruling is assigned as error."

The plaintiff in error asserts that it had the right at the trial to have the court appoint a committee of physicians to make a physical examination of the defendant in error to qualify them to testify before the jury as to the injuries received by Cluck, and their effect. The right to have such examination is supported by the greater number of decisions of the courts of the states of this Union and by the text writers. The following cases support the right asserted: *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 3 L. R. A. 808, 14 Am. St. Rep. 189, 9 S. E. 602; *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 9 L. R. A. 442, 24 Am. St. Rep. 764, 8 So. 90; *White v. Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Schrader v. Chicago, R. I. & P. R. Co.* 47 Iowa, 375; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Miami & M. Turnp. Co. v. Baily*, 37 Ohio St. 104; *Lane v. Spokane Falls & N. R. Co.* 21 Wash. 119, 46 L. R. A. 153, 75 Am. St. Rep. 821, 57 Pac. 367; *Wanck v. Winona*, 78 Minn. 98, 46 L. R. A. 448, 79 Am. St. Rep. 354, 80 N. W. 851; *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, 35 Am. St. Rep. 561, 54 N. W. 757; *South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200, 60 N. E. 271; *Brown v. Chicago, M. & St. P. R. Co.* (N. D.) 95 N. W. 153. The supreme court of Missouri first held that the courts had no power to compel a party to a civil case to submit to a physical examination. *Loyd v. Hannibal & St. J. R. Co.* 53 Mo. 515. After vacillating and qualifying their decisions in 64 L. R. A.

various particulars, that court, in *Shepard v. Missouri P. R. Co.* 85 Mo. 629, 55 Am. Rep. 390, announced the doctrine contended for by the railroad company in this case. The decisions of the supreme court of the state of Indiana cover all phases of this question from an absolute denial to the assertion of the right in a qualified sense as announced in the case of *South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. Rep. 200, 60 N. E. 271. That case has been since greatly qualified, and their decisions are in such conflict on the question that they are of little value as authority. The case of *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 3 L. R. A. 808, 14 Am. St. Rep. 189, 9 S. E. 602, rests upon the following statutory provision: "Every court has power . . . to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." This statute authorized the examination in the state of Georgia; hence that case is not authority upon the question of power under the common law. The authorities above stated, as well as many cases which we have not cited fully sustain the conclusion of the supreme court of Indiana in the case of *South Bend v. Turner*, which is embodied in the following propositions: "(1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts, which can only be disclosed or fully elucidated by such an examination, and such an examination may be made without danger to the plaintiffs life or health or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding."

Counsel for the defendant in error deny the authority of the court to require the plaintiff in this case to submit to a physical

examination by a committee to be appointed by the court, in which they are supported by these authorities: *Parker v. Enslow*, 102 Ill. 279, 40 Am. Rep. 588; *McQuigan v. Delaware, L. & W. R. Co.* 129 N. Y. 50, 14 L. R. A. 466, 26 Am. St. Rep. 507, 29 N. E. 235; *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 155, 52 L. R. A. 328, 83 Am. St. Rep. 269, 58 N. E. 686; *Peoria, D. & E. R. Co. v. Rice*, 144 Ill. 232, 33 N. E. 951; *Roberts v. Ogdensburgh & L. C. R. Co.* 29 Hun, 154; *Union P. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000. The question has been before this court in these cases: *International & G. N. R. Co. v. Underwood*, 64 Tex. 463; *Missouri P. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325; *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703; *Gulf, C. & S. F. R. Co. v. Butcher*, 83 Tex. 309, 18 S. W. 583. In each case this court declined to decide the question now before us; therefore it is practically a new one, which we must determine by the weight of authority, or upon the sounder reasoning, as derived from the provisions of our Constitution, the statutes, and the common law.

After citing a number of cases to support their decision in the case of *South Bend v. Turner*, the supreme court of Indiana said: "These cases assert the doctrine that courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." That honorable court gives no source from which it is claimed the courts derive the power to compel a party to submit to examination, but asserts that the duty to administer justice implies "all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." If this proposition be well founded, then, indeed, the power of a court over the persons of parties who apply to it for adjustment of their rights is unlimited. This statement of judicial power is too broad to be accepted as correct, but that line of decisions cannot be sustained by less comprehensive authority. The point we wish to call attention to is that the court does not claim to derive its authority from either the common law, the Constitution of that state, or from the statutes of Indiana. Comment upon *South Bend v. Turner*, 64 L. R. A.

Bend v. Turner is equivalent to a comment upon the other cases, because it is, perhaps, the best reasoned of all, and fairly represents them.

Article 5, § 8, of the Constitution of this state defines the jurisdiction and powers of the district courts in the following language: "The district court shall have original jurisdiction . . . of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to \$500 exclusive of interest;" and the legislature has defined the jurisdiction of the district courts in the same language. The common law was adopted by the Congress of the Republic by enactment embraced in the following article 3258 of the Revised Statutes of 1895: "The common law of England (so far as it is not inconsistent with the Constitution and laws of this state) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature." Whatever may be the powers of courts of other states, there can be no doubt that the courts of Texas must look to the Constitution of this state, the enactments of the legislature, and the common law for their authority to proceed as requested in this case; and, if the authority did not exist at common law, and has not been conferred by the Constitution nor by the statutes of this state, then no court in Texas has the power to force any citizen to submit to a physical examination under such circumstances. In the case of *Messner v. Giddings*, 65 Tex. 309, a judgment of the district court, which had assumed to exercise authority over the estate of minors, was under review. It was claimed that the authority was given by the Constitution, wherein it conferred on the district court all the powers of courts of equity. Speaking by Judge Stayton, the supreme court said: "If it is claimed that in the court, as a court of equity, under that clause [of the Constitution], the power existed, it must be replied that the district court, whether as a court of law or a court of equity, had only such power as the Constitution gave it. There is no such thing as the inherent power of a court, if by that be meant a power which a court may exercise without a law authorizing it. That clause of the Constitution empowered district courts to exercise all the power given, whether the procedure necessary to accomplish that purpose be such as pertains to a court of law or a court of equity; but it in no manner conferred upon such courts the power to exercise any and every power which at any time may have been exercised by courts of chancery in England or elsewhere." In *Union P. R. Co.*

v. Botsford, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000, Judge Gray said: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history." Not one of the cases which declare the existence of the right cites a case from the English courts. To this Justice Brewer, in the dissenting opinion filed on behalf of himself and Justice Brown of that court, replied: "The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute." The reply of Justice Brewer does not answer the argument of Justice Gray. The better rule was laid down in *Russell v. Devon County*, 2 T. R. 673, where it was sought to maintain the action by argument from necessity and by reason of the analogy to other actions which were authorized by statute; but Justice Ashurst said in that case: "It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action might be maintained, namely, that, where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case,—that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." We are of the opinion that the fact that no such examination was ever authorized by a court at common law in England is conclusive that those courts had no authority under the common law to make such order. Judge Brewer's suggestion that all persons who were ordered by the common-law courts to be examined must have submitted without contention is contrary to the record of those courts, which show a stubborn resistance by the English

people to every encroachment upon their personal liberty. It is more consistent with the facts to presume that lawyers and courts recognize that no such power existed; therefore there was no attempt to secure the examination. In his dissenting opinion Judge Brewer said: "Certainly the power of the courts and of the common-law courts to compel a personal examination was in many cases often exercised and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar, and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered." The learned judge does not cite a case to support his statement of the frequency of similar proceedings in the common-law courts of England, but we presume he refers to three exceptional cases mentioned by Judge Gray: First. In divorce proceedings upon the ground of impotency the court might order the examination of either party, but the exercise of this power "rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law as administered in spiritual and ecclesiastical courts not proceeding in any respect according to the course of the common law." Second. In case a woman was convicted of a capital crime, the court might order an examination of her to determine whether she was quick with child, to prevent taking the life of the unborn infant. Third. If a widow claimed to be with child, the heir to the estate might cause her to be examined to ascertain whether she was or not with child, to protect the heirs against the fraud of having a false heir presented to inherit the estate. "But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered in any part of the United States, as suited to the habits and conditions of the people." Comments in quotation marks are from the main opinion in *Union P. R. Co. v. Botsford*, and furnish complete answers to the arguments based upon the exceptional cases. The exceptions are the sole reliance of all cases which uphold the authority of the court to order such an examination for a precedent showing that the right existed and was exercised by common-law courts. They do not establish the fact, and the answers made by Judge Gray in the main opinion are so conclusive as to leave no doubt that in truth and in fact no such practice ever prevailed in the common-law courts of England.

Since the common law furnishes no prece-

dent for such proceeding, we must look to our Constitution and statutes for authority in our courts to order the examination. The provisions of our Constitution and of our statutes with regard to the practice and jurisdiction of courts are antagonistic to the spirit and purpose of such proceedings. To make sure of the immunity of the person of citizens from improper interference by any authority, the convention which framed our Constitution adopted, as a part of the Bill of Rights, this § 9 of article 1: "The people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation." Whether, under this guaranty of immunity from interference with the person, the legislature might authorize the physical examination of a party to a suit, is not before us for determination; but we are of the opinion that our Constitution secures every citizen of this state against any seizure or search of his person which is not plainly authorized by some law of this state. In organizing the district courts the legislature has with great particularity prescribed what its powers shall be, and the writs and processes which may be issued. Among other things which may be done to secure testimony for the trial is the propounding of interrogatories by one party to the other for the purpose of getting a full and complete statement of his cause of action or ground of defense. By this method a person or corporation sued for damages for personal injury may secure a complete statement of all the symptoms and a description of all the external injuries for which compensation is sought. It has been held by this court that the right to examine the opposite party by interrogatories is a substitute for a bill of discovery, which does not exist in our practice. *Cronin v. Gay*, 20 Tex. 460; *Cargill v. Kountze Bros.* 86 Tex. 386, 24 L. R. A. 183, 40 Am. St. Rep. 853, 22 S. W. 1015, 25 S. W. 13. The argument that the examination may be ordered as upon a bill of discovery is fully met by the fact that we have no such proceeding.

The common-law proceeding most analogous to physical examination is the right of view, by which a party sought to have his witnesses examine the premises to qualify them to testify. "There are but two such cases reported in the English Reports. *Newman v. Tate*, 1 Arnold, 244, and *Turquand v. Strand Union*, 8 Dowl. 201." The request was refused in both cases. *Union P. R. Co. v. Botsford*. It is significant that the legislature of this state, after adopting the common law of England, within a short time

after those cases were decided, repealed the right of view by this article 1451, Rev. Stat. 1895: "All vouchers, views, essoins, and also trials by wager of battle and wager of law, shall stand repealed." Thus we see that the legislature has not only failed to provide for a physical examination of parties, but has actually repealed from the common law in this state the only proceeding that bore the slightest resemblance to it.

The claim that the duty rests upon each court to administer exact justice between parties is not supported by any authority, nor is it consistent with the general law of this state nor with the common law upon these questions. It is the province of a court to try issues formed by the pleadings of parties according to the rules of procedure, to furnish all process authorized by law to secure evidence, and to administer justice according to the evidence adduced on the trial. The common law and our statutes provide all of the means which courts are authorized to use in the administration of justice between parties, and no court has authority to originate and introduce a new process to enable parties to secure evidence in support of their cases. A court with power "to make subservient to its order all persons and things that will afford the most reliable evidence" would be an anomaly in constitutional republican government. It is better for the common good that courts should be restrained within prescribed limits than that judges be invested with unlimited and irresponsible power over the persons and property of the citizen. In this state, by our Constitution and the common law, the person of a citizen is so sacred that an officer may not disregard the right of personal freedom even to satisfy an execution by levying upon property which is on the person of the defendant. To show the fallacy of the claim, made by those that uphold the right of physical examination, we will suppose A has instituted a proceeding against B for damages on account of personal injuries inflicted by B upon the plaintiff; and the defendant asks that a committee be appointed to examine the plaintiff as to his injuries that witnesses may be furnished to testify of his condition. The court, in order "to administer exact justice," orders the examination, takes forcible control of the person of plaintiff, and makes an examination, produces evidence, and at the trial a judgment is rendered in favor of the plaintiff against the defendant for damages. When execution issues, the officer calls upon the defendant for satisfaction; but, with a valuable diamond in his shirt front and \$10,000 in his pocket, the defendant defies the officer to make a levy. The court would have made

the person of the plaintiff "subservient to its order" to enable defendant to have an examination of plaintiff's person, and to use the private parts of it as evidence, but would, if called upon, enjoin the invasion of the person of defendant to satisfy its judgment. This would be the practical working of the doctrine contended for. Many illustrations might be given of court proceedings which would show the fallacy of the claim that courts in Texas have power to order a person to submit his or her person to examination in civil suits; but we feel it is unnecessary. It is sufficient to say for the courts of Texas that the authority to order such an examination and force a party to submit to it is found neither in common law nor in the statute laws of this state, and therefore does not exist and cannot be exercised by the courts of Texas.

The plaintiff in error contends that new conditions have arisen in connection with this class of litigation, which make it necessary for the courts to adopt this method so as to enable the defendants to secure necessary evidence. In support of this contention counsel for the plaintiff in error has injected into his argument matter which is wholly irrelevant in this court, and might be more appropriately addressed to the legislature. We cannot better express our views upon this matter than to quote from the opinion of Chief Justice Holmes of the supreme court of Massachusetts in the case of *Stack v. New York, N. H. & H. R. Co.* 177 Mass. 158, 52 L. R. A. 328, 83 Am. St. Rep. 269, 58 N. E. 687: "We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made almost invariably by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds with such consistency as he may be able to attain." It may be true that evil practices by plaintiffs in these cases have grown up, but it is equally true that to establish such a rule of practice would place in the power of defendants in damage cases the means of

annoying plaintiffs, and of intimidating the most worthy of the complainants in such suits.

At the trial of the cause, after the testimony of physicians who had treated Cluck for his injuries had been introduced, and Cluck had himself testified as to his injuries and the circumstances under which he received them, the attorney for the railroad company propounded to him this question: "Are you willing, in the presence of some reputable person, or by yourself, and subsequently to be supported by your affidavit that it is urine voided by you into a vessel which is absolutely free from any foreign matter, to furnish a specimen of your urine, voided under the circumstance stated, to a committee of competent physicians to be appointed by the court, so that an analysis of that urine may be made?" To which counsel for plaintiff objected on the ground that same was irrelevant and immaterial, and a useless consumption of time, which objection was by the court sustained. The same objections apply to this procedure as to that which sought a physical examination of the plaintiff. The court could not enforce such an order without taking possession of the person of plaintiff and exercising coercive power to compel him to perform the act. For the reasons before given, we hold that the objection was properly sustained.

The plaintiff, Cluck, being on the stand as a witness in his own behalf, and having testified of his injuries and their effect, the railroad company propounded to him the following question: "I will ask you whether or not a proposition has been made to you to have the court, without the suggestion of counsel for defendants, appoint a committee or board of skilled physicians to examine you physically with a view of ascertaining the nature and extent of the ailments of which you complain and their cause?" To this question counsel for plaintiff objected on the ground "that the same was incompetent, irrelevant, and immaterial, and that the purpose of it was to prejudice the plaintiff's case before the jury; that the matter had already been ruled upon by the court, and could not again be inquired into; and that the right to decline to submit himself to a physical examination by physicians to be appointed by the court was a legal right." The objections were sustained by the court. In this ruling the court erred. The reason for refusing a physical examination of the plaintiff is not that the defendants are not entitled to have the benefit of the evidence, but because the court has no power to force the plaintiff to submit to such an examination. He has a right to submit or refuse, but, in case he should refuse, the defendants

are entitled to have that fact go to the jury to be considered by them in determining upon the credibility and sufficiency of the testimony upon which he seeks to recover. *Union P. R. Co. v. Botsford*, 141 U. S. 255, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000. If the jury should believe that the refusal showed a purpose to conceal the truth, they might take the fact into account in weighing the evidence. If a satisfactory reason should be given for the refusal, and other evidence were sufficient, the refusal would not defeat a recovery. The suggestion that the court might enforce its order by refusing to submit the case to a jury is not sound, for in this state a party is entitled to a trial by jury whenever he produces evidence which shows *prima facie* a right to recover. In case of unreasonable refusal to allow examination, the court could and should set aside

the verdict, unless the evidence satisfactorily established the right.

It is claimed by the defendant in error that these matters occurred in the presence of the jury, who were fully informed as to the plaintiff's refusal. That is true, but the action of the court had the effect to take it from the jury, which would neutralize any effect that the occurrence, in the presence of the jury, might have had upon their minds. It was equivalent to telling the jury that it was not to be considered by them. The defendant in error would get no benefit from the fact that the question was asked and objected to in their presence by the plaintiff's counsel.

For the error indicated, *the judgments of the District Court and of the Court of Civil Appeals are reversed*, and the cause is remanded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

C. F. WALL
v.

NORFOLK & WESTERN RAILWAY COMPANY, Impleaded, etc., *Appt.*

(52 W. Va. 485.)

- *1. Under § 8 of article 11 of the state Constitution, rolling stock and all other movable property of a railroad company or corporation are subject to process of attachment, where the attachment is applicable, as well as to ordinary execution.
2. The right under attachment of the garnisher as to the garnishee does not, by garnishment, rise higher than the right of the principal defendant as to the garnishee. When the right of such defendant is subject to a right of the garnishee under a contract be-

tween them, the right of the garnisher is likewise subject to the right of the garnishee.

3. One railroad company has an agreement with another by which loaded cars of the one are to be received at connecting points by the other, and hauled over its line to the destination of load of the car, and then be reloaded with other freight by the receiving company on its line, and carried over its line, and returned loaded to the railroad of the owner of the cars; the receiving company compensating the owning company for such use of the cars. Such cars cannot be seized under an attachment against the company owning the cars, so as to defeat the rights under such arrangement or contract of the company receiving and entitled to so use the cars, and a garnishment of the receiving company cannot affect its rights under such arrangements by reason of its possession of such cars.

4. A railroad car sent loaded with

*Headnotes by BRANNON, J.

NOTE.—Attachment or garnishment of foreign railroad cars.

This specific question has arisen in but three other cases besides *WALL v. NORFOLK & W. R. Co.* and *CONNERT v. QUINCY, O. & K. C. R. Co.*, and in one only of the three is the question treated from the standpoint in which it is viewed in the cases above reported.

In *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* (1878) 1 Ill. App. 899, it was held that public policy forbade the garnishment of a railroad company for freight cars in its possession belonging to a foreign railroad company when the circumstances of the possession were that the railroads of the two companies had connecting lines, and, at the time of the service of the writ, running arrangements existed between said companies, such as are usually adopted by connecting lines of railroad throughout the country, by which, instead of unloading and transferring their freight from the cars of the one to the cars of the other at the point

of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as possible in the due course of business. In support of its opinion that, although the language of the attachment act was sufficiently broad to permit the attachment or garnishment of foreign railroad cars, considerations of public policy would have the effect to limit the application of the act to a much more restricted extent than the language employed would seem to import, the court says as follows: "If the statute [attachment act] should be allowed the operation sought to be given it in the present case, it would, beyond doubt, very seriously interfere with the transportation of freights by railroad according to the method which experience seems to have developed as the speediest, most economical, and best. Our railroads extend into all parts of the country, and traverse all of the various states of the Union, forming one

freight from another state into this state, and to be returned loaded to the former state in the transaction of interstate commerce, cannot be levied upon under an attachment in this state; nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company, against which an attachment was issued. This is because of the commerce clause of the national Constitution and the Interstate Commerce Act of Congress.

(March 21, 1903.)

A PPEAL by defendant garnishee from a judgment of the Circuit Court for Jef-

great and complicated system of internal communication, so that, for most of the practical purposes of transportation, each railroad, instead of constituting a separate line, is only a part or member of this general system. Cars may be loaded at any point upon one line and transported without unloading to the point of destination on any other railroad, however distant. It can not be doubted that this method of conducting the carrying business of the country greatly subserves the public convenience, and should not be interfered with for the mere prosecution of individual and private ends, except for very strong and controlling reasons. If a car, as soon as it passes from the line of the road of its owner onto the line of another company becomes subject to process of garnishment, no railroad company owing debts can safely allow its cars to pass beyond its own line for any purpose; nor can any company, without exposing itself to the annoyance of continual litigations between other parties, and in which it has no interest, receive the loaded cars of other companies for transportation to their place of destination. The doctrine contended for . . . would make each railroad company an agency for the collection of the debts and liabilities of every other railroad company with whose track its line of road is immediately or remotely connected. The railroad companies would be compelled either to abandon the present economical and expeditious system of transportation or carry it on at the risk of being continually drawn into controversies between third parties, and of being exposed to expensive and vexatious litigations in which they have no interest."

The other two cases are decided upon widely different grounds, and, aside from the fact that foreign railroad cars were attached in each instance, they can not be considered authorities in favor of the doctrine that such a practice is not inimical to interstate commerce, as it is apparent that they were decided without a consideration of that question.

The question in *Humphreys v. Hopkins* (1889) 81 Cal. 551, 6 L. R. A. 792, 15 Am. St. Rep. 76, 22 Pac. 892, was whether a receiver appointed in a foreign jurisdiction to take possession of the property of a railroad corporation, and carry on its business, and who, in pursuance of his authority as such receiver, has taken a freight car into his actual possession, within the jurisdiction of the court by which he was appointed, can hold the car against the claim of the citizen of another state, who, upon finding it there, caused it to

be attached as security for his just demand against the railroad company. In holding that the right of the attaching creditor was superior to that of the receiver the court stated that the latter had no right to sue in another state except on the ground of comity, and that in the case at bar the court, in justice to the citizens of its own state, would not extend the principle of comity so far as to award the property in question to the representatives of creditors residing in other states, who were seeking to hold it for their own exclusive benefit.

The facts are stated in the opinion.

Messrs. Cleon Moore, Joseph I. Doran, and Marshall McCormick, for appellant:

The contract set up in the answer is certain and clear, and will be enforced.

As the garnishee is but a stakeholder, with no interest in the main controversy whatever, the pleadings of the garnishee are

be attached as security for his just demand against the railroad company. In holding that the right of the attaching creditor was superior to that of the receiver the court stated that the latter had no right to sue in another state except on the ground of comity, and that in the case at bar the court, in justice to the citizens of its own state, would not extend the principle of comity so far as to award the property in question to the representatives of creditors residing in other states, who were seeking to hold it for their own exclusive benefit.

To this decision there is a dissenting opinion, concurred in by another judge, also, in which the theory is advanced that, the freight car having been in the possession of the receiver, within the jurisdiction of the court appointing him, he thereby acquired a special property in the car, as the hand and instrument of the court, which could not be interfered with by attachment in another jurisdiction.

The question in *Buffalo Coal Co. v. Rochester & State Line R. Co.* (1880) 8 W. N. C. 126, was whether the rolling stock of a railroad company was to be treated as realty or personality in regard to being subject to execution and attachment. In this case a Pennsylvania coal company sued a New York railroad company, in the latter state, for a balance due for coal, and by foreign attachment seized twenty-one freight cars belonging to the railroad company, found in Pennsylvania. It was contended that the rolling stock of a railroad company is to be treated as realty, and as not subject to seizure upon attachment, the remedy of a creditor being by process of sequestration; but the court stated that while that was formerly the rule, the legislature, in 1870, expressly provided that all property of a railroad company, excepting real estate held in fee, should be subject to seizure and sale. And the cars were held properly attached, the court stating that process of sequestration against the railroad company was out of the question, it being a foreign corporation, having no portion of its road within the state, and no officer or agent upon whom service could be made and that to quash the attachment would be to deny a right which, if the defendant were a natural person, would be too clear for question. The court also pointed out that no obligation to hold otherwise existed on the ground of comity, because the rule in New York had been finally settled to be that the rolling stock of a railroad company is personal property, which can be levied upon and sold as such.

M. M. M.

construed with the utmost liberality, and all the garnishee's contract and other rights are preserved with the utmost care and strictness.

Conshohocken Tube Co. v. Iron Car Equipment Co. 167 Pa. 592, 31 Atl. 949; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 619, 38 L. ed. 573, 14 Sup. Ct. Rep. 710; *Baldwin v. Great Northern R. Co.* 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370, 83 N. W. 986; *Van Camp Hardware & Iron Co. v. Plimpton.* 174 Mass. 208, 75 Am. St. Rep. 296, 54 N. E. 538.

The cars of a foreign railroad company cannot, in West Virginia, be reached by process of attachment or garnishment, because they are necessary to enable the owning company and the holding company to discharge their duties to the public, and are consequently exempt from such process.

11 Am. & Eng. Enc. Law, 2d ed. p. 620; *Foster v. Fowler*, 60 Pa. 27; *Wood v. Truckee Turnp. Co.* 24 Cal. 474; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315; *Great Northern R. Co. v. Tahourdin*, L. R. 13 Q. B. Div. 320, 53 L. J. Q. B. N. S. 69, 50 L. T. N. S. 186, 32 Week. Rep. 559; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240; *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488; *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399.

The Norfolk & Western had the right, under its contract with the Pennsylvania Railroad Company, to use the car under the agreement set up in the answer.

Any construction of the attachment laws of West Virginia which would have the effect of laying a burden upon interstate commerce, by preventing the Norfolk & Western Railway Company from receiving the benefit of its contract for the use of the car, would not only nullify the contract, but would be a burden upon, and a regulation of, commerce between the states, such as would fall within the inhibition of the commerce clause of the Federal Constitution.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 709, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Lord v. Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Brown v. Houston*, 64 L. R. A.

114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Robbins v. Shelby County Tazing Dist.* 120 U. S. 493, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Re Langford*, 57 Fed. 570; *Richmond v. Southern Bell Teleph. & Teleg. Co.* 28 C. C. A. 659, 42 U. S. App. 686, 85 Fed. 19; *Brown v. Memphis & C. R. Co.* 5 Fed. 499; *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881; *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 184.

A garnishee is entitled to the protection of the court, even to the extent of the benefit of all doubt.

Conshohocken Tube Co. v. Iron Car Equipment Co. 167 Pa. 592, 31 Atl. 949.

Messrs. John De Witt Warner, John W. Daniel, and J. M. Mason, Sr., for appellee:

There is a wide difference between property essential to exercising the franchise of a railroad, and exercising the business of a railroad. Property, though essential to the business, is not exempt from execution, and never was exempt.

East Side Bank v. Columbus Tanning Co. 170 Pa. 1, 32 Atl. 539; *Potter v. Hall*, 3 Pick. 368, 15 Am. Dec. 226; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 382, 75 Am. Dec. 518; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792, 15 Am. St. Rep. 76, 22 Pac. 892; *Central Trust Co. v. Moran*, 56 Minn. 188, 29 L. R. A. 212, 57 N. W. 471; *Risdon Iron & Locomotive Works v. Citizens' Traction Co.* 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529; 11 Am. & Eng. Enc. Law, 2d ed. p. 620; *National Bank v. Furtick*, 2 Marr. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479.

If the Pennsylvania road had any interest in this car, that interest, whatever it was, was reached by the garnishment.

Garnishment reaches only such rights as the owner himself could assert, but it reaches every right which he could assert.

Chesapeake & O. R. Co. v. Paine, 29 Gratt. 502; *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399.

Garnishment presupposes some sort of bailment to exist.

Bailment means the transfer of possession without a transfer of ownership.

3 Am. & Eng. Enc. Law, 2d ed. p. 733.

The reversion may be garnished although the bailment protects the property from seizure.

Smith v. Niles, 20 Vt. 315, 49 Am. Dec. 782; *Hartford v. Jackson*, 11 N. H. 145; *Scott v. Scholey*, 8 East, 467, 9 Revised Rep. 487.

There is a wide distinction between the kind of bailment which exists while a car is occupied transporting goods, and the kind of bailment which exists after the car is unloaded.

The Pennsylvania road could seize its empty car unless a contract gave the Norfolk & Western the right to retain possession.

A usage could not entitle the Norfolk & Western to hold the car, as against its owner, while it was standing empty on the siding.

Sterling Organ Co. v. House, 25 W. Va. 68; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *St. Paul & S. C. R. Co. v. Minneapolis & St. L. R. Co.* 26 Minn. 243, 37 Am. Rep. 404, 2 N. W. 700.

Any property which is subject to execution is likewise subject to attachment.

Bond v. Ward, 7 Mass. 123, 5 Am. Dec. 28; *Mack v. Parks*, 8 Gray, 517, 69 Am. Dec. 267; *Handy v. Dobbin*, 12 Johns. 220; *Davis v. Garrett*, 25 N. C. (3 Ired. L.) 459.

Railroad cars are not within any of the statutory exemptions of West Virginia.

Rolling stock is personality, and is subject to all the incidents thereof.

Dubuque v. Illinois C. R. Co. 39 Iowa, 56; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 327; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 314, 13 Am. Rep. 595; *Stevens v. Buffalo & N. Y. City R. Co.* 31 Barb. 590; *Beardsley v. Ontario Bank*, 31 Barb. 619; *Bement v. Plattsburgh & M. R. Co.* 47 Barb. 104; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 45, 91 Am. Dec. 458.

Cars belonging to one railroad company are in transit on the road of a connecting line only when they are *en route*.

Missouri P. R. Co. v. Chicago & A. R. Co. 25 Fed. 317; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *Vermont & M. R. Co. v. Fitchburg R. Co.* 14 Allen, 462, 92 Am. Dec. 785; *Peoria & P. U. R. Co. v. United States Rolling Stock Co.* 136 Ill. 643, 29 Am. St. Rep. 348, 27 N. E. 59.

Railroad cars, locomotives, etc., are liable to levy under attachments and execution like the personal property of any other corporation or of an individual.

Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Beardsley v. Ontario Bank*, 31 Barb. 619; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Coe v. Peacock*, 14 Ohio St. 187; *Buf-*

falo Coal Co. v. Rochester & State Line R. Co. 8 W. N. C. 126; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 311; *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 314, 13 Am. Rep. 595; *Stevens v. Buffalo & N. Y. C. R. Co.* 31 Barb. 590.

Brannon, J., delivered the opinion of the court:

C. F. Wall brought an attachment in equity against the Pennsylvania Railroad Company in the circuit court of Jefferson county to recover damages for some cattle killed and others injured while being carried over the line of the defendant in the state of Pennsylvania, and sued out an attachment, and levied the same on a freight car of said company found at Shepherds-town, in Jefferson county,—the car being in the possession of the Norfolk & Western Railway Company,—and served the attachment also on the latter company, as a garnishee, on account of its having the car in its possession. The Pennsylvania Railroad Company is a foreign corporation. That company did not appear in the suit; but the Norfolk & Western company filed an answer, which stands as taken for true and uncontroverted as to its statement of facts. That answer, after stating that both railroad companies are common carriers of goods by railroad, states: "That at the time of the issue and service of the writs of attachment herein upon the garnishee, and ever since that time, an arrangement and understanding existed between the defendant and garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives the loaded cars of the other from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them, as soon as and when practicable, in the due course of business, reloaded with freight, to some point, on or near or reached by the line of the company owning them. That under the arrangement and understanding existing as aforesaid, the Norfolk & Western Railway Company, the garnishee, had the right to use in its business the cars aforesaid; the cars owned by it while on the lines of the Pennsylvania Railroad Company being similarly in current and constant use of the Pennsylvania Railroad at all times, and each company paying the other by wheelage or mileage of such cars.

The method aforesaid of receiving and returning railroad cars of other lines by railroads facilitates traffic, and is a great accommodation to the shipping public, and has become a part of the general system of freight transportation throughout the United States. That it would be practically impossible for the garnishee to carry on its business with arrangements and understanding of this character with other lines, and that the garnishee, under the arrangements and understanding aforesaid, is entitled to hold and use as aforesaid the cars for said business free and discharged of, and without interference from, attachment or garnishment proceedings herein, and that the maintenance of such proceedings would nullify the rights of the garnishee with the defendant under the arrangement and understanding aforesaid, and interfere seriously with the proper movement of traffic and accommodation of the shipping public." The car levied upon had been loaded beyond Hagerstown, Maryland, with sacks of patent plaster, consigned to Shepherdstown, and when levied upon was standing upon a side track, loaded with plaster, to be delivered in said town, according to said bill, and, according to the answer, was being unloaded when the garnishee was served with the attachment. The case resulted in a decision by the circuit court holding the attachment and garnishment valid, and a decree was rendered against the Norfolk & Western Railway Company for \$432.25 on account of its liability by reason of its possession of said car, and that company has appealed to this court.

The question is raised, Is this car subject to attachment? Upon the question whether the property of a quasi public corporation, essential to its operation, is so liable, there is much conflict of authority, as will appear from the authorities cited. *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 737, 26 Atl. 49; *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558; *Ammant v. New Alexandria & P. Turnp. Road Co.* 15 Am. Dec. 593, note, 595 (13 Serg. & R. 210). All admit that the property of a purely private corporation, not serving the general public, though ever so essential to its use, is liable to execution; but, as to those corporations created to carry on business valuable to the public, such as a railroad corporation, which is a common carrier, this conflict of cases exists. On the one side, it is said that such a corporation would be disabled from performing its public duties if its property essential in so doing could be seized and sold away from it, and thus the public would suffer great harm. On the other side, to exempt so much property cripples the power of the law to enforce pay-

ment of debts, and exempts from its scope a great mass of property. If we say that such property is not wholly free from subjection to debt, for the reason that it may be reached by sequestration of earnings or by the sale of the whole property, the reply is that the ordinary and ready remedy by execution upon judgment is abortive, and that relief is practically denied to small debts. Between these adverse interests the courts have greatly conflicted. All the cases say that, unless statute authorizes, the franchise itself cannot be sold under execution; and the major part of legal authority says, also, that property of such corporations essential to the exercise of such franchise is also not subject to execution. In *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635, the United States Supreme Court held that a corporate franchise to take tolls on a canal cannot be sold under fieri facias, unless authorized by a statute of the state granting the incorporation, and also that the lands or works essential to the enjoyment of the franchise cannot be separated from it and sold under a fieri facias, so as to destroy or impair the value of the franchise. So in *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869, it was held that a railroad right of way could not be sold to any one not owning the franchise, under an execution. Elliott on Railroads, vol. 2, § 520, says: "The franchise of a railroad company, and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution unless the legislature authorizes or assents to the transfer. But locomotives, cars, and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution: and there seems to be no reason why property of a railroad corporation, not essential to the enjoyment of its franchise, should not be subjected to the payment of its debts." Amid the conflict, I have concluded that the law is properly stated in 11 Am. & Eng. Enc. Law, 2d ed. p. 620, as follows: "In the case of corporations, such as railroads or bridge companies, which, though not strictly public corporations, are created to serve public purposes, and are charged with public duties, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation is not, according to the weight of authority, apart from statutory provision, subject to execution at law. But the property of a quasi public corporation, not necessary or not used for the purposes which called the corporation into being, is not exempt from seizure and sale under execu-

tion." There are some cases which, while admitting that a franchise or things indispensable to its use cannot be levied on under execution, yet hold that rolling stock is liable to execution. *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432. It thus seems that the franchise itself and everything pertaining to it, essential to its operation, are exempt from execution, and thus the matter turns upon the question whether railroad rolling stock is so essential. I do not think that that question is tested by whether the property is indispensable in the use of the franchise, but that, as put by the case of *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 737, 26 Atl. 49, if it is of a nature to be of practical use in the operation of the franchise. Rolling stock is essential, next to the track or right of way,—in fact, equally with them. True, rolling stock taken can be replaced, but often this is beyond the ability of the company, and we can easily imagine cases where seizure of rolling stock would stop the performance of public duties. So I think the common law exempts such rolling stock from execution. The convention which framed our Constitution must have been of this opinion when it inserted in article 11, § 8, the provision: "The rolling stock and all other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals." It is argued that this section can have no application to foreign corporations, but only to those chartered by this state. It is a principle that no state can, and therefore no state is presumed to intend to, legislate as to persons or things outside of its territory, and I would be inclined to concur—did at first concur—in that view; but that would establish a difference between the property of foreign and home corporations, found within the territory of the state. And in this connection we must remember that it is a proposition disputed by no one that a state having property of a nonresident within its territory may appropriate it to satisfy demands of her citizens. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. So I do not see but that the state Constitution would make all rolling stock of a railroad company, whether foreign or domestic, liable to execution when found within the state. If that provision of our Constitution had no application to property owned by a foreign corporation, then this car would not be leviable; but I think the Constitution applies to it.

It is said that this provision of the Constitution does not apply, for the reason that 64 L. R. A.

it makes rolling stock liable to execution only, and not to attachment, as execution is only the end of the law, issuing only upon a judgment, whereas an attachment goes at the opening of the suit, and is only a means to compel the appearance of the defendant. Such was the object of the ancient process of foreign attachment, according to the custom of London; but the modern doctrine is that attachment is not for the purpose of bringing the defendant into court, and that its object is to give the plaintiff execution against the thing attached,—to seize it, and create a lien upon it conditional upon the rendition of judgment. In this state, upon judgment, the order is not for another execution, but for sale under the attachment. 3 Am. & Eng. Enc. Law, p. 187; 4 Cyc. Law & Proc. 395; 1 Shinn, Attachm. § 2. I do not think that it was the intention of the convention to make railroad rolling stock liable to ultimate execution, and deny its liability to attachment, as attachment would often be the only process available for prompt seizure to answer ultimate judgment. The object of the section was to do away with the law exempting rolling stock and other movable properties of railroads and other corporations, and not to discriminate between writs of process.

Is the Norfolk & Western Company liable as garnishee, under the circumstances of the case? It had possession of this car under the circumstances stated in the answer. We must look at the character of this possession. The garnishee held the car under "an arrangement and understanding between the defendant and the garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives the loaded cars of the other, from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them as and when practicable, in due course of business, reloaded with freight, to some point on or near, or reached by, the line of the company owning them." Here is a contract between the two companies, vesting the Norfolk & Western Company with a valuable right, which it could carry into effect by reason of its possession of the car, but could not if it was seized and taken from it. The Pennsylvania Company had got the load of plaster from some point on its line, carried it in this car to Hagerstown, where its line

connected with the line of the Norfolk & Western, and the latter took up the car and hauled it to Shepherdstown; and, in consideration of so doing, it had the important right of loading that car, after discharge of the plaster from it, with freight at some point on its own line, hauling it over its own line, earning compensation thereby, and turning it over to the Pennsylvania Company for further transportation. The answer says it paid wheelage for this right. It is needless to endeavor to impress the fact that the use of a car to a railroad company to carry on its business is a valuable use. In short, the garnishee company had a subsistent contract for the possession and use of this car, and it had executed that contract, so far as was to its disadvantage, by haulage to the place to which the plaster was consigned, but had not yet enjoyed that part of the contract most beneficial to it, by loading it with freight on some part of its line, and earning compensation for its carriage. It had the right to keep the car until it returned it, loaded, to the Pennsylvania Company at Hagerstown, and it could not be levied upon and taken from it to defeat that right, because of principles of law that are beyond all question. What is such law? Drake, *Attachm.* § 462, states that law as follows: "It is an invariable rule that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself." "A plaintiff by garnishment cannot place himself in a superior position, as regards a recovery, than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant." 2 Shinn, *Attachm.* § 516. In *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 619, 38 L. ed. 573, 14 Sup. Ct. Rep. 717, we find the court saying: "The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor." "The service of garnishment neither changed nor interrupted the contractual relations existing between the Chicago Company and the St. Louis Company. The rights and equities existing and to arise out of those contractual relations were in no way terminated or defeated by that service." *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. 595, is pointed authority; also *Neill v. Rogers Bros. Produce Co.* 41 W. Va. 37, 23 S. E. 702. Therefore we hold that the Norfolk & Western Company could

not incur liability by the possession of that car. Liability could only arise from possession of it. It did not owe the Pennsylvania company anything. It had the right to use that car, regardless of the levy on it, and carry it to Hagerstown and return it to the Pennsylvania Company, under its contract with that company. It will not do to say that it could be liable by reason of the ultimate right of the Pennsylvania Company to have possession of the car, because the right of the Norfolk & Western would be defeated by the subjection of the car to the attachment,—its right to carry the car back to Hagerstown. It would be impracticable, under the circumstances, to subject such reversion. In fact, the court took no steps to ascertain the value of the reversion, as its order shows that it ascertained the value of the car as it stood at Hagerstown, without reference to any idea of reversion, and, finding it greater than the demand, gave a personal judgment against the garnishee.

The case of *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399, is very pointed in this case to sustain our decision. Loomis brought suit against a railroad company, and garnisheed another, having in its possession cars of the debtor company, just as in this case. It was held that "a railroad company is not liable to garnishment for cars received of a connecting line under running arrangements existing between them, such as are usually adopted by connecting lines throughout the country, whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as practicable in due course of business." But it is said that the answer of the company does not set up a contract as actually existing, but relies simply on a universal custom among railroad companies as to such traffic arrangement. This contention cannot be sustained in the face of the fact that the answer affirmatively avers that "an arrangement and understanding existed between the defendant and the garnishee companies." Those words plainly import a perfect contract, because, by the agreement and understanding of the parties, there is a union of minds upon a specific thing. What if the answer does say that such agreement was according to the universal custom in such cases among railroad lines? That does not destroy the statement that there was an agreement and understanding between the parties to a certain effect. The averment as

to custom is surplusage, merely stating that the contract conformed to such custom. Therefore we hold that, by reason of the contractual relation between the two companies, the car was not attachable; the garnishee was not subject to garnishment and liability. It is argued that there was no contract such as would forbid the Pennsylvania Company from taking the car from the Norfolk & Western Company at any time. There was that contract. It forbade the Pennsylvania Company from taking the car from the Norfolk & Western Company. The latter company had the right to do as it did under the contract; that is, take the car to Luray and load it with freight, and haul it to the end of its line, and there deliver it to the Cumberland Valley Railroad, to be carried over that road and delivered to its owner.

It may be thought that if the attachment created a lien on the car, conceding the right of the Norfolk & Western, under said contract, to carry the car back to Hagerstown, yet the attachment lien still clung to the car; and, it giving Wall a right superior to the right of the Pennsylvania Company, it was the duty of the Norfolk & Western to carry the car back to Jefferson county, to be made amenable to the attachment. It is an accepted principle of law that the laws and process of one state have no force outside of that state, and to say that the lien of the attachment clung to the car in its physical absence from the state would seem to violate that principle of law. This lien exists only under the attachment law and process, and is not a contractual lien. It passes no title. Where there is a mortgage or other conveyance passing the title to movable property, doubtless that title can be asserted in another state so as to recover the property there. So, likely, will a contractual lien avail there. How far this doctrine goes is not well settled. Even such mortgages or liens passing title have been held subordinate to rights acquired in the state to which the property is removed by third persons. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Walcworth v. Harris*, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; *Corbett v. Littlefield*, 84 Mich. 30, 11 L. R. A. 95, 22 Am. St. Rep. 681, 47 N. W. 581; *Hornthal v. Burwell*, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556, 13 S. E. 721; *Harrison v. Sterry*, 5 Cranch, 289, 298, 3 L. ed. 104, 106; *Story, Conf. L. § 402*. These authorities are not cited as pointed on this question, for they involve rights of third persons, but are cognate. In our case the rights of no third person had intervened. We do not say whether or not Wall could 64 L. R. A.

enforce this lien in another state. If he could not, the lien would end at the state line, and the garnishee, having rightfully taken the car to Hagerstown, would be under no obligation to return it. We must pass simply on the rights between Wall and the Norfolk & Western. The company had right to take the car loaded to Hagerstown. It seems clear that at that point it had the right to end its obligation to the Pennsylvania Company by delivery of the loaded car to it. It was not under obligations to assume the burden of carrying the car back to Jefferson county. Its contract placed upon it no such burden. On the contrary, that contract gave it the right to end its relation with the Pennsylvania Company by delivery of the car, and thus end its obligation, as the right to end an obligation under a contract is an essential part of the contract. The Norfolk & Western Company could not be called upon to unload the car, for that would be a violation of the rights of the shipper in the middle of the transit, and the company could not be required to haul the load back to Jefferson county, first, because that, also, would be a great wrong upon the shipper of the load in the car; and, second, because it would place a burden upon the Norfolk & Western which its contract did not put upon it. Thus we cannot see that the garnishee company was under any obligation to return the car.

There is another reason still, of very controlling force, exempting the garnishee from liability, and that is that clause of the Federal Constitution giving power to Congress to regulate commerce among the states, and the act of Congress providing "that every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road . . . passengers, . . . freight and property on their way from any state to another state, . . . and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination." It has been frequently held that the powers of the Federal government under said clause of the Constitution are exclusive of all power in the state. This power in the national government was held in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, and *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173, to be "designed to remove trammels upon transportation between different states which had previously existed, and to prevent a creation of such trammels in the future, and to facilitate railway transporta-

tion by authorizing the construction of bridges over the navigable waters of the Mississippi . . . to reach trammels interposed by state enactments. . . . The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation. . . . So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself." It would be easy to cite many Federal cases to show that any state legislation hindering, obstructing, or placing burdens upon interstate commerce are void, and that no state legislation can be so used or applied as to effect this result. No one can claim that the attachment laws of West Virginia are void under the commerce clause of the Federal Constitution, but that the use of the writ of attachment in this case works a hindrance of the freedom of interstate commerce; that is, that the writ is abortive and of no effect, applied as in this case. Any statute or action by state authorities which amounts to a regulation of commerce between the states is void; and, if it works obstruction or even retardation of such commerce, it is, in law, a regulation of commerce. Thus, a state tax on telegraph messages beyond the state is void for that reason. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067. A state act requiring a telegraph company to deliver messages within a mile of the office was held void under the commerce clause. *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126. A state statute prohibiting a greater charge for a shorter than for a longer haul was held invalid because it tended to hinder interstate commerce, from the fact that it might prohibit, or operate to prohibit, the railroad from carrying freight from another state at lower rates than it could afford to carry for from points within the state. It worked a consequential effect upon business outside the state. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277. A steamboat was engaged in navigating a river between two towns in Michigan, but it was in a habit of carrying goods destined for points in another state. The court said that the case related to transportation on navigable waters, and, further, it was unable to draw any distinct line between the authority of Congress to regulate an agency employed in commerce between the states, and when it is confined in its action entirely within limits within a sin-

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gle state. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary of the other, would not oust the Federal power under the commerce clause. *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, it was held that the statute requiring a steamboat to carry colored passengers in the same cabin with white was unconstitutional, in requiring those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, and was void under the commerce clause. These cases will show that, no matter what the form, mode, or means by which such commerce is impeded or obstructed, it is void. 4 Elliott, Railroads, § 1664. Even the states' power of taxation, large as it is, cannot be exerted on interstate commerce, because it tends to lessen it and impair it. *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. It is true that, in order to brand state law or action as contrary to the Federal Constitution and law, the operation of such state law or action must be direct and substantially hurtful to such commerce, not merely remotely hurtful. *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95. But is not the operation of this writ of attachment a direct impediment and obstruction of interstate commerce? If this levy is given any effect, it would take the car from the custody of the Norfolk & Western after it had started on its mission of carriage from one state to another, while yet its freight was under its roof and entitled to shelter from the elements, and the security of its inclosure. Its transit with its freight had not yet ended when the writ was levied. The protection and security of the plaster were a part of the function of interstate carriage, and the railroad company and consignee were entitled thereto, just as much as they were entitled to the car for transportation to the point of consignment. Not only so because that attachment would prevent the Norfolk & Western Company from taking that car to some point on its line, loading it with goods, and hauling it back over its road, and prevent the Cumberland Valley Road from hauling in Maryland and Pennsylvania, and prevent the Pennsylvania road from hauling it on to Newark,—it would prevent those companies from earning freight for such return load, and would prevent citizens of West Virginia and another state from the benefit of such car in transporting their goods, and thus deprive them, as consignor and consignee, from the

full enjoyment of the benefit of interstate commerce. I cannot imagine anything more directly operative on interstate commerce than an attachment so used. The Norfolk & Western Railroad Company passes from state to state with its line, and is engaged in the business of interstate commerce, as held in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958. It is a link and part of lines of railroads affording communication and transportation between different states.

It will not do to say that we can find no act of Congress saying that state process shall not be served upon railroad cars running from state to state, and that, until there is such act, state process can be so used. Powers of the national government were given to it in this commerce matter by the states at the foundation of the government, in order that the indispensable transaction of interstate commerce should be under one single governmental power, for the sake of uniformity, so that it would not be hampered and crippled by the action—the different and diverse and variant action—of many states, which would forbid the growth of commerce and prosperity of all the states; and this power in the nation is exclusive. It is well established that, “so long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that that commerce shall be free and untrammelled.” *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The power

is exclusive, and “the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.” *Robbins v. Shelby County Tazewell Dist.*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

I have already said that our state attachment statute is entirely valid, but that it cannot be used in a manner and in cases in which it would operate to infringe upon the exclusive power of the Federal government as to interstate commerce. It may be asked, if this is so, what becomes of that section of the very Constitution of this state providing that rolling stock shall be liable to execution? I apply to it the same rule as the attachment law is subject to. Both are subject to the paramount force of the national Constitution, as it is an admitted principle that a state Constitution, can no more detract from the force of Federal law than can a state statute. It may be that this ruling will render the application in practice of the provision of the state Constitution making liable the rolling stock of foreign corporations, or even of railroad companies created by the state, very narrow; but, if so, it is the result of the force—the paramount force—of the Federal Constitution.

For these reasons, we reverse the decree of the Circuit Court, and dismiss the plaintiffs suit.

MINNESOTA SUPREME COURT.

STATE of Minnesota *ex rel.* P. G. HOFFMAN
v.

Philip C. JUSTUS.

(.....Minn.....)

*Laws 1903, chap. 362, p. 652, which prohibits the keeping open of butcher shops for the sale of meats, and other business places, on any portion of Sunday, while it authorizes confectionery and tobacco

*Headnote by LOVELY, J.

NOTE.—As to the constitutionality of laws prohibiting the doing of business on Sunday, see also cases in *note* to *Judefind v. State*, 22 L. R. A. 721; and the later cases in this series, of *People v. Bellet*, 22 L. R. A. 696; *People v. Havnor*, 31 L. R. A. 689; *Eden v. People*, 32 L. R. A. 659; *Ex parte Jentsch*, 32 L. R. A. 664; *Tacoma v. Krech*, 34 L. R. A. 68; *Denver v. Bach*, 46 L. R. A. 848; and *State v. Sopher*, 60 L. R. A. 468, 64 L. R. A.

to be sold in an orderly manner on that day. —Held not to be such an unreasonable discrimination between these several occupations as to invalidate the law for violation of §§ 33, 34, art. 4, of the Constitution of this state, prohibiting special or class legislation.

(February 5, 1904.)

APPLICATION for a writ of habeas corpus to secure the discharge of relator from custody to which he had been committed for alleged violation of the statute prohibiting the transaction of business on Sunday. *Writ discharged.*

The facts are stated in the opinion.

Messrs. Lawler & Arnold, for appellant:

This law is not general and uniform in its operation, and the classification thereunder is purely arbitrary.

Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; *State v. Petit*, 74 Minn. 376, 77

N. W. 225; *State ex rel. McCue v. Sheriff of Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112.

No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar.

State v. Wagener, 69 Minn. 206, 38 L. R. A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; *Murray v. Ramsey County*, 81 Minn. 359, 51 L. R. A. 828, 83 Am. St. Rep. 379, 84 N. W. 103; *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531; *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965.

Messrs. W. B. Douglas, Attorney General, and *Thomas R. Kane* for respondent.

Lovely, J., delivered the opinion of the court:

Habeas corpus proceedings originally brought in this court to determine the legality of petitioner's imprisonment upon a complaint under chapter 362, p. 652, Laws 1903, which prohibits the sale of articles of merchandise on any portion of the Sabbath day. Under a proper complaint defendant was convicted of the offense charged, and is held upon a warrant issued thereon. The objection to plaintiff's detention rests upon the ground that this statute is invalid, as contravening the provisions of §§ 33, 34, art. 4, of the state Constitution, prohibiting partial or class legislation. The act under which petitioner was convicted reads as follows: "All manner of public selling or offering for sale of any property upon Sunday is prohibited, except that meals may be sold to be eaten on the premises where sold or served elsewhere by caterers; and prepared tobacco in places other than where spirituous or malt liquor or wines are kept or offered for sale; and fruits, confectionery, newspapers, drugs, medicines, and surgical appliances may be sold in a quiet and orderly manner: Provided, however, that nothing in this section shall be construed to allow or permit the public sale or exposing for sale of uncooked meats, fresh or salt, or groceries, dry goods, clothing, wearing apparel of any kind, or boots or shoes." While it is necessarily conceded that, as a police regulation, the law prohibiting work on the Sabbath is within the scope of legislative power and authority, it is insisted for petitioner that this statute involves and authorizes a discrimination for a favored class, which is so unreasonable as to convict the legislature of gross partiality in its adoption; that its provisions prohibit the sale of meats on the morning hours of Sunday, which had been previously permitted under § 6517, Gen. Stat. 1894 (§ 223, Penal Code), which is regarded as especially obnoxious to the re-

tail city butchers, who are particularly interested in these proceedings, since the provision in the act abrogates the privilege previously conferred, but retains the right of dealers to sell fruit, confectionery, newspapers, drugs, medicines, and surgical instruments in a quiet and orderly manner.

It is insisted that there is no intelligent or apparent reason for these distinctions in the classes referred to. The right to dispose of drugs, medicine, and surgical appliances is so clearly a necessity in favor of health and life that it is not suggested that by the exception the vendors of these articles are improperly favored in the act, or that newspapers may be properly sold, but that there is no reason why cigars, candy, and tobacco in packages can be sold on Sunday, while uncooked meats, which are as much of a necessity, are restrained and forbidden. The consideration of this subject is not entirely new. Section 6513, regulating labor on Sunday, was passed upon by this court when we have held that keeping open a barber shop on Sunday was not a work of necessity, and that a statute prohibiting the same was not unreasonable discrimination. In the case referred to it was claimed that the act was invalid, as being class legislation, and we held that in the exercise of the police power in establishing a day of rest a very large discretion must be allowed to the legislature in determining what kind of labor or business should be prohibited, and what are and what are not works of necessity or charity; and, unless the classification is manifestly purely arbitrary, and not founded upon any substantial distinction or apparent natural reason which suggests the necessity or propriety of different legislation, the courts have no right to interfere with the exercise of legislative discretion. Courts, it was there said, would take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more and during later hours, than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday, the employees would ordinarily be deprived of rest during half of that day. *State v. Petit*, 74 Minn. 376, 77 N. W. 225. The purpose of the Sunday law in this opinion was held to be, not to enforce religious observances, but, in the exercise of legislative judgment, to protect those who were engaged in servile labor from imposition by the public or employer upon their enjoyment of rest and recuperation, in furtherance of what has been

well expressed in the sentiment of a modern aphorism that "He who ordained the Sabbath loves the poor." Very many of the population of our cities would not have the day of rest which the Sunday laws afford were it not for these provisions which have made this manifestly just and humane purpose the subject of legislative cognizance and protection, and if it can be found from a consideration of the way in which the people of our cities live and enjoy the repose and relief from labor every Sabbath day accorded by the Sunday law, and that there is to any sensible extent or degree a distinction in securing the proposed purposes of the law between the keeping open of butcher shops, grocery stores, and the sale of uncooked meats or family supplies that does not apply to the sale of confectionery and tobacco, the wisdom of the selection designated in the law is with the legislature, and not the courts.

It may be said here quite as pertinently as in *State v. Petit*, 74 Minn. 376, 77 N. W. 225, that the object is to give essential and useful benefits to employees from compulsory servile labor on Sunday, and it is not to be disputed that a custom which existed of making purchases of meats and the prohibited merchandise on Sunday required the employment during portions of that day of a large number of clerks and laborers who are engaged in and about these establishments when they serve the public, and that the purchase of meats and groceries therein can, without extreme disadvantage, be made on the previous day. This may impose some extra burden upon the patrons of such establishments as well as the proprietors; but it will, as it seems to us obvious, relieve the persons to be protected to a much greater extent than in the sale of confectionery and tobacco, and give the desired bene-

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fits more generally than in the occupation permitted by the statute. Whether the discrimination be justified by wise legislative policy, we are not required to determine. That is the province of the lawmaking power, not ours. It is our duty to ascertain, if possible, whether, from our knowledge of existing conditions, there is such a sensible distinction between these occupations as would furnish a basis of judgment in making the same. It is undoubtedly the custom of a large number of our people in the cities to visit public parks, which have been to a considerable extent provided by the liberality and civic spirit of our municipalities for the enjoyment of the occasion. The statute clearly prohibits the sale of intoxicating drinks in any form on Sunday, and only allows confectionery to be sold, which is on many occasions required by parents for the children and the more youthful class of visitors thereto. Tobacco has come to be among a very large portion of the respectable people of this country a necessity in the appreciation of appropriate Sunday rest and recreation, which cannot, in a practical way, be provided for beforehand in the suitable enjoyment of the period of recuperation and rest which makes the day of rest beneficial. In view of these differences, as well as the number of those engaged in these occupations and the nature and character of the business, it seems apparent that a distinction exists between the occupations distinguished in the statute, so far at least as to make the classification therein reasonably obvious in the judgment of the court; and we cannot say that an unusual favoritism is so clear that we must convict the legislature of the violation of the constitutional provisions invoked for the petitioner.

The writ is discharged.

ILLINOIS SUPREME COURT.

Mary A. ISLE, Admr., etc., of Henrietta Sackman, Deceased, Appt.,
v.

Kate CRANBY.

(199 Ill. 39.)

1. A person of unsound mind, who has not been adjudged insane, or for whom no conservator has been appointed, may bring a suit by next friend.
2. A suit instituted by the next friend of one alleged to be of unsound mind need not be dismissed in case such person appears by attorney, protests that he is of sound mind, and moves to dismiss the bill; but the court may determine whether or not it should retain jurisdiction by investigating complainant's mental condition.

(October 25, 1902.)

NOTE.—Right of insane person to institute proceedings by next friend.

- I. Introduction, 513.
- II. In general, 513.
- III. Before inquisition of lunacy.
 - a. In general, 518.
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- IV. After inquisition of lunacy.
 - a. In general, 528.
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 - c. Where committee refuses to act, 528.
 - d. Where no committee has been appointed, 528.
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 - f. In case of nonresident having no committee within jurisdiction, 529.
- V. Distinction between suits in equity and at law.
 - a. In general, 529.
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- VI. Conclusion, 533.

I. Introduction.

It was formerly held that idiots, mad men, and such as were born deaf and dumb were incapable of suing, because they wanted reason and understanding; but actions may now be maintained in their names, and prosecuted on their behalf. Co. Litt. 135b.

This right to sue seems to have been uniformly admitted from the time of Fitzherbert (F. N. B. 63*g*), and is now never contested.

For some time after the right of lunatics and deaf and dumb persons to sue was conceded, the right of idiots to appear in the courts was still questioned. And the distinction between idiocy and lunacy was always carefully observed in the old cases. Indeed, the various degrees of insanity were formerly clearly defined, and persons *non compos mentis* divided into several classes. These classes are stated in Beverley's Case, 4 Coke, 124, to be four: "(1) Idiot or fool natural; (2) he who was of good and sound memory, and by the visitation of God has lost it; (3) *lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*; (4) by his own act, as a drunkard." And it is added that there is a great difference between an idiot, a *nativitate*, and he who was of sound memory and becomes, by the visitation of God, of unsound memory. The careful observance, in England, of this distinction between idiots and lunatics was doubtless due, in part at least, to the fact that in the case of idiots the King, who was regarded as the natural protector of all persons *non compos mentis* as *parens patrie*, had an absolute proprietary interest in their lands, but in the case of lunatics his interest was only that of a trustee.

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County dismissing a suit filed by the next friend of Henrietta Sackman, to compel defendant to account for certain moneys, notes, mortgages, and other property in her possession alleged to belong to Mrs. Sackman. *Reversed*.

The facts are stated, in the opinion.

Messrs. James Lindon and Guy Brockway, for appellant:

Under the peculiar circumstances of this case, it was absolutely necessary for the complainant to sue by next friend. No conservator could have been appointed, for the complainant was in the hands of the defendant in Cook county, and her residence was in Lake county; and a proceeding for the ap-

peal, and sometimes is of good and sound memory, and sometimes *non compos mentis*; (4) by his own act, as a drunkard." And it is added that there is a great difference between an idiot, a *nativitate*, and he who was of sound memory and becomes, by the visitation of God, of unsound memory. The careful observance, in England, of this distinction between idiots and lunatics was doubtless due, in part at least, to the fact that in the case of idiots the King, who was regarded as the natural protector of all persons *non compos mentis* as *parens patrie*, had an absolute proprietary interest in their lands, but in the case of lunatics his interest was only that of a trustee.

In the United States this distinction has not been observed except in a few of the early cases, and it is said in *Holzheiser v. Gulf, W. T. & P. R. Co.* 11 Tex. Civ. App. 677, 33 S. W. 887, that the distinction made in England between idiots and lunatics, if really affecting the question as to the right to sue by next friend, cannot exist under our law; that the reason why the courts should hear complaints in their behalf when made by next friend exists in one case as well as in the other.

Therefore, in making this note this distinction has been ignored, and no effort has been made to marshal the cases as to suits by idiots in a division by themselves.

There is but little conflict in the decisions as to the right of a next friend to maintain a suit on behalf of an insane person, and the substance of such decisions, showing the general principles governing such actions both at law and in equity and before and after an adjudication of lunacy, has been summed up in the conclusion of this note.

II. In general.

The earliest reported case of proceedings instituted on behalf of an insane person by next friend is that of *Dennis v. Dennis*, 2 Wms' Saund. 328, 2 Keble, 691, in the reign of Charles II., in which a next friend was specially admitted by the court to represent an idiot in what seems to have been a writ of error coram nobis to annul a judgment taken at the same term against the idiot, who had appeared in the

pointment of a conservator only, must be in the county in which the person resides.

Ill. Rev. Stat. chap. 86, § 1; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88.

On a proper showing, it is the court's duty to appoint a next friend to sue on behalf of an insane person; otherwise an insane person not under conservatorship is made an outlaw.

10 Enc. Pl. & Pr. pp. 1223, 1224; *Light v. Light*, 25 Beav. 248; *Rock v. Slade*, 7 Dowl. P. C. 22, 1 Arnold, 346, 2 Jur. 993; 1 Smith, Ch. Pr. 7th ed. p. 311; Archbold, Pr. 13th ed. 1047; Foster, Fed. Pr. § 33; Foster, Pr. First Book, p. 317; 11 Am. & Eng. Enc. Law, p. 126; Buswell, Insanity,

§ 120; Dan. Ch. Pl. & Pr. 6th Am ed. **9, 82, note a, 86, note 1; *Chicago & P. R. Co. v. Munger*, 78 Ill. 300; *Brown v. Riggin*, 94 Ill. 560; *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694; *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88.

Messrs. Langworthy & Raymond for appellee.

Hand, J., delivered the opinion of the court:

On the 2d day of October, 1900, Mary A. Isle entered a motion in the circuit court of Cook county that she be appointed next friend of her mother, Henrietta Sackman, a

original action by attorney, and not by next friend, as she claimed she should have done. It does not appear whether or not the plaintiff in error had been judicially declared insane and a committee appointed, and nothing is said in the opinion as to the right to sue by next friend. But the right must have been conceded, since the next friend was specially admitted by the court, and no objection appears to have been made by anyone to his acting. A footnote states that it is held that, if an idiot sue, he must appear in person, and anyone who prays to be admitted as his friend may sue for him; but that a lunatic, or one who becomes *non compos mentis*, must appear by guardian, if within age, and by attorney, if of full age. This undoubtedly was the old rule in actions at law.

Daniel's Chancery Pleading & Practice, 6th Am. ed. p. 9, cites West v. Davis, Rolls 1863, W. No. 83, to the proposition that persons incapable of acting for themselves, though not coming under the description of idiots or lunatics, have been permitted to sue by their next friends without the intervention of the attorney general; but it has been impossible to obtain access to the case itself.

To this same proposition he cites, also, the unreported case of Liney v. Wetherley, Ld. Red. 30, n., which is universally cited by all the text-books and many of the decisions to sustain the right to sue by next friend in case of partial incompetency. In this case, a decree in which was given in December, 1760, a decree on supplemental bill in March, 1779, the plaintiff was a person deaf and dumb, suing by her next friend.

In *Gleddon v. Trebble*, 9 C. B. N. S. 367, 30 L. J. C. P. N. S. 160, which was an action by the wife of a lunatic, not so found in his name, for the recovery of a debt, the court made absolute a rule for payment of the money to the wife. It is said in the argument that the action was founded upon a supposed implied authority in the wife to bring it in the name of her husband, he being a lunatic; but the wife is not here called a next friend, and there is nothing said as to the practice of instituting suits for lunatics by their next friends.

A similar case is *Rock v. Slade*, 7 Dowl. P. C. 22, 1 Arnold, 346, 2 Jur. 993, in which it is also held that the wife of a lunatic who has no committee has sufficient implied authority to sue in the name of the incompetent for a sum of money due him. Lord Abinger said: "It is 64 L. R. A.

every day's practice to sue in the name of a lunatic, and I never heard any question as to the propriety of such action where no committee was appointed."

As these two cases are sometimes cited to sustain the right of an insane person to sue by next friend, they have been included in this note, although there is nothing to show that the wife in either case sued as next friend.

A case frequently cited against the right of a lunatic to institute proceedings by next friend is *Wartnaby v. Wartnaby*, Jac. 377, but there is nothing in this case to indicate that there was any next friend in the suit, except the fact that the defendant alleged that the bill was not the bill of the plaintiff, but that somebody was using her name without her authority; she not being in a state of mind competent to give authority; and the court intimates that, if the mind of a person were gone, so that he could not, as a matter of choice, authorize a suit, he might be treated as if dead, and the bill taken from the files.

This case was cited in *Blake v. Smith*, Younge, 596, to sustain a motion by defendant to have the bill taken from the files on the ground that it had been filed in the name of the plaintiff, who was an imbecile, at the instance of defendant without the plaintiff's authority. The court referred the motion to the master to inquire what authority, if any, was given by the plaintiff, and whether the institution of the suit was for his benefit. Upon the master reporting that no authority had been given by plaintiff, and that the bill was filed at the instance of the defendant, and was not for the plaintiff's benefit, the bill was taken from the files.

Neither of these cases seems to be of any value on the question under discussion.

On motion of defendant after decree in *Hartley v. Gilbert*, 13 Sim. 596, the proceedings were stayed until after the opening of a commission of lunacy issued against his wife, who was the plaintiff in this case suing by next friend, the court saying that prima facie there was good ground for supposing that the suit, instead of being conducted by the next friend, would be conducted under the jurisdiction in lunacy. Apparently, however, the wife sued in this case by next friend because she was a married woman, and not because of her lunacy.

Hill v. Hill, 3 Ont. L. Rep. 202, was an action by a lunatic wife by her next friend, for alimony. Nothing is said as to the propriety

distracted person, to file and prosecute a bill in chancery in the name of Henrietta Sackman against Kate Cranby. The bill desired to be filed was presented to the court with the motion, and sought to compel Kate Cranby to account for certain moneys, promissory notes, mortgages, and other property in her possession belonging to Henrietta Sackman. The motion was supported by the affidavit of Mary A. Isle, to the effect that Henrietta Sackman for many years last past had been a distracted person, who, by reason of her unsoundness of mind, was incapable of managing or caring for her estate; that Henrietta Sackman had no conservator; that she was then under the control of Kate Cranby, who was also her daughter, and that the affiant had no interest in the

subject-matter of the suit, or otherwise, adverse to the interest of Henrietta Sackman. Thereupon the court entered the following order: "In the matter of the application of Mary A. Isle to be appointed as next friend to file and prosecute the bill of Henrietta Sackman, a distracted person, against Kate Cranby. This matter coming on to be heard on the motion of Mary A. Isle, supported by the affidavit of said Mary A. Isle, and it appearing to the court, by the said affidavit, that the said Henrietta Sackman is a distracted person and that there is no conservator of the estate of said Henrietta Sackman, and that the said Mary A. Isle is a proper person to bring suit as next friend of said Henrietta Sackman, it is ordered that said Mary A. Isle be, and she is

ty of the action, and it does not appear whether she sued by next friend because of insanity or because she was a married woman.

The leading American case against the right of a lunatic to sue by next friend is that of *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, in which it is held that a bill in equity cannot be maintained in the name of a lunatic or insane person by his next friend to set aside a deed made by the incompetent, but that such a suit can only be maintained by a conservator who has the custody and control of the estate and rights of the lunatic. It does not appear whether a conservator had been appointed for the lunatic in this case or not, but the court in the case of *ISLE V. CRANBY*, in discussing the *Covington* Case, says that after a careful reading of the opinion he is inclined to think that a conservator had been appointed, but that, if the doctrine of the case was that an insane person not so adjudged could not sue by next friend, it is contrary to the weight of authority and in conflict with later decisions of the court. The case is also distinguished in *Roughan v. Morris*, 87 Ill. App. 642, *infra*, III. a.

And in *Brown v. Riggin*, 94 Ill. 560, a bill in chancery was filed on behalf of an insane person, by his next friend, and the propriety of the form of action was apparently recognized. It does not appear whether or not there had been a finding of lunacy.

So, also, in *Ronan v. Bluhm*, 173 IH. 277, 50 N. E. 694, in which one of the complainants in the bill was an insane person suing by next friend, there is nothing to show whether or not there had been an inquisition of lunacy. The court makes no comment on the fact that the insane complainant was represented by next friend, and seems to recognize such method of bringing the suit as being correct.

On a motion to tax costs, where a suit instituted by a next friend of an incompetent person to set aside a deed made by the incompetent was voluntarily dismissed by the next friend, the court said, in *Nance v. Stockburger*, 112 Ga. 90, 81 Am. St. Rep. 22, 37 S. E. 125, that it knew of no law in Georgia that authorized anyone, without authority from the court, voluntarily to institute a suit as next friend for an imbecile or lunatic; that when the property of such a person was being wasted, or had been seized wrongfully by others, it was, under the statute, the duty of the ordinary to appoint

a guardian for such imbecile or lunatic. The court added, however: "We do not mean to say that a person could not, as next friend, without order of court, bring such an action for the protection of the rights of an irresponsible person; but we are confident that when it is done, and the next friend voluntarily dismisses his action, he has no right to ask that the court render a judgment for costs against the party for whose benefit he pretends to be acting."

In an earlier Georgia case—that of *Wilson v. Ansley*, 47 Ga. 278—a suit was brought in the name of a lunatic by her next friend; and, since nothing is said in the opinion or briefs as to the propriety of the form of action, it seems that the right so to sue must have been conceded.

And it has since been held that, under Ga. Civil Code, § 4283, providing that persons not *sui juris* may appear either by guardian or next friend, one *non compos mentis* may sue by any competent person as his next friend; and the fact that a suit is brought by a person as next friend of an incompetent, instead of by the incompetent by his next friend, though irregular according to the strict rules of pleading, is held to be immaterial in the absence of a demurrer at least. *Dent v. Merriam*, 113 Ga. 83, 38 S. E. 334.

The right of a next friend to institute a suit for divorce on behalf of a lunatic is denied in *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; but the reasoning of the court seems to apply to suits for divorce only, the right to institute such suits being regarded as strictly personal to the party aggrieved, and to argue nothing against the right to bring suits generally by next friend.

In New Jersey a bill cannot be filed by a next friend without special authorization from the court. *Dorshelmer v. Roorback*, 18 N. J. Eq. 438.

And a bill which avers the lunacy of a complainant, and that she sues by her next friend, without recital of any adjudication that the complainant is a lunatic, or that there has been any order appointing the person who seeks to act for the lunatic as her guardian or next friend, is demurrable. *Palmer v. Sinnickson*, 59 N. J. Eq. 530, 46 Atl. 517.

And when idioy or lunacy is not partial a court of equity will not allow a suit to be brought on behalf of an idiot or lunatic by a next friend; but when a person is only partially

hereby, appointed as next friend of said Henrietta Sackman, to file and prosecute the bill in chancery presented with said motion, said bill being against Kate Cranby." Thereupon the bill, which was brought in the name of "Henrietta Sackman, a distracted person, by Mary Isle, her next friend, duly appointed theretofore by this court," was filed, which afterwards having been amended, Kate Cranby appeared by her solicitor, and filed a demurrer thereto, and Henrietta Sackman appeared by her solicitor, and moved the court to dismiss the suit. The solicitor for Mary A. Isle, as next friend of Henrietta Sackman, moved the court to set the motion of Henrietta Sackman to dismiss the suit down for hearing for the purpose of determining the mental condition of Hen-

rietta Sackman. This the court declined to do, but sustained the motion of Henrietta Sackman and the demurrer of Kate Cranby, and entered a decree dismissing the bill of complaint, as amended, "for want of jurisdiction, for the reason that the same is brought by the next friend, and not by a conservator," which decree has been affirmed by the appellate court. Henrietta Sackman has died since the filing of the transcript in that court, and Mary A. Isle, having been appointed her administratrix, and having been substituted in her stead in that court, has prosecuted an appeal to this court.

The first question presented by this record is, Was this suit properly brought in the name of Henrietta Sackman, a distracted person, by Mary A. Isle, her next friend?

incapable, as one merely deaf and dumb, the court will appoint a next friend to be joined with him in the suit, and to conduct it for him. *Dorshemer v. Roorback*, 18 N. J. Eq. 438.

But both of these cases are criticized in *Collins v. Topplin*, 63 N. J. Eq. 381, 51 Atl. 933, *infra*, III. a.

The court says, in *Wood v. Throckmorton*, 26 Colo. 248, 57 Pac. 699, that, persons *non compos mentis* not being able to judge for themselves as to the bringing of an action, their rights must be presented to the court for adjudication through the intervention of a next friend, or someone authorized to represent him, though not every action instituted by a next friend should be permitted to continue; that proper and necessary suits for the benefit of the incompetent should be encouraged, but that it is in the discretion of the court to allow an action so instituted to proceed or not.

It was said to be self-evident in *Kerwin v. Hibernia Ins. Co.* 35 La. Ann. 33, that the petitioners, who had brought a suit in equity for themselves and on behalf of minor brothers and sisters and their mother, who was of unsound mind, not being curators of the alleged insane person, had no capacity to bring her into court, and that no judgment rendered in such suit would be *res judicata* as to the alleged insane mother.

A case which is of value on this question only as an indirect denial of the right of a lunatic to sue by next friend is that of *Ruchanan v. Rout*, 2 T. B. Mon. 114, in which it is said that it is well settled that a lunatic must appear by guardian if within age, or by attorney if of full age. This was an action of trespass brought by a lunatic by her attorney, and it was objected that the plaintiff should have appeared by her committee; but the court said that it did not appear that the lunatic was within age, and, if she was of full age, according to the well-settled doctrine of the common law she could appear only by attorney.

This case cites, as authority on the question, *Cameron v. Pottinger*, 3 Bibb, 11, where it is said that a lunatic, or one who becomes *non compos mentis*, must appear by guardian if within age, and by attorney if of full age. But both these cases were actions at law, and were decided according to the old common-law principles, and, while nothing is said as to any distinction between suits at law and in equity, it seems reasonable to suppose that the court con-

sidered and intended to decide only the proper mode of procedure in the particular suit then before it, which was one at law.

So, likewise, in *Amos v. Taylor*, 2 Brev. 20, it is said, *obiter*, that one who becomes *non compos mentis* must appear by guardian if within age, or by attorney, citing *Beverley's Case*, 4 Coke, 124b.

There is no New York case expressly deciding the question, though in *Runberg v. Johnson*, 11 N. Y. Civ. Proc. Rep. 283, an unreported case, decided February 24, 1885, is referred to incidentally, in which a person, without notice to the nominal plaintiff, and in fact in open hostility to her, had procured an order appointing him her next friend for the purpose of commencing an action to set aside a conveyance of real estate, and the action was brought in her name by him as next friend. It was held that such a procedure was unauthorized by any law or practice in the state, but this seems to be on the ground that the next friend was acting in hostility to the incompetent, and does not seem to go so far as to hold that a suit could never be prosecuted on behalf of an incompetent by next friend.

And Chancellor Kent said, in *Malin v. Malin*, 2 Johns. Ch. 238, that, if a person has religious scruples in regard to becoming a party to a suit, which cannot be surmounted, and this shall be made to appear either by affidavit or the report of the master, perhaps she may be permitted to become plaintiff by her *prochein ami*, and that a person incompetent to protect himself from age or weakness of mind, or from some religious delusion or fanaticism, ought to come under the protection of the court.

The right of an insane person to sue by next friend is recognized in a *dictum* in *Allen v. Babcock*, 1 Harr. (Del.) 348, where the court says, in discussing the right of a lunatic to conduct proceedings by next friend, that as to this question a late author (citing *Shelford, Lunatics*, 395) lays it down that a lunatic can sue or defend by next friend. In this case, however, the lunatic was defending.

In *Plympton v. Hall*, 55 Minn. 22, 21 L. R. A. 675, 56 N. W. 351, it is held that an action on behalf of a person incapable of acting for himself, as a lunatic, may be brought in his name, and the court will authorize some suitable person to carry it on as next friend or guardian *ad litem*.

In *King's Case*, 161 Mass. 46, 36 N. E. 685,

We are of the opinion it was. Formerly the right of idiots and lunatics to sue in the courts was not recognized, but this rule has been universally abrogated, and at the present time such persons are as much entitled to have their rights settled by the courts as though they were sane. If an idiot or lunatic have a conservator, he should be represented by his conservator, unless for special reasons—as that the interests of the two are adverse—it be proper that some other person be appointed to represent him as next friend. If, however, a person of unsound mind has not been so adjudged, or he has no conservator appointed for him, the suit or proceeding is brought in the name of the incompetent by some responsible party to be appointed to represent him as his next

friend. Mr. Daniell, in his work on Chancery Practice, thus states the rule: "Suits on behalf of a lunatic are usually instituted in the name of the lunatic; but, as he is a person incapable, in law, of taking any step on his own account, he sues by the committee of his estate, if any, or, if none, by his next friend, who is responsible for the conduct of the suit." Dan. Ch. Pl. & Pr. 5th ed. p. 83. In Story's Equity Pleading the author (§ 66) says: "Where persons are incapable of acting for themselves, although not strictly either idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as their next friend. But in every such case it is in the discretion of the court to allow the suit to proceed or not;

on appeal from the dismissal of a petition for writ of habeas corpus to obtain the release of a person from an insane asylum, although nothing is decided as to the right to sue by next friend generally, the court holds that, if the person imprisoned is a minor, or if there is reason to believe that he is not of sound mind, a next friend or guardian *ad litem* may be appointed by the court; and that, after a next friend or guardian *ad litem* has been thus appointed, a mere stranger, who shows no interest in the controversy, and by whom the petition was filed, cannot control the proceedings, and has no right to appeal from the decision of the court.

Upon appeal from a judgment remanding an insane petitioner for writ of habeas corpus to an insane asylum, it was held in *King v. McLean Asylum*, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 325, that the *prochein ami*, by whom the petition was presented, might prosecute an appeal therefrom until he was especially challenged for some cause, or until the higher court appointed a guardian *ad litem*. The court says that the aid of a *prochein ami* in cases of this character, including appeals, is necessary for the protection of those who, on account of the rigorous nature of their detention, or of their mental inability, are incapable of acting for themselves, and that wherever a proceeding is commenced by *prochein ami* the presumption that it was properly so commenced stands until rebutted.

In a subsequent opinion filed in this cause (26 L. R. A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 331) the right of the court to supersede the next friend by a guardian *ad litem* was contested, but the court said that this right was so well established that it required no comment, except to say that it would be a reproach to the law if, in the case of a person unable, through weakness of intellect, or age, to conduct his own litigation, the court had not the right to supersede a volunteer when, in its just discretion, it finds it for the interests of the petitioner or plaintiff to do so. It is added that the privilege of suit by next friend in behalf of a person *non compos mentis* seems to be of modern growth, and to be wholly the creation of the chancellor.

In *Stephens v. Porter*, 11 Helsk. 341, it was held that where a petition for the sale and partition of a tract of land was signed by an in-

sane wife by her husband as attorney, and the petition did not show that the wife was a lunatic, a sale of the land was void as to the wife; that while a suit for partition might be prosecuted by an insane wife by her husband as next friend this should appear upon the face of the proceedings, so that the court could protect her rights. This was a bill in chancery to recover the complainant's interest in the land, and the headnote says that the bill was filed by the next friend of the insane wife, but there is nothing in the opinion or case to show this. The case, however, is relied upon as authority for the right to sue by next friend, in *Parsons v. Kinzer*, 8 Lea, 349, *infra*, III. a.

In *Harris v. Schlinke* (Tex. Civ. App.) 62 S. W. 72, which was a suit of trespass to try title, one of the plaintiffs being a lunatic suing by her next friend, it was held that where, on the appearance day at the ensuing term, defendants filed a cross bill, and, plaintiffs failing to appear, judgment was entered against them, the fact that one of the plaintiffs was a lunatic did not render the judgment void because no notice of the cross bill was given, where she was represented, as in this case, by a next friend. This decision was reversed, however, in 95 Tex. 88, 65 S. W. 172, on the ground that judgment could not be entered on a cross bill by defendants in such case without service of it on plaintiff, where he failed to appear.

In *Kline's Estate*, 9 Pa. Dist. R. 386, upon demurrer to the petition it is stated in the opinion that, since the claimant was of full age, he should have been the petitioner, and that there was no authority for his appearance as a suitor by a next friend; and if, as alleged, he was not mentally competent to make affidavit, then a committee of his person and estate was the proper party to present the petition. The court added that this was evident from the fact that, should the claim be adjudged valid and awarded, it could not be paid to a next friend, but only to a committee, who is alone, authorized to receive it. The petition was, therefore, held defective for want of proper parties. There is no statement of facts in this case, and it is impossible to tell from the title whether or not the petitioner sued as an insane person by a next friend, but, from the extract given above from the opinion, it would seem that this probably was the case.

and it will order a stay of proceedings, or the bill to be taken off the file, if the suit is deemed improper." In *Chicago & P. R. Co. v. Munger*, 78 Ill. 300, which was an action at law, the court says (p. 301): "By our statutes the conservator of a lunatic shall demand, 'sue for, and receive in his own name, as conservator, all personal property of and demands due the ward,' etc. Rev. Stat. 1874, chap. 86, § 11. But until the appointment and qualification of the conservator it is clear, suit is properly brought in the name of the lunatic." In *Brown v. Riggins*, 94 Ill. 580, a bill in chancery was filed by James H. Riggins, an insane person, by his next friend, Ignatius Riggins, to contest a will. The case was reversed for lack of necessary parties defendant, but the pro-

priety of bringing the suit by next friend was not questioned. In *Speck v. Pullman Car Co.* 121 Ill. 33, 12 N. E. 213, which was a partition suit, the bill was filed in the name of James Dunn, who was described therein as a lunatic, and who brought the suit by Simeon Straus, as his next friend. The court says (p. 50, 121 Ill., and p. 220, 12 N. E.): "We are not required to assume, from the evidence, that this lunacy [the lunacy of James Dunn] existed when the suit was commenced; but, if it did, no conservator having been appointed under our statute, the suit might be prosecuted in the name of the lunatic." *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383, was a suit in chancery by an insane person suing by next friend. The court treats the proceed-

III. Before inquisition of lunacy.

a. In general.

In the case of *Eyre v. Wake*, 4 Ves. Jr. 795, decided in 1798, the right of a person *non compos* to sue by next friend seems to be conceded, since, though the question is not passed upon, an action instituted on behalf of an insane person not so found, by next friend, against the widow and executrix of a trustee to whom money had been bequeathed for the benefit of the incompetent, was sustained, and the relief asked for granted.

And it is stated, *arguendo*, in the opinion of the master of the rolls in *Nelson v. Duncombe*, 9 Beav. 211, 15 L. J. Ch. N. S. 296, 10 Jur. 389, that a bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by anyone professing to be his next friend.

This case is cited as authority in *Carr v. Boyce*, 13 Ir. Eq. Rep. 102, which was a bill by a person of unsound mind by his next friend asking that a receiver be appointed to raise the arrears of a rent charge devised to the plaintiff. The objection that, as there had been no commission of lunacy, there was no one capable of giving a valid discharge for the rent charge, payment to the pretended next friend would not protect the defendant in the event of a commission of lunacy, and that the proper course where no commission had sued out was an information by the attorney general, was held to be merely technical, and the bill was, therefore, sustained.

The question was directly raised in 1858 in the case of *Light v. Light*, 25 Beav. 248, which was a suit in chancery by a person of weak mind by his next friend, and is one of those most frequently cited to sustain the right of an incompetent to sue by next friend. But its value as authority is somewhat weakened by the fact that the master of the rolls gave as one reason for refusing to give way to the objection that the plaintiff was not entitled to sue in that way, that the defendant had not demurred to the bill or moved to take it from the file, and added that there was a great deal of force in many of the observations of the defendant's counsel. However, as the question was directly raised in the contentions of counsel, and as the court made a decree for the benefit of the plaintiff, the case must be considered as sustaining the right,—at least in favor of persons of weak

mind, if not in favor of idiots or lunatics actually so found.

It is said in the brief of counsel in this case that the right of a person of weak mind to sue by his next friend was discussed in *Makins v. Thompson* in March, 1848, before the vice chancellor, who intimated that he was prepared to take such a bill off the file; but the case went off on the merits.

So in a suit in chancery instituted in the name of a next friend by an imbecile person who was said to be incapable of managing her affairs, though not insane, the lord chancellor in an opinion of but a few lines said that it was for the security of the defendant that a next friend should be instituted, and that it was difficult to draw the line; that, the parties agreeing upon the minutes, it may be done. *Wilkinson v. Harwood*, 4 Jur. 957.

In *Re Law*, 30 L. J. Ch. N. S. 512, 7 Jur. N. S. 410, and also in *Re Macfarlane*, 2 Johns. & H. 673, 31 L. J. Ch. N. S. 335, 8 Jur. N. S. 208, 6 L. T. N. S. 154, 10 Week. Rep. 369, a petition in the name of an incompetent, by his father and next friend, for the transfer of money and property of the incompetent to his father in satisfaction of money expended for his support, was entertained and dealt with without anything being said as to right of the next friends to file the petitions.

And the right is indirectly recognized in *Palmer v. Walesby*, L. R. 3 Ch. 732, 16 Week. Rep. 924, in which, after a bill was filed in the name of an alleged incompetent not so found by inquisition, by his next friend, a petition in lunacy was presented, and the alleged incompetent found to be of sound mind, the vice chancellor, on the motion of the alleged incompetent, took the bill from the files, but refused to tax the next friend with the costs of the proceeding, on the ground that there was reasonable and probable cause for supposing the alleged incompetent to have been of unsound mind, and that there was a case demanding inquiry.

The same is true of *Re Green*, 48 L. J. Ch. N. S. 681, 41 L. T. N. S. 30. In this case, an incompetent having been found by inquisition to be of unsound mind, and a committee appointed after the institution on her behalf by next friend of an action for the administration of the estate of the deceased person, an *ex parte* application was made on behalf of the committee for leave to continue the action for the administration of the estate in the same manner as the plaintiff

ing as entirely proper, saying (p. 26, 148 Ill., and p. 387, 35 N. E.): "No conservator seems to have been appointed for his estate but this suit has been brought for him by a next friend." In *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694, one of the complainants in the bill was an insane person suing by next friend. The court makes no comment on that fact, but seems to recognize such method of bringing suit as correct, and the established practice. In the case of *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88, a bill for separate maintenance was filed. The defendant being insane, the court appointed the defendant's son as his guardian *ad litem* and next friend, and gave leave to file a cross bill. The defendant, by said guardian *ad litem* and next friend, filed a

cross bill to annul the marriage contract. The court, on page 289, 191 Ill., page 91, 61 N. E., says: "After an inquisition and appointment of a conservator for an insane person under the statutory provisions on the subject, all suits and proceedings in behalf of the lunatic should be brought by the conservator, unless the interests of the conservator are adverse to those of his ward, or for other sufficient reason the court shall deem it better to appoint some other person as next friend to appear for, counsel, prosecute, or defend for such insane person. 16 Am. & Eng. Enc. Law, 2d ed. p. 601; Hurd's Rev. Stat. 1899, chap. 86, § 13, p. 1132. Before such inquisition the rule which now obtains in both England and the United States is that a lunatic may sue in his own

might have done by her next friend, or otherwise, if she had not been found a lunatic. Leave was granted without any discussion as to the right to sue by next friend.

And the right is sustained in *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 121, in which it is said that where there is a person of unsound mind, not found so by inquisition, and, therefore, incapable of invoking the protection of the court, that protection may, in proper cases, be invoked on his behalf by any person as next friend; but that every person so constituting himself the protector of a person of unsound mind does so entirely at his own risk, and must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question.

A bill in chancery by a person of unsound mind, not so found, by his next friend, praying for the dissolution of a partnership in which plaintiff was interested, and for the appointment of a receiver, was sustained in *Jones v. Lloyd*, 48 L. J. Ch. N. S. 826, L. R. 18 Eq. 275, 30 L. T. N. S. 487, 22 Week. Rep. 785, though the court refused to say whether the incompetent could or could not obtain a final decree without application to the jurisdiction in lunacy. It was contended that, if there was an equity in the insane partner to have the partnership dissolved, it could only be asserted by the committee in lunacy, and not by a bill filed by next friend. But the court said that he did not think this proposition well founded; that he thought such an equity might be asserted by next friend; adding that he did not say it was not desirable to have a committee appointed, or that, if the cause came to a hearing, he himself, if the judge to hear it, or the court which might hear it, might not think it desirable that it should not be finally adjudicated until an application had been made for an adjudication in lunacy, and the appointment of a committee; but that what he had now to decide was merely whether the bill itself was maintainable, and whether an interim order for the protection of the property of the lunatic or his interest in the partnership could, or could not, be obtained. But, after referring to the cases of *Light v. Light*, 25 Beav. 248, and *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 121, he said that, independent of distinct authority, the reason of the thing required that the suit be allowed to be main- 64 L. R. A.

tained, since if this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's property, or do damage or serious injury to him, without there being any remedy whatever, as, in the first place, the lord's justices, or the lord chancellor, are not always sitting for applications in lunacy, and, in the next place, if they were, it takes a considerable time to make a man a lunatic; and that if a man is insane, but his family hesitate about making him a lunatic, or hope for his recovery, it could not be tolerated that any person could injure him or his property without there being any power in any court of justice to restrain such injury.

In the unreported case of *Fisher v. Meiles*, M. R. (1870) F. 3, before Lord Romilly, referred to in the preceding case of *Jones v. Lloyd* as having discussed the question of right to sue by next friend, a bill was filed by a person of weak mind by his next friend, asking for an injunction to restrain the defendants from meddling with the assets of a partnership in which plaintiff was interested, and that the partnership might be dissolved. Lord Romilly ordered that the motion should stand over until the fact that the plaintiff was a person of such unsound mind as to be incapable of taking care of himself or his property might be established. A petition in lunacy was presented, the plaintiff found lunatic by inquisition, and the next friend appointed his committee. This account of the case is given in a footnote to *Jones v. Lloyd*, but it does not show what discussion there was in regard to the right of the next friend to institute the proceedings.

In *Higginson v. Hall*, L. R. 10 Ch. 235, 48 L. J. Ch. N. S. 250, 39 L. T. N. S. 603, 27 Week. Rep. 469, which was a suit in equity by a person of unsound mind, not so found, by her next friend, asking to have an account taken of certain sums alleged to be due by the defendant to the plaintiff, the right of the next friend to maintain the suit seems to be conceded, the question discussed being the right of the defendant to demand that the next friend make an affidavit of documents in the possession and power of the plaintiff.

And in *Howell v. Lewis*, 65 L. T. N. S. 672, 61 L. J. Ch. N. S. 89, 40 Week. Rep. 88, which was an action by a woman in her own name and as next friend of her nephew, a person of unsound mind, not so found, for an accounting of money received from the sale of land in which the plaintiffs were interested, where the alleged

name by some proper person appointed or recognized by the court, as the next friend or guardian *ad litem* for the insane person." In *Plympton v. Hall*, 55 Minn. 22, 21 L. R. A. 675, 56 N. W. 351, the doctrine was announced that, where persons are incapable of acting for themselves, as in the case of lunatics, they are entitled to the protection of the courts, and proceedings will be instituted under its direction. Suit may be brought in their name, and the court will authorize some suitable person to carry it on as next friend or guardian *ad litem*; and the power of the district courts to exercise such authority is not taken away by the provisions of the general statute authorizing the probate courts to appoint general guardians for insane persons. In *Beall*

incompetent asked that his name might be stricken out as coplaintiff on the ground that he had been joined without his authority, being falsely alleged in the writ to be of unsound mind.—It was held that the court of chancery, in the exercise of its general jurisdiction to allow lunatics and persons of unsound mind to sue by their next friends, had power, in case of a dispute as to the condition of the mind of the alleged insane person, to direct an inquiry to ascertain whether his condition of mind was such as to incapacitate him from instituting proceedings himself. Inquiry was accordingly directed.

A petition on behalf of a lunatic, not so found, confined in an insane asylum in New South Wales, was presented in *Re Barlow*, L. R. 36 Ch. Div. 287, 56 L. J. Ch. N. S. 795, 57 L. T. N. S. 95, 35 Week. Rep. 737, by the master in lunacy in New South Wales as next friend, asking for the transfer to him of a fund which had accumulated from the income of a portion of the estate of a testator in England to which the lunatic was entitled for life. This petition was entertained and dealt with without any question being raised as to the right of the next friend to institute the proceedings.

Where, after a suit in chancery had been instituted, the plaintiff became incapable to transact business and to comply with an order of the court to file an affidavit of documents, it is held in *Cardwell v. Tomlinson*, 54 L. J. Ch. N. S. 957, 52 L. T. N. S. 746, 33 Week. Rep. 814, upon motion of defendant to dismiss the action, that the action still subsisted, and the plaintiff should have leave to amend by adding a next friend. It is said in the opinion that the practice of the court at all times has been that a person incapacitated from conducting an action himself might do so by means of a next friend.

And a suit by information and bill was instituted on behalf of a lunatic not so found, by her next friend, in *Atty. Gen. v. Wilkinson*, L. R. 2 Eq. 817, 12 Jur. N. S. 593, 14 L. T. N. S. 725, 14 Week. Rep. 910, and the right to do so was apparently conceded, not being discussed.

Upon a petition in bankruptcy by the mother and next friend of a lunatic, not so found, praying that the affidavit directed by statute to be made by the bankrupt on the allowance of his certificate might be dispensed with, and that the commissioners be directed to sign the certificate without such affidavit, it was held, in *Es parte May*, 2 Mont. D. & DeG. 381, to be sufficient if the affidavit were made by someone else. 64 L. R. A.

v. Smith, L. R. 9 Ch. 85, 43 L. J. Ch. N. S. 245, 29 L. T. N. S. 625, 22 Week. Rep. 121, James, L. J., said: "The law of the court of chancery undoubtedly is that in certain cases, where there is a person of unsound mind, not found so by inquisition, and therefore incapable of invoking the protection of the court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend." In *Jones v. Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785, the plaintiff, who sued by a next friend, was a lunatic, but had not been so found by inquisition, and he sought to dissolve a partnership of which he was a member, on the ground of his mental condition. The juris-

The question of the propriety of the form of the petition is not discussed.

But, that a liquidation petition in bankruptcy cannot be filed by a next friend in the name of a lunatic not so found by inquisition, is decided in *Es parte Cahen*, L. R. 10 Ch. Div. 183, 39 L. T. N. S. 645, 27 Week. Rep. 387. The court said that it seemed to him utterly impossible that any man should be able to say, for a lunatic, that he was unable to pay his debts and desired to have his affairs liquidated, adding that possibly, if he had been found a lunatic by inquisition, the court of lunacy might think that this course would be for his interest, and might be able to act on his behalf, but that the court of bankruptcy had no such jurisdiction.

A writ on behalf of a person of unsound mind, not so found, suing by next friend, was entertained and dealt with in *Vane v. Vane*, L. R. 2 Ch. Div. 124, 45 L. J. Ch. N. S. 381, 34 L. T. N. S. 613, 24 Week. Rep. 602, without anything being said as to the propriety of the form of action, that apparently being conceded.

The latest English authority upon the subject is that of *Didisheim v. London & W. Bank*, 69 L. J. Ch. N. S. 443 [1900] 2 Ch. 15, 82 L. T. N. S. 738, 48 Week. Rep. 501, in which it is held that an action in the name of a lunatic not so found may be maintained by a next friend for the recovery of the lunatic's personal property, without the sanction of the court in lunacy, in the absence of any lunacy proceedings, and that a foreign curator of a lunatic, domiciled and resident abroad, may sue in England as such next friend. Lindley, M. R., says in his opinion that in chancery it has long been the settled practice to institute suits in the names of lunatics, not so found by inquisition, by a next friend.

The case of *ISLE v. CRANBY* seems to be in accord with the weight of authority in the United States in holding that a person of unsound mind, who has not been adjudged insane, and for whom no conservator has been appointed, may bring a suit by next friend. It is said in this case, in discussing *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, where the right to sue by next friend is denied, though it does not appear whether or not a conservator had been appointed, that, if the doctrine of that case is that a bill will not lie in the name of a lunatic or insane person who has not been adjudged insane, or who has no conservator, by his next friend, it is contrary

diction to entertain the suit before the plaintiff had been "found" a lunatic was strenuously denied. On this question the master of rolls said: "Can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion really to refer to the reason. . . . But, independently of authority, let us look at the reason of the thing. If this were not the law, anybody might, at his will and pleasure, commit waste on a lunatic's property, or do damage or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the lords justices or the lord chancellor are not always sitting for ap-

plications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition, and his family sometimes hesitate about making him a lunatic, or hope for his recovery, and take care of him in the meantime without applying for a commission in lunacy. Is it to be tolerated that any person can injure him or his property without there being any power in any court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that, because no effort of his can be made, no member of his family can file a bill in his name, as a next friend, to prevent that injury? Is it to be allowed that a man may make away with the share

to the weight of authority, and is in conflict with later decisions of the court and must be deemed to have been overruled.

And it is said, *obiter*, in *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88, that, before an inquisition of lunacy, the rule that now obtains in both England and the United States is that a lunatic may sue in his own name by some proper person appointed or recognized by the court as the next friend or guardian *ad litem* for the insane person.

So, likewise, it is said, in *Dudgeon v. Watson*, 23 Blatchf. 161, 23 Fed. 161, that any person may volunteer to act as next friend, and bring a suit for an insane person, when no committee has been appointed, and the court will entertain it and decide its merits. The point actually decided, however, was as to the sufficiency of a plea by the defendant of the insanity of the plaintiff who brought the action, without the intervention of any other person.

And in *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937, it is said that the cases holding that a lunatic may not sue by next friend are for the most part those where a guardian or committee has been appointed, or where, as in Ohio and Illinois, the statute makes adequate provision for suing in another manner. In this case it is held that an action may be brought on behalf of an insane person, by a volunteer as next friend, where there has been no adjudication of insanity, and no guardian appointed.

A person *non compos mentis* may sue by next friend before and without inquisition of lunacy, but one who thus voluntarily institutes such a suit always proceeds at his peril,—peril that the alleged *non compos* may not in fact be so, and may recover and repudiate the interference; or that the chancery court may not consider him a suitable person, and may disallow his intermeddling. *Whetstone v. Whetstone*, 75 Ala. 495.

Upon an information by the attorney general to set aside a deed made by a person of unsound mind, not so found, it was held, in *Pennington v. Thompson*, 5 Del. Ch. 328, after an extensive review of the authorities, that the proper proceeding was a bill in the name of the incompetent by his next friend. It was contended that a trustee duly appointed after inquisition of lunacy was the only person competent to bring the suit, but the court said that the idea that a person of unsound mind, not so found by inquisition, cannot, by a next friend, 64 L. R. A.

invoke the interference of a court of chancery must be owing to the old notion on the subject of a person not being permitted to disable or stultify himself; and it was held that, without the appointment of a trustee, the court had authority to act in the exercise of its inherent and original power to declare such a conveyance void.

It was strongly insisted in *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846, that no suit can be brought in behalf of a lunatic or person *non compos mentis*, except by a legal guardian appointed after the question of sanity or insanity has been tried by a commission of lunacy as provided by the Code. But the court held that there was no statutory provision preventing a lunatic who is without legal guardian from suing by any competent person as his next friend, and that it knew of no reason which should preclude one from claiming the protection of the courts until his mental status is adjudicated and a legal guardian appointed.

In Arkansas it is expressly provided by statute (*Gantt's Dig.* § 4486) that the action of a person judicially found to be of unsound mind must be brought by his guardian, or, if he has none, by his next friend; and the court said in *Jetton v. Smead*, 29 Ark. 372, an action for the recovery of personal property, in which defendants objected that plaintiff was *non compos mentis*, and had no lawful curator or guardian, that, if the plaintiff was in fact insane before suit, he should properly have sued by his next friend, though no inquisition had been held by the proper court, but that it was not certain that his failure to do so would be cause for abating the suit. However, as the objection of the defendants was not filed until after several continuances and after the trial had commenced, it was held properly stricken out by the court.

Likewise, in Kentucky the right to sue by next friend is, where no committee has been appointed, granted by statute (*Civil Code*, § 35, subs. 3), and in *Howard v. Howard*, 87 Ky. 616, 1 L. R. A. 610, 9 S. W. 411, it is held that such a suit on behalf of one of weak mind by next friend is authorized both by the Code and under the general chancery practice. The court said that, in respect to allowing a lunatic having no committee to sue by next friend, the Code made an innovation upon the elementary chancery practice which did not allow a lunatic to sue by next friend, but that in reference to persons of

of a lunatic in a partnership business, or take away the trust property in which he is interested, without this court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he cannot maintain such a suit." In *Denny v. Denny*, 8 Allen, 311, it is held a court of chancery has authority to entertain a petition filed by a third party representing that the libellant for divorce is insane, and, if such insanity is established, the court will appoint a guardian *ad litem* to conduct the cause for the libellant. The court, on page 313, says: "The doctrine, as stated in *Story*, Eq. Pl. §

66, is that, where persons are incapable of acting for themselves, although not strictly idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as their next friend. In every such case it is in the discretion of the court to allow the case to proceed or not. In *Malin v. Malin*, 2 Johns. Ch. 240, the chancellor says: 'A person incompetent to protect himself, from age or weakness of mind, or from some religious delusion or fanaticism, *quem urget fanaticus error, vel iracunda Diana*, ought to come under the protection of the court.'"

Neither is the power of the court to act upon this subject taken away by the provisions of §§ 5 and 6 of the chancery act (1 Starr & C. Anno. Stat. 2d ed. chap. 22, pp.

weak or unsound mind such section by allowing them to sue by next friend simply declared a rule of chancery practice.

In an earlier Kentucky case, that of *Wilson v. Oldham*, 12 B. Mon. 55, tried before the enactment of the Code provision, a suit in equity by a person of unsound mind, by his next friend, was sustained against the contention that a lunatic cannot sue by next friend. The court said that this question did not arise in the case, as the complainant did not appear to be a lunatic, and did not sue as such, the bill alleging that he was an old man of great mental weakness, unable to protect himself against imposition, but not alleging that he was a lunatic. After quoting from *Mitford's Pleading*, to the effect that persons incapable of acting for themselves, though not idiots or lunatics, have been permitted to sue by next friend, the court added that it could not be denied that the complainant, though of weak intellect, could sue in his own name without a next friend, and that were there no authority on the subject, it could not be supposed that the mere addition to his name of the phrase "by his next friend" would vitiate his suit.

So, in *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, also decided before the Code went into effect, it is held that a person of unsound mind, who has no committee, and who has never been found a lunatic by any judicial proceeding, may institute an action by her next friend.

A bill on behalf of an insane person, filed by his next friend, asking for the appointment of a receiver to collect rents of real estate of the incompetent and manage his business until a conservator could be appointed, on the ground that the estate was being wasted by the mismanagement of one who had obtained from the incompetent a pretended power of attorney, was sustained in *Roughan v. Morris*, 87 Ill. App. 642. *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, *supra*, II., was distinguished in this case, the court saying that, if the purpose of the present suit was the termination of the agency created by the power of attorney and for an accounting, it would be governed by the *Covington* Case, and a bill for such purpose would not be brought by one volunteering as next friend, but that here the purpose of the bill was merely to preserve the estate until a conservator might be appointed. The court added that it seemed clear that it was not intended in the *Covington* Case to hold that a

suit by next friend might not in any case be allowed, and that there is a distinction between an attempt to procure equitable relief in chancery by setting aside a deed of a lunatic (as in the *Covington* Case) and an effort merely to protect the estate of a lunatic until a committee or conservator could be appointed.

And the right of a lunatic for whom no committee has been appointed to sue by his next friend is recognized in *Ryder v. Topping*, 15 Ill. App. 216, and it was held that the mere fact that the suit was brought without leave of court was no ground for dismissing it. *Illinois Rev. Stat. 1884*, chap. 86, § 13, provides that, where a conservator has been appointed, it shall be his duty to represent his ward in all suits and proceedings, but permits the court to appoint a next friend to commence or prosecute a suit, even though there is a conservator, but it was held that, even if it was thus made a matter of discretion with the court to permit a suit to be so brought, there should be some reason for refusing it before the suit will be dismissed.

In *New Jersey* a suit may, by leave of court, be maintained in a court of chancery by a next friend on behalf of a lunatic who has not been so found by inquisition. *Collins v. Toppin*, 63 N. J. Eq. 381, 51 Atl. 833. The bill in this case did not state that the next friend had been appointed by the court, but the order of the chancellor granting leave to file the bill by next friend was produced, and, in distinguishing *Palmer v. Sinnickson*, 59 N. J. Eq. 530, 46 Atl. 517, *supra*, II., the court said that he could not believe that the vice chancellor in that case would have held the bill demurrable because of its failure to recite that the next friend had been appointed by the court, if the facts had shown that he had actually been so appointed. As to the statement of the chancellor in *Dorshelmer v. Roorback*, 18 N. J. Eq. 438, *infra*, IV. a, that he had found no case or authority in which it is held that persons of unsound mind may sue by next friend, either voluntarily, or upon appointment for that purpose, the court said, after examining the authorities on the subject, he came to the conclusion that the rule stated is confined to cases where there has been an adjudication of lunacy and the appointment of a committee, and that, if there is none, the court may order suit to be brought by next friend.

And the right of a next friend to institute a suit for a person of unsound mind is impliedly

560, 562), or § 13 of the act upon lunatics, etc. (2 Starr & C. Anno. Stat. 2d ed. chap. 86, p. 2666). Under a statute substantially the same in Massachusetts, where the probate courts have the exclusive jurisdiction to appoint guardians for the persons and estates of lunatics, the supreme court of that state sustains this view, and holds that the provisions of the statute do not limit the powers of the court in which an action is brought by or on behalf of a lunatic to appoint a guardian or next friend to appear in his behalf. To the same effect is *Plympton v. Hall*, 55 Minn. 22, 21 L. R. A. 675, 56 N. W. 351.

No authority has been cited holding that a bill will not lie in the name of a lunatic or insane person by his next friend, when

he has no conservator, except it be that of *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764. While it does not clearly appear from the opinion in that case that George W. Covington, in whose name the bill was filed by his next friend, Alexander Covington, then had a conservator, we are inclined to think, from a careful reading thereof, that such was the case, in which event the suit should have been brought by the conservator, and not in the name of the lunatic by his next friend. Especially was this true as it appears that the next friend was not appointed by the court, but seems to have been a mere volunteer. On the other hand, if the doctrine of that case is that a bill will not lie in the name of a lunatic or insane person who has not

recognized in *Kidder v. Houston* (N. J. Eq.) 47 Atl. 336, where a bill was filed on behalf of a person simple-minded and *non compos* from her birth, by her next friend, to quiet title and set aside a mortgage sale. Laches in bringing the suit was urged as a defense, but it was held that limitations could not run against an imbecile, and that the laches of the next friend in bringing the suit could not be imputed to the incompetent. The propriety of the form of action was not discussed. This case is said, in the preceding case of *Collins v. Topplin*, to have been brought by the next friend by leave of the court, but that leave was granted by the court does not appear from the case itself.

The right is also recognized in *Lamb v. Lamb* (N. J. Eq.) 23 Atl. 1009, where a person old and feeble-minded, though not actually insane, having been permitted to proceed with her case until her testimony was all produced before any objection to her right to maintain the action was made, the court refused to dismiss the bill, and appointed a next friend to continue the suit for her. It was insisted that she could only sue by guardian, citing *Dorsheimer v. Roorback*, 18 N. J. Eq. 438, and *Norcum v. Rogers*, 16 N. J. Eq. 484, *infra*, IV. b, but the court said that, however forcibly these cases might apply to proceedings instituted by volunteers in the name of another who has been actually adjudged insane, it had not been the practice in New Jersey to apply this rule to cases like the present, in which complainant was not actually insane, but only feeble-minded and incapable of managing her affairs, and had no guardian.

On the petition of the solicitors of a person who, though not a lunatic, was, by reason of old age, incapable of transacting business, to have reinstated an action brought by her for the cancellation of a deed because of fraud, but which she had ordered to be dismissed, the court held, in *Owings's Case*, 1 Bland Ch. 370, 17 Am. Dec. 311, that as an imbecile adult might be permitted to sue in that court by his next friend (citing 1 Mont. Dig. 39), the suit should be reinstated and the solicitors allowed to conduct it, subject, however, to the control of the court should there be any occasion for its interference.

In *Denny v. Denny*, 8 Allen, 311, it is said that the doctrine as stated in *Story's Equity Pleading*, § 66, is that, where persons are incapable of acting for themselves, although not strictly idiots or lunatics, the suit may be brought in their name, and the court will au-

thorize some suitable person to carry it on as next friend, but that in every such case it is in the discretion of the court to allow the suit to proceed or not. This, however, was not a suit by one suing as next friend on behalf of a lunatic, but a petition by the children of a libellant in a divorce suit asking the court to appoint a guardian *ad litem* for the libellant on the ground that she was insane.

In *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188, it was held that there can be no question but that a person *non compos mentis* may sue by his next friend when he has no general or testamentary guardian, citing N. C. Code, § 180. But the court also cites, in support of the right of a next friend to sue for a lunatic, several leading English cases, and says that, when there has been no inquisition of lunacy, the right to so sue is well settled. A new trial was granted in this case on other grounds, and the action was dismissed upon the second trial, and costs taxed against the next friend, but upon appeal such taxation of costs was held error. See *Smith v. Smith*, 108 N. C. 365, 11 S. E. 188.

Likewise, in *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268, it is held that an insane person may sue by his next friend, though there has been no inquisition of lunacy. This was an action by a woman and her husband suing by the wife as next friend, and the wife had been regularly appointed next friend by the clerk of the superior court in the mode prescribed by rule 16 of that court.

Where, in an action of ejectment brought by a lunatic, which was prosecuted by a person appointed by the court on her own motion as next friend of the plaintiff, the objection that no suit could be brought in the name of a lunatic was made for the first time on appeal, it was held, in *Rankin v. Warner*, 2 Lea, 302, that the objection came too late. But the court also held that, even if the objection had been taken in proper form, it could not have availed; that the object of the rule requiring a next friend in the prosecution of suits for the use of persons under disability is to have someone responsible for costs and liable to judgment therefor, and against whom the court may make and enforce its orders, and for the more especial purpose that there may be someone before the court capable of looking after, taking care of, and protecting the interests of those incapable of understanding and defending their own rights.

And that a bill may be filed on behalf of a

been adjudged insane, or who has no conservator, by his next friend, it is contrary to the weight of authority, and is in conflict with the later decisions of this court, and must be deemed to have been overruled, as it clearly appears that a lunatic or person of unsound mind who has not been adjudged insane or who has no conservator, may sue by his next friend.

The next question that arises on this record is, What is the proper course to pursue in case the person who is alleged to be of unsound mind appears in court and protests that he is not of unsound mind, and that the suit was instituted and prosecuted without his authority, and against his will, and asks that the same be dismissed? The presumption is that all adult persons are of sound

mind, and capable of managing their own affairs, and caring for their estate; and the mere fact that it is alleged in an affidavit filed in support of a motion by a person asking that he be appointed the next friend to a particular person, who, it is alleged, is of unsound mind, and not capable of taking care of his own affairs, does not destroy that presumption. Neither would such presumption be rebutted by the order of the court, based upon *ex parte* affidavits, appointing such person, and permitting him to file a bill in the name of and on behalf of the person who is alleged to be of unsound mind, as his next friend. Such motions are usually made in behalf of persons alleged to be of unsound mind, by some friend; and it is presumed, we think, in the absence of any-

person of unsound mind by her next friend, either before or after inquisition of lunacy, where there is no committee or guardian, is held in *Parsons v. Kinzer*, 3 Lea, 346.

A *dictum* in *Pelham v. Moore*, 21 Tex. 756, states the rule in equity to be, as shown by the cases cited by Judge Story in the notes to his *Equity Pleadings*, that, if a lunatic have no guardian, or his interests clash with those of his committee, an information may be exhibited on his behalf by the attorney general. This would seem to imply that an action could not be brought on behalf of an incompetent by next friend; but that question was not discussed, the action in this case having been brought by the lunatic himself.

In *Abrahams v. Vollbaum*, 54 Tex. 226, a suit having been brought by a party for himself and as next friend, for his minor brother and sister, and for his mother alleged to be *non compos mentis*, though not so found, to enjoin the selling, under a deed of trust, of a tract of land, it was held that the proper procedure at the time this suit was instituted and tried was to apply to the court to appoint a special guardian, and that it was error to allow the suit to proceed in the name of the next friend. But it was pointed out that the Revised Statutes have omitted this requirement.

And in the later case of *Holzheiser v. Gulf, W. T. & P. R. Co.* 11 Tex. Civ. App. 677, 33 S. W. 887, brought after the passage of the Revised Statutes, the right to maintain a suit by next friend on behalf of a person who from his birth had been of unsound mind, though never so adjudicated, is sustained. The court calls attention to the fact that since the change in the law by the Revised Statutes omitting the requirement of a special guardian to represent the *non compos* the law had been recognized, in the case of infants, as authorizing suits on their behalf by next friend, instead of by special guardian, and said that he thought the same rule existed as to suits in behalf of idiots and lunatics. The fact that provision was made for the appointment of guardians for such persons, the court held should no more be held to prohibit suits in their favor by the next friend when no guardian had been appointed than such suits in behalf of minors are prevented by a like provision.

This case is cited in *Edwards v. Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080, to sustain the decision that a court of equity has jurisdiction 64 L. R. A.

to entertain a suit by next friends of an alleged incompetent to have conveyances of land made by her set aside on the ground of fraud and undue influence, although she is not of such unsound mind as to be declared a lunatic and an attempt to have her so declared has failed, where she is, nevertheless, so incapacitated by disease, decrepitude, or other infirmity as to require the protection of a court of equity against the undue influence and fraud of others.

In *Mills v. Cook* (Tex. Civ. App.) 57 S. W. 81, a judgment for the cancellation of a deed on the ground that plaintiff at the time it was made did not possess sufficient mental capacity to execute it was reversed on the ground that there was evidence to show that such mental incapacity existed, if at all, at the time of the institution of the suit; and that, if the plaintiff relied upon insanity to execute the deed, and the facts averred and proved did not show that she had regained her mental condition, the court should, upon another trial, if she were not represented by a guardian, permit the suit to be conducted for her benefit by some one as next friend.

It is said in *Owings's Case*, 1 Bland Ch. 290, that, according to the loose proceedings of the land office, it seems that a warrant of resurvey was obtained by his next friend for the benefit of one who was then *non compos mentis*, although not found so by inquisition, citing *Land, H. A. 180*.

In *Wentz's Appeal*, 76 Conn. 405, 56 Atl. 625, an appeal by an insane person suing by his next friend was taken from a decision denying an application by the next friend for the appointment of a conservator for the incompetent. The appeal was entertained and dealt with without anything being said as to the right to so sue.

b. In actions affecting real estate.

The question of the right of a next friend to sue on behalf of a lunatic in an action affecting the latter's real estate is one which has been passed upon in but few cases, and it is doubtless now settled that the rule in such actions is no different from that in any other action. There is no American case in which the question whether or not any distinction exists between actions affecting real estate and other actions has been discussed and decided. In *Stephens v. Porter*, 11 Heisk. 341, the right to prosecute a suit for partition on behalf of an insane person by next friend is expressly recognized, but nothing is said to indicate that the court considered an action for partition to be governed by any

thing appearing to the contrary, that whatever consent to the bringing of the suit such person is capable of giving has been obtained, and that it is, in fact, his suit. But when he makes known to the court that it is not his suit; that he is competent to take care of his own affairs, and that the supposed friend is a mere intermeddler,—what should the court do? The individual liberty of the person is involved, and his right to dispose of his property as he may see fit. These are rights which he cannot be deprived of by any court, unless it be made to appear that by reason of the condition of his mind he has become incapable of taking care of his property. We see no reason, however, under our practice, why this question cannot be properly disposed of in the cause

different rule than that governing other actions. It is not entirely clear whether this action was brought before or after an adjudication of lunacy, but it seems probable that there had been no inquisition.

That a bill for partition cannot be filed by next friend on behalf of a person of unsound mind not so found by inquisition, is held in *Halfhide v. Robinson*, L. R. 9 Ch. 373, 43 L. J. Ch. N. S. 398, 22 Week. Rep. 448, 30 L. T. N. S. 216. It was held that the proper course, if it were desirable to avoid the expense of an inquisition of lunacy, was to proceed under the lunacy regulation act of 1853, and Lord Justice James, writing the opinion, said: I desire it to be clearly understood that I do not think a bill can be filed on behalf of a person of unsound mind for dealing with his real estate. In this case, it appearing that one of the defendants was absent from the country, which would prevent the property from being sold at public sale, the other defendant offered to purchase the shares of his two cotenants, and, this offer being sanctioned by the court, this petition was presented in the suit asking for an order vesting plaintiff's share in the property in the purchaser.

But in *Watt v. Leach*, 26 Week. Rep. 475, which was also a partition action, although it is assumed that *Halfhide v. Robinson* was correctly decided, it is held that that case is no longer law since the passage, in 1876, of 39 and 40 Vict. chap. 17, § 6, under which the next friend of an insane person might "request a sale;" and that, that being so, the next friend might also institute an action for sale, the section having to that extent altered the law since the decision in *Halfhide v. Robinson*.

And *Halfhide v. Robinson*, L. R. 9 Ch. 373, 43 L. J. Ch. N. S. 398, 22 Week. Rep. 448, 30 L. T. N. S. 216, is distinguished in *Porter v. Porter*, L. R. 37 Ch. Div. 420, 58 L. T. N. S. 688, 36 Week. Rep. 580, in which an action by a person of unsound mind, not so found, by his next friend, asking for a sale of real estate, was sustained. The decision in the lower court was based on the ground that since the partition act of 1876 *Halfhide v. Robinson* was no longer law, but, upon appeal to the supreme court of judicature, the court stated that, although no doubt the case of *Halfhide v. Robinson* raised a difficulty, it was not there laid down that no bill could be filed for partition by a person of unsound mind, by his next friend; that, notwithstanding

then pending in court, either by the chancellor, or by submitting the question to a jury, should a jury be demanded. In the *Pyott Case*, on page 289, 191 Ill., page 91, 61 N. E., it is said: "When the mental capacity of a party to a proceeding arises for determination as an issue in a case in chancery (other than bill to contest a will), the better practice is to cause the question of sanity to be submitted to a jury for an advisory verdict; but the court is not without jurisdiction to hear and determine the question without a jury, and even upon verdict rendered by a jury the court may decline to accept the finding of the jury, and decide for itself the issue, upon the evidence presented in the case."

In the case of *Howard v. Howard*, 87 Ky.

standing the statement of James, L. J., in that case, that he wished it to be understood that a bill could not be filed by next friend for dealing with the real estate of a person of unsound mind not so found, he thought that, taking into consideration the fact that the court was not asked to carry out an order for sale made in a partition action, that the application was apparently not under any provisions of the partition act, and that the petition was presented, not for carrying the decree into effect, but for vesting the share of the person who was of unsound mind in one of the other parties to the action. All that James, L. J., meant to decide was that the course taken was not the proper course; that there should have been a petition to the lords' justices under the lunacy regulation act of 1862. The judge adds that, if he had felt that James, L. J., had really decided the point involved in the present case, such respect was due to his opinion that he should not have given the judgment which he did give. In a concurring opinion Bowen, L. J., speaks of this statement of James, L. J., as to the right to bring an action by next friend to deal with the real estate of an incompetent as a *dictum*, but, since the judge expressly raised the question of the authority of the next friend to file the bill, and stated so plainly his opinion that such a bill could not be filed by next friend, the statement can hardly be treated as mere *dictum*. Bowen, L. J., in his concurring opinion argues at considerable length that, since the true ground upon which a next friend is allowed to institute proceedings on behalf of a person of unsound mind, not so found, is that such person stands in need of the protection or intervention of the court, and that, in case he would, if sane, be entitled to such protection or intervention, a stranger may do that which is clearly for the benefit of the incompetent, the reason would apply as well to an action for partition, where that would be for the benefit of the lunatic, as to any other action not dealing with real estate. It was, therefore, said that the question to be decided was not whether the act of 1876 created this right, but whether it destroyed it, and that there was nothing in that act which would prevent an action for partition being brought in any case where it could be brought before that act was passed.

And an action for the recovery of land and for damages, instituted by the next friend of plaintiff, a person of unsound mind not so found, claiming to be the owner in fee of the premises,

610, 1 L. R. A. 610, 9 S. W. 411, this identical question was before the Kentucky court of appeals. After having held it was proper to commence a chancery suit in the name of a person of unsound mind by his next friend, when he has no conservator, the court, in disposing of the question, said: "The court, in such a state of case, is presented with the question, What is the proper course to pursue? The individual liberty of the person is involved. His right to dispose, of himself [provided he does not interfere with the rights of others], also of his property, by sale, gift, or otherwise, as he pleases, is at once recognized as an absolute right, which he cannot be deprived of by any court of the land,—not even the highest,—unless it be made to appear that he by

age, disease, or other cause has ceased to be a man by so far losing his mind as to be incapable of taking care of his property, and has become the victim of shrewd and designing persons. But when he puts in issue the charge that he has thus ceased to be a man, and has become a mere hulk, how is the fact to be determined? It seems to us that the issue which thus involves his personal liberty should be settled by his peers,—a jury of his country; and for that purpose the chancellor should issue his writ out of chancery, directing an inquiry by a jury into the fact as to whether the mind of the person is so impaired by age, disease, or otherwise as to render him incapable of understanding and appreciating his property rights to such an extent as to render him

is held in *Waterhouse v. Worsnop*, 59 L. T. N. S. 140, to be authorized by order 16, r. 17, which provides that, when lunatics and persons of unsound minds, not so found by inquisition, might, before the passing of the practice act, have sued as plaintiffs, they may sue as plaintiffs in any action by their committee or next friend, according to the practice of the chancery division. It was contended by counsel for defendant, relying on *Halfhide v. Robinson*, that before order 16, r. 17, was made, there was no jurisdiction in the court of chancery to deal with real estate of a person of unsound mind not so found, and that this rule made no change; but, without discussing this contention, the action was held properly instituted and the writ regular.

IV. After inquisition of lunacy.

a. In general.

In all cases in which idiocy or lunacy has been found on inquisition a court of equity will not allow a suit to be brought on behalf of an idiot or lunatic by a next friend nominated by himself or appointed by the court; but his guardian or committee must join in the suit. *Dorshelmer v. Roorback*, 18 N. J. Eq. 438. The court states that he finds no case or authority in which it is held that an idiot or lunatic may sue in equity by a next friend.

And the vice chancellor, in *Collins v. Topplin*, 63 N. J. Eq. 381, 51 Atl. 933, says, in speaking of this statement, that the authorities all agree that idiots and lunatics must sue in equity by their committees or guardians; that this is undoubtedly true when they have been found such on inquisition, and committees have been appointed.

An action in the name of a person judicially found to be of unsound mind cannot be maintained by his next friend, since Iowa Code, § 2569, requires that all actions on behalf of a person judicially found to be of unsound mind must be brought by his guardian, or, if he has none, by a guardian appointed by the court for the purposes of the action. *Tiffany v. Worthington*, 96 Iowa, 560, 65 N. W. 817.

So, in *Chavannes v. Priestley*, 80 Iowa, 316, 9 L. R. A. 193, 45 N. W. 766, which was an action by a person adjudged to be insane, for libel, the court held that under Iowa Code, § 2569, a person adjudged insane, and for whom a guardian has been appointed, can sue only in the name of

his guardian. Nothing is said as to the right to sue by next friend, but the plain implication is that, under the statute, an action by the guardian is the only proper mode of procedure.

In *Penington v. Thompson*, 5 Del. Ch. 328, the court said that all the text writers, supported by the judicial decisions, say that idiots and lunatics must sue in courts of equity by the committees of their estates, and that such doubtless is the case where committees exist.

And that a lunatic for whom a conservator has been appointed must sue by the conservator, and not by his next friend, is recognized in *LSLA v. CRANBY*, where, in discussing the case of *Covington v. Neftzger*, 140 Ill. 648, 33 Am. St. Rep. 261, 30 N. E. 764, in which the right of a lunatic to sue by next friend is denied, it is said that, while it does not clearly appear that a conservator had been appointed in that case, the court was inclined to think, from a careful reading of the opinion, that such was the case; in which event the suit should have been brought by the conservator.

And a *dictum* in *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88, states that after an inquisition and appointment of a conservator for an insane person under the statutory provisions on the subject all suits and proceedings in his behalf should be brought by the conservator, unless his interests are adverse to those of his ward, or for other sufficient reason the court shall deem it better to appoint some other person as next friend to appear and prosecute for such insane person.

Likewise, a *dictum* in *Owings's Case*, 1 Bland Ch. 290, says that a lunatic—that is, one who has been found and returned to be *non compos mentis*—can sue only by his committee.

But a suit in equity to annul the marriage of a person adjudged to be a lunatic may be maintained by his next friend although a committee of his person and estate has been previously appointed under D. C. Code, § 1286, which specifically provides that a proceeding to declare the nullity of a marriage of an idiot or lunatic may be instituted by next friend; but the committee should be made a party defendant to such suit. *Mackey v. Peters* (App. D. C.) 31 Wash. L. Rep. 504. But this decision is expressly limited to a suit to annul the marriage, that being said by the court to be a peculiar proceeding, and to have been specifically provided for by the Code,—and that undoubtedly the general rule is that when a committee has been appointed for a lu-

unable to protect himself against designing persons; and upon the verdict of the jury, if in the affirmative, the chancellor should appoint a committee for the person, and allow him to prosecute the suit in his name; but, if the verdict should be in the negative, then the suit should be dismissed, unless the court, from the evidence before the jury, should deem it proper to take other steps in reference to the matter."

We see no good reason why it should be held that the circuit court should be ousted of jurisdiction as soon as the person who it is claimed is of unsound mind, through an attorney, appears, and asks that the suit be dismissed; but think that the court, having taken jurisdiction of the case by the appointment of a next friend, and having al-

lowed the bill to be filed, has the right to determine for itself the question of whether or not it should retain jurisdiction by investigating the mental condition of the complainant either by hearing the evidence and passing upon the question, or by submitting the question to a jury; otherwise the very object of allowing the suit to be commenced might be defeated by the defendant procuring an attorney, in the name of the complainant, to appear without the knowledge of the complainant, and who, by reason of his mental incapacity, was incapable of taking any action in the case, by employing an attorney or otherwise, and moving that the cause be dismissed. Persons of unsound mind, incapable of caring for themselves or their property, are the special wards of a

natic all suits for his benefit, or for the benefit of his estate, should be instituted by such committee.

While the right of a lunatic not so found to sue by next friend is sustained in *Didisheim v. London & W. Bank*, 69 L. J. Ch. N. S. 443 [1900] 2 Ch. 15, 82 L. T. N. S. 738, 48 Week. Rep. 501, it is said in the opinion that, when a lunatic has been so found by inquisition, the court of chancery will stay a suit instituted in his name until the appointment of a committee.

But in *Re Gordon*, L. R. 10 Ch. 192, 44 L. J. Ch. N. S. 208, 32 L. T. N. S. 348, 23 Week. Rep. 760, after an inquisition of lunacy and the appointment of a committee, leave was given to a son of the lunatic to file a bill as next friend to impeach a settlement made by the lunatic at a time when there was reasonable ground for believing he was of unsound mind.

The court said, in *Bird v. Bird*, 21 Gratt. 712, that it is clear that, when there is a committee, every suit respecting the person or estate of a lunatic must be instituted by the committee.

This case is relied upon in *Cole v. Cole*, 28 Gratt. 365, to obtain the dismissal of a suit in equity, brought in the name of a person of unsound mind by his next friend and committee, on the ground that the suit could be maintained only by the committee. The court, however, said that the bill, which was in the name of the incompetent, "who, being a person of unsound mind, sues by his next friend and committee," was substantially a suit by the committee; and that, if there was any defect in the bill, the objection should have been made in the circuit court, where, by amendment, the error, if any, might have been corrected.

b. Where interests of committee and lunatic clash.

In *Melick v. Melick*, 17 N. J. Eq. 159, it is said, *arguendo*, that a lunatic ordinarily sues only by his committee or guardian; but, if the guardian has an interest adverse to that of the lunatic, he may sue by the attorney general, or by next friend specially appointed by the court. In *Norcom v. Rogers*, 16 N. J. Eq. 484, it is held that a lunatic sues only by his committee or guardian, who is responsible for the conduct of the suit, or by the attorney general or next friend, where the interests of the guardian clash with those of the lunatic. This was a bill exhibited by a lunatic in his own name against his guardian.

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In all cases where the interests of the committee clash with those of the lunatic, it is said, in *Bird v. Bird*, 21 Gratt. 712, that the lunatic should be permitted to institute a suit in his own name, with some responsible party named as next friend.

In *Bonner v. Evans*, 89 Ga. 656, 15 S. E. 906, it is said that, if a next friend, suing in behalf of a lunatic, can maintain an action for waste by the guardian, or recover money in his hands, it can be done only in connection with a proceeding to remove the guardian and revoke his letters. In this case a judgment in favor of the next friend, for a sum of money alleged to have been misappropriated by the guardian, without any disposition of the case in so far as it related to the removal of the guardian, which was asked in the petition, was held contrary to law.

In an action against the guardian of an insane person, seeking, among other things, his removal and an accounting, brought by a next friend, it was held, in *Tiffany v. Worthington*, 96 Iowa, 560, 65 N. W. 817, that an action in the name of a person judicially found to be of unsound mind cannot be maintained by his next friend; since Iowa Code, § 2569, requires all actions on behalf of a person judicially found to be of unsound mind to be brought by his guardian, or, if he has none, by a guardian appointed by the court for the purposes of the action.

The right of a lunatic to sue by his next friend is evidently conceded in *Wood v. Throckmorton*, 26 Colo. 248, 57 Pac. 698, which was an action by the brother of a lunatic, as his next friend, to remove a conservator of the lunatic's estate; the point discussed and decided being whether or not the removal of the conservator would be for the lunatic's benefit. The court says that, persons *non compos mentis* not being able to judge for themselves as to the bringing of an action, their rights must be presented to the court for adjudication through the intervention of a next friend or someone authorized to represent him, though not every action instituted by a next friend should be permitted to continue; that proper and necessary suits for the benefit of the incompetent should be encouraged; but that it is in the discretion of the court to allow an action so instituted to proceed or not, as it may be governed by a consideration of its necessity for the protection of the inter-

court or chancery, and the chancellor has the power to investigate, with or without a jury, the question of the mental capacity of the complainant, and to determine whether he will retain jurisdiction of the case, and not force the party out of court, and into the county court, to adjudicate the question of the mental condition of the complainant before a jury in that tribunal, which, by reason of the delay incident thereto, might lead to the entire loss or sacrifice of the complainant's rights. When the solicitor appeared on behalf of Henrietta Sack-

man, and moved the court to dismiss the case, and the court was asked to set that motion down for hearing, and to investigate the mental condition of said Henrietta Sackman, the court, in declining so to do, and in dismissing the cause, committed reversible error.

The judgment of the Appellate Court and the decree of the Circuit Court will be reversed, and the cause remanded to the Circuit Court for such other proceedings as are not inconsistent with the views herein expressed.

ests of one mentally incapable of judging in this respect for himself.

An implied recognition of the right of an insane person to sue by next friend is made in *Clark v. Crout*, 34 S. C. 417, 13 S. E. 602. This was an action between the administrators of the estate of a deceased idiot and the administrators of his committee, in which mention is made of a former suit by the idiot, who had been judicially declared such, suing by his next friend, against his committee, for an accounting. It was held that a settlement of that suit, whereby it was agreed in writing that the committee should be discharged from further liability, but should provide proper maintenance for the lunatic for life, did not prevent the administrators of the lunatic's estate from demanding from the committee, or his representatives, an account of the lunatic's estate, where the settlement was never presented to, or signed by, the judge. The propriety of the form of action in this previous suit is not discussed, apparently being conceded.

c. Where committee refuses to act.

In *Row v. Row*, 53 Ohio St. 249, 41 N. E. 239, which was an action in the name of an imbecile to recover property alleged to have been obtained from her through fraud, the petition in which stated that her guardian refused to bring such action, and it was, therefore, brought by the next friend, a demurrer was sustained to the petition on the ground that, if the guardian refused to bring the action, he should have been removed and another guardian appointed. The court said that it could not be tolerated that the rights and property of an imbecile should be controlled by a next friend in opposition to the wishes of the guardian.

d. Where no committee has been appointed.

A bill may be filed on behalf of a person of unsound mind by her next friend, either before or after an inquisition of lunacy, where there is no committee or guardian. *Parsons v. Kinzer*, 3 Lea, 346. In this case the incompetent had been found lunatic by the verdict of a jury, and this bill was filed after the inquisition for a construction of a certain item of her father's will. The court said that the text writers concur in the statement that a person of unsound mind may sue by next friend either before or after an inquisition of lunacy,—at any rate where there is no committee or guardian; and that the weight of authority is in accord.

And a suit in equity by next friend, on behalf of a person judicially declared to be a lunatic, but for whom no conservator had been appointed, was entertained in *Van Buskirk v.* 64 L. R. A.

Van Buskirk, 148 Ill. 9, 35 N. E. 383. The court apparently considered the proceeding an entirely proper one, and, in disposing of the question of laches in bringing the suit, said that the rights of the lunatic could not be prejudiced by the fact that the next friend did not bring the suit immediately after the declaration of lunacy.

When no committee has been appointed for a lunatic, it is said, in *Bird v. Bird*, 21 Gratt. 712, that he may be permitted to institute a suit in his own name, by some responsible party as next friend.

Where, after the institution of a suit on behalf of a person of unsound mind, by a mere stranger calling himself a next friend, the plaintiff was found lunatic by inquisition, though no committee was appointed, it was held, in *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 121, that every proceeding and order taken or made in the suit after the inquisition was irregular and void,—as much so as if it had been taken or made after the lunatic's death. While the court conceded the right of an insane person to sue by next friend before a finding of lunacy, it was said that, if the plaintiff be found lunatic by inquisition, so as to come under the control and protection of the court of lunacy, there is no pretext for continuing the officious protection of a self-constituted guardian. Some decisions or *dicta* to the effect that a suit is abated by the appointment of a committee were referred to, and it was contended from this that there could be no abatement until such appointment. But this contention was held unsound, the court saying that it is not because a committee has been appointed, but because the Crown, by its proper tribunal, has the lunatic and all his affairs under its exclusive care and protection; that the power of any person to commence or prosecute any proceeding for his protection is taken away.

e. Where committee has died or been removed.

In *Gillespie v. Hauenstein*, 72 Miss. 838, 17 So. 602, which was a suit in equity on the bond of a deceased guardian of a person declared insane after inquisition, the bill was filed by a person as guardian and next friend of the incompetent. It was alleged that the bill did not show that the one filing it had ever been appointed guardian, and that he had no authority to prosecute the action as guardian and next friend; also that the inquisition of lunacy and the appointment of the first guardian were void. All the court says is that the suit was properly brought by the lunatic suing by his guardian and next friend, without discussing the validity of the inquisition, or whether or not the next

friend suing had ever been appointed guardian by the court.

A suit in equity in the name of a lunatic, by her next friend, against the former committee of the plaintiff, to surcharge and falsify the accounts of the committee, was sustained in *Bird v. Bird*, 21 Gratt. 712, against the objection that a lunatic is incompetent to maintain an action, except through the intervention of a committee. The court admitted that ordinarily suits must be instituted by the committee, but said that when the committee has been removed, as in this case, the lunatic should be permitted to institute a suit in his own name with some responsible party named as next friend and approved by the court. The force of this decision is weakened, perhaps, by the fact that, the objection to the form of action not having been made until the hearing of the case upon appeal, the court said the defendant must be considered to have waived the objection by his silence.

1. In case of nonresident having no committee within jurisdiction.

In *Cook v. Thornhill*, 13 Tex. 293, 65 Am. Dec. 63, which was an action in the name of an incompetent by her next friend to recover the possession of two slaves, it was contended that, as the lunatic was a resident of Virginia, where she had been adjudged a lunatic and a committee appointed, she could not bring a suit by next friend in another state, where neither she, her committee, nor her next friend, resided; that idiots and lunatics must appear by the committees of their estates when they have any. A previous suit had been instituted by the plaintiff by her next friend in Mississippi, where judgment was recovered for the slaves or their value, and the court in the present case held that the record of the judgment recovered in Mississippi established the right of the plaintiff to recover in the name and capacity in which she was now suing; that her right to sue by next friend was matter material and traversable in that suit, and that, as to that matter, the judgment was final and conclusive.

In *Pelham v. Moore*, 21 Tex. 756, where the plaintiff had been adjudged a lunatic in another state, and brought an action in his own name, the court said that, if he were a resident having a guardian, no doubt the action ought to be brought by his guardian; but that, being a non-resident, having neither a guardian nor a committee authorized to sue in his behalf within the state, it seemed that, if he could sue at all, it must be by information, or by the appointment by the court of someone to sue in his behalf as next friend.

In *Thiery v. Chalmers* [1900] 1 Ch. 80, 69 L. J. Ch. N. S. 122, 81 L. T. N. S. 511, 48 Week. Rep. 148, which was an action by a person described to be of unsound mind, not so found, resident and domiciled in France, by his next friend and his *tuteur*, to recover certain money and securities held by the defendants as the lunatic's bankers, the court held that where there has been a judicial declaration of the status of lunacy, and the applicant on the lunatic's behalf has the latter's property vested in him, an application for the transfer or payment of that property may be granted; that under these circumstances no difficulty arises from the fact that the lunatic is described as a person of unsound mind not so found, and, therefore, sues by his next friend; that in truth, although the action was properly framed as it stood, the

tuteur might have sued in his own name. The lunatic in this case had in fact been so declared in France, and the *tuteur* appointed by a family council, which, according to French law, vested in him the whole estate of the lunatic.

And an application on behalf of a person, who, after judicial inquiry by the Royal Bavarian court, had been found to be of unsound mind and made a ward of the court, presented by her next friend, who was a judge of that court, asking that a fund standing in court in England to her credit might be sold and the proceedings paid to the deposit commission of the court, was entertained and considered in *Re Linden* [1897] 1 Ch. 453, 66 L. J. Ch. N. S. 295, 76 L. T. N. S. 180, 45 Week. Rep. 342, without any discussion or decision as to the propriety of the form of the application.

A bill in chancery on behalf of a nonresident lunatic duly adjudged to be such in England, filed by his next friend, was entertained and disposed of in *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213, without anything being said as to the propriety of the form of action.

V. Distinction between suits in equity and at law.

a. In general.

It is said in *Stock on the Law of Non Compotes Mentis*, chap. 2, p. 32, that the incapacity of persons *non compotes mentis* to sue or defend in the King's courts is of a very partial nature, and varies greatly according to the jurisdiction, whether legal or equitable, civil or criminal, under which the proceeding took place; that the incapacity to sue or defend in equity is more considerable than at law. This seems to have been true as to persons judicially found to be insane, the old rule at law apparently being that, in actions at law, a lunatic should appear by guardian if within age, and by attorney if of full age; but that, in equity he must sue by the committee of his estates; and that in such a suit the committee, as well as the lunatic, should be a party. But when a person is in fact insane, but has not been judicially so declared or placed in charge of a committee or guardian it seems that the courts, whether of law or equity, have always had jurisdiction to entertain suits brought by one as next friend of the insane person. *Buswell, Insanity*, § 120; *Dan. Ch. Pl.* & *Pr.* 6th Am. ed. p. 9.

It is said in *1 Fonblanque, Eq.*, that bills in chancery to set aside conveyances and settlements by idiots and lunatics ought properly to be brought by the attorney general, and it is true that sometimes informations have been exhibited by the attorney general on behalf both of idiots and lunatics, considering them as under the peculiar protection of the Crown,—especially if the interest of the committee has clashed with that of the lunatic; but it has been held that in such cases a proper relator ought to be named (*Atty. Gen. v. Tiler*, 1 Dick. 378, 2 Eden, 230), which would seem to be the same as requiring a next friend to be joined. And in *Daniel's Chancery Pleading & Practice*, 6th Am. ed. p. 82, it is stated that, although in certain cases suits may be instituted in the form of informations by the attorney general, yet the proper course to proceed to assert their rights in equity is by a suit in the name of the lunatic, which, as he is a person incapable in law of taking any steps on his own account, is brought by the committee of his estate, if any, or, if none, by his next friend.

This distinction between suits at law and in equity is not discussed in many of the cases, and in the United States seems to be ignored except in a few states. Since a large proportion of the states has now by statute abolished the distinction between actions at law and in equity generally, there have been collated in this division only those cases which were decided before the enactment of such statutes, or in which this distinction has been discussed. Nor have cases decided under the express provisions of statutes granting or denying the right to sue by next friend, without referring to any distinction between suits at law and in equity, been included here.

In England, also, an attempt was made by the judicature act of 1878, as amended in 1875, to abolish the distinction between suits at law and in equity. It should, therefore, seem that in that country the question of the right of a lunatic to sue by next friend is not now affected by the nature of the action, whether legal or equitable; and this is confirmed by the latest English case on the subject,—*Didlsheim v. London & W. Bank*, 69 L. J. Ch. N. S. 443, [1900] 2 Ch. 15, 82 L. T. N. S. 738, 48 Week. Rep. 501,—in which it is said that the notion that, either at law or in equity, an action or suit cannot be successfully maintained if brought in the name of a lunatic not so found by inquisition, without the sanction of the Crown, is not supported by authority or sound principle. This was an action in the nature of a common-law action of detinue, in the name of a lunatic suing by his next friend, and the right to so sue was sustained. It is also said in the opinion that, in chancery, it had long been the settled practice, before the judicature act, to institute suits in the names of lunatics, not so found by inquisition, by next friend. The right to sue in this way, both at law and in equity, is thus recognized.

In Nebraska there is no distinction as to the right of an insane person, not so found by inquisition, to sue by next friend, between cases at law and in equity. The procedure is the same. *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937.

And in *Holzheiser v. Gulf, W. T. & P. R. Co.* 11 Tex. Civ. App. 677, 33 S. W. 887, it is said that the authorities show that in courts of law and equity a recognized mode of prosecuting suits for the protection of the interests of idiots, lunatics, and parties *non compos mentis*, when no guardian or committee has been appointed, is by next friend.

b. In equity.

Idiots and lunatics must sue in equity by their committees or guardians. *Dorshelmer v. Roorback*, 18 N. J. Eq. 438. The court states that the authorities all agree to this, and that he has found no case in which it is held that they may sue in equity by next friend, either voluntarily or upon appointment for that purpose.

But this statement is criticized in *Collins v. Topplin*, 63 N. J. Eq. 381, 51 Atl. 933, where the chancellor says that, after examining the authorities on the subject, he came to the conclusion that the rule stated is confined to cases where there has been an adjudication of lunacy and the appointment of a committee, and that, if there is none, the court may order suit to be brought by next friend.

And when a person is only partially incapable,

as one merely deaf and dumb, it is conceded in *Dorshelmer v. Roorback*, *supra*, that a court of equity may appoint a next friend to be joined with him in the suit, and to conduct it for him.

In *Mellick v. Mellick*, 17 N. J. Eq. 159, and *Norcom v. Rogers*, 16 N. J. Eq. 484, the right to sue in equity by next friend where the interests of the lunatic clash with those of his committee is recognized.

And a suit in chancery by next friend of a lunatic was entertained in *Kidder v. Houston* (N. J. Eq.) 47 Atl. 336, the right to so sue not being contested.

While in *Lamb v. Lamb* (N. J. Eq.) 23 Atl. 1009, a next friend was appointed by the court to conduct a suit for a person of unsound mind, against the contention that she could only sue by guardian.

But a demurrer was sustained in *Palmer v. Sinnickson*, 59 N. J. Eq. 530, 48 Atl. 517, to a bill in equity filed by next friend in behalf of an insane person, because it failed to show that the next friend had been appointed by the court.

The right of an imbecile adult to sue in a court of equity by next friend is recognized in *Owings's Case*, 1 Bland Ch. 370, 17 Am. Dec. 311.

The chancellor, in *Penington v. Thompson*, 5 Del. Ch. 328, says that he takes it to be settled law that in all cases in equity, where idiots and lunatics are parties plaintiff and have committees, they must sue by the committees of their estates; and that there is no exception to this rule, unless in cases where the interests of the committees clash with those of the idiots or lunatics. But the right to sue in equity by next friend where there has been no inquisition of lunacy is sustained, the court saying that the idea that a person of unsound mind, not so found, cannot, by a next friend, invoke the interference of a court of chancery to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness must be owing to the old notion on the subject of a person not being permitted to stultify himself.

And in *Whetstone v. Whetstone*, 75 Ala. 495, it is held that, where a brother has constituted himself a trustee or agent for his insane sister without the inquisition of lunacy, and has taken her estate into his control and management, she being of weak and imbecile mind, equity has jurisdiction to entertain a suit on her behalf, by next friend, to bring his executors to a settlement.

It is stated in *Howard v. Howard*, 87 Ky. 616, 1 L. R. A. 610, 9 S. W. 411, that Ky. Civil Code, § 85, subs. 3, which permits any person of unsound mind who has no committee to sue by next friend, made an innovation, in respect to allowing a lunatic having no committee to sue by next friend, upon the elementary chancery practice, which did not allow a lunatic to sue by next friend; but that, in reference to persons of weak or unsound mind, such section, by allowing them to sue by next friend, simply declared a rule of chancery practice.

And in the two earlier cases of *Wilson v. Oldham*, 12 B. Mon. 55, and *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222, both of which were suits in equity tried before the enactment of the Code, the right of a person of unsound mind, who has never been declared a lunatic, to sue by next friend, is sustained.

. And the right to bring a suit for partition by next friend on behalf of a lunatic is recognized in *Stephens v. Porter*, 11 Helsk. 341, which was a suit in chancery to set aside a sale under partition proceedings, said in the headnote to have been brought by next friend.

And Chancellor Kent stated, in *Malin v. Malin*, 2 Johns. Ch. 238, that, if a person has religious scruples as to becoming a party to a suit, perhaps he may become plaintiff by *prochein ami*; and that a person incompetent to protect himself from age or weakness of mind, or from some religious delusion or fanaticism, ought to be protected by the court.

And in *Dudgeon v. Watson*, 23 Blatchf. 161, 23 Fed. 161, and *Pyott v. Pyott*, 191 Ill. 280, 61 N. E. 88, which were suits in equity, it is said, *obiter*, that a suit for an insane person may be prosecuted by next friend when no committee has been appointed.

So, the right to sue by next friend was sustained in *Parson v. Kinzer*, 3 Lea, 346, and *Bird v. Bird*, 21 Gratt. 712, which were both suits in equity.

In *Denny v. Denny*, 8 Allen, 311, it is said that the doctrine, as stated in *Story's Equity Pleading*, § 66, is that where persons are incapable of acting for themselves, though not strictly idiots or lunatics, the suit may be brought in their name, and the court will authorize some suitable person to carry it on as next friend; but that in every such case it is in the discretion of the court to allow the suit to proceed or not.

But in *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, it is held that a bill in equity cannot be maintained in the name of a lunatic or insane person by his next friend, to set aside a deed made by the incompetent, but such a suit can only be maintained by a conservator, who has the custody and control of the estate and rights of the lunatic. The court said that whatever might be the rule of law in an action to recover money did not affect the question here, as this was a proceeding in equity, and rested upon a different principle.

This case, however, is distinguished in *Roughan v. Morris*, 87 Ill. App. 642, where a bill in chancery was filed by next friend on behalf of an insane person, asking for the appointment of a receiver to collect rents of real estate of the incompetent and manage his business until a conservator could be appointed, on the ground that the estate was being wasted by the mismanagement of one who had obtained from the incompetent a pretended power of attorney. The court said that, if the purpose of the suit was the termination of the agency created by the power of attorney and for an accounting, it would be governed by the *Covington Case*, and a bill for such purpose would not lie when brought by one volunteering as next friend, but that here the purpose of the bill was merely to preserve the estate until a conservator might be appointed. That it should seem upon principle that a court of chancery should have power to protect the estate of an insane person until a conservator could be appointed, though the jurisdiction of the chancellor to thus appoint a receiver could not be maintained upon the ground alone that the subject-matter of the suit was a matter proper for equitable cognizance,—that is, the agency, the waste, and the right to an accounting,—for, in respect to such relief as the complainant might be entitled to in 64 L. R. A.

these matters, the suit could not be maintained by one volunteering as next friend, but that it should seem that the suit might be maintained under the general chancery power to protect the estates of lunatics. The court added that it seemed clear that it was not intended in the *Covington Case* to hold that a suit by next friend might not in any case be allowed, that there was a distinction indicated between an attempt to procure equitable relief in chancery by setting aside a deed of a lunatic who appears only by next friend (as in that case), and an effort merely to protect the estate of the lunatic through suit brought by next friend until a committee or conservator might be appointed to represent him. It was therefore held that while, under the decision in the *Covington Case*, the suit could not be maintained for the ultimate purpose, alone, of annulling the deed by which the agency of the defendant was created, nor for obtaining an accounting alone, yet it might be maintained for the sole purpose of protecting the estate of the lunatic until a conservator might be appointed.

Although these two cases seem to indicate that in Illinois the jurisdiction of chancery to entertain suits on behalf of insane persons when brought by next friend is limited, nevertheless, in *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213, a bill in chancery on behalf of a nonresident lunatic, duly adjudged to be such in England, by his next friend, to vacate and set aside a sale of land under a decree of the court in a partition suit, was entertained and dealt with without anything being said as to the right of the lunatic to thus sue.

So, also, in *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383, a bill on behalf of a person judicially declared to be a lunatic, but for whom no conservator had been appointed, was filed by his next friend to have a resulting trust declared in favor of complainant in a certain tract of land, and for an accounting of the rents and profits, and for such other relief as equity might require. Since these two bills, filed by next friends, seeking, not merely to preserve the estate of the lunatic until the appointment of a conservator, but to procure the fullest equitable relief, were entertained and dealt with by the court without any question being raised as to the propriety of the form of action, it should seem that the right of the lunatic to thus sue in equity by next friend was conceded.

And in the case of *ISLE V. CRANBY*, which was a suit in chancery on behalf of an insane person by his next friend, it is said, in discussing the *Covington Case*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, that, if the doctrine of that case is that a bill will not lie in the name of a lunatic or insane person who has not been adjudged insane, or who has no conservator, by his next friend, it is contrary to the weight of authority, in conflict with the later decisions of the court, and must be deemed to have been overruled.

So, also, the right is expressly recognized in *Ryder v. Topping*, 15 Ill. App. 216, where a bill in chancery was filed by a next friend against persons who held in trust for an insane person certain money left for his support by his father's will, alleging waste and mismanagement on the part of the trustees, and asking for an accounting. The court held that, although ordinarily it is the duty of the committee to represent a lunatic, the court had power, under the statute, to appoint a next friend to represent

his interests in a pending suit, and that the mere fact that suit was brought by next friend without leave of court was no ground for dismissing it.

And the right to thus sue in chancery is impliedly recognized in *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 894, where one of the complainants filing a bill in chancery was an insane person appearing by next friend, and also in *Brown v. Riffin*, 94 Ill. 560, in which a bill in chancery was filed on behalf of an insane person by his next friend to contest the validity of a will. In neither of these cases is the form of action discussed, the right to so sue being apparently conceded.

In *Gillespie v. Hauenstein*, 72 Miss. 838, 17 So. 602, a suit in equity on behalf of a lunatic by one calling himself his guardian and next friend was sustained against the objection that the person filing the bill had not been appointed guardian, and had no authority to sue.

But the right of next friend to bring a suit for divorce on behalf of an insane person is denied in *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758.

The law of the court of chancery on this subject is stated in *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 121, to be that in certain cases where there is a person of unsound mind, not found so by inquisition, and, therefore, incapable of invoking the protection of the court, that protection may, in proper cases, be invoked on his behalf by any person as next friend, but that every person so constituting himself the guardian and protector of a person of unsound mind does so entirely at his own risk, and must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceeding. The court adds that it must be borne in mind that unsoundness of mind gives the court of chancery no jurisdiction whatever; that it is not by reason of the incompetency, but notwithstanding it, that the court entertains the proceedings; that it can exercise only such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself if of sound mind. An essential element of such a suit is said to be that the plaintiff must be of unsound mind, and that he should not have been so found by inquisition.

This statement of the rule of the court of chancery is quoted as authority in *Jones v. Lloyd*, L. R. 18 Eq. 265, 43 L. J. Ch. N. S. 826, 30 L. T. N. S. 487, 22 Week. Rep. 785, but nothing further is said to indicate what distinction, if any, there is between the right to sue by next friend in equity and the right to so sue at law.

It was claimed in *Light v. Light*, 25 Beav. 248, that a person of unsound mind could sue in a court of chancery only by a committee duly appointed in lunacy, but, without any discussion of the question, the right of the lunatic to sue by next friend was sustained.

So, in *Howell v. Lewis*, 65 L. T. N. S. 672, 61 L. J. Ch. N. S. 89, 40 Week. Rep. 88, it is said that the court of chancery, in the exercise of its general jurisdiction to allow lunatics and persons of unsound mind to sue by their next friends, has power, in case of a dispute as to the condition of the mind of the alleged insane person, to direct an inquiry to ascertain the condition of his mind.

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While in *Cardwell v. Tomlinson*, 54 L. J. Ch. N. S. 957, 52 L. T. N. S. 746, 33 Week. Rep. 814, which was a suit in chancery, it is said that the practice of the court at all times has been that a person incapacitated from conducting an action himself might do so by means of a next friend.

In *Nelson v. Duncombe*, 9 Beav. 211, 15 L. J. Ch. N. S. 296, 10 Jur. 399, which was a suit in equity, there is a *dictum* to the effect that a bill may be filed in the name of a person of unsound mind, though not so found, by anyone professing to be his next friend.

Other English cases decided before the passage of the judicature act in which suits in equity by next friend on behalf of an insane person not so found have been entertained, without anything being said as to whether the rule governing such suits in equity differed from the rule at law in regard thereto, are: *Eyre v. Wake*, 4 Ves. Jr. 795; *Re Law*, 30 L. J. Ch. N. S. 512, 7 Jur. N. S. 410; *Re Macfarlane*, 2 Johns. & H. 673, 31 L. J. Ch. N. S. 335, 8 Jur. N. S. 208, 6 L. T. N. S. 154, 10 Week. Rep. 369; *Palmer v. Walesby*, L. R. 3 Ch. 732, 16 Week. Rep. 924; *Wilkinson v. Harwood*, 4 Jur. 957; *Atty. Gen. v. Wilkinson*, L. R. 2 Eq. 817, 12 Jur. N. S. 593, 14 L. T. N. S. 725, 14 Week. Rep. 910; *West v. Davis*, Rolls 1863, W. No. 83; and the unreported case of *Fisher v. Mellie*, M. R. 1870, F. 3.

While in *Re Gordon*, L. R. 10 Ch. 192, 44 L. J. Ch. N. S. 208, 32 L. T. N. S. 348, 23 Week. Rep. 760, and *Carr v. Boyce*, 13 Ir. Eq. Rep. 102, such suits were entertained after an adjudication of lunacy.

And a suit in equity by next friend on behalf of one deaf and dumb was sustained in *Liney v. Wetherley*, Ld. Red. 30, n.

c. At law.

In *New Jersey Idiots and Lunatics may sue at law* by next friend to be appointed by the court. *Dorshelmer v. Roorback*, 18 N. J. Eq. 438.

And an action at law for ejectment, prosecuted on behalf of a lunatic by next friend appointed by the court, was sustained in *Rankin v. Warner*, 2 Lea, 302.

Also, in *Wilson v. Ansley*, 47 Ga. 278, a legal proceeding by next friend on behalf of an insane person was sustained.

Cameron v. Pottinger, 3 Bibb, 11, and *Buchanan v. Rout*, 2 T. B. Mon. 114, were both actions at law in which the question of the right to sue by next friend did not arise, but they are included here as impliedly denying the right, since the court in both cases said that a lunatic, or one who becomes *non compos mentis*, must sue by guardian if within age, or by attorney if of full age. In both these cases the lunatics had been so adjudged and committees appointed. Nothing is said as to any distinction between suits at law and in equity, but, since the rule stated is that which undoubtedly governed actions at law under the old common-law rules, and these suits were at law, it may be inferred that the court intended to limit its decision to the particular form of action then before it.

As to the right of a lunatic to sue at law in Illinois, *Ryder v. Topping*, 15 Ill. App. 216, *supra*, V. b, refers to *Chicago & P. R. Co. v. Munger*, 78 Ill. 300, where it is held that, until the appointment and qualification of a conservator, he may maintain an action at law in his

own name without anyone to represent him. It should seem that, as he may sue at law without anyone to represent him, there could be no objection to suing in a legal action by a next friend, and this right is apparently conceded in the Covington Case, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, *supra*, V. b.

In *King v. McLean Asylum*, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 325, a petition for habeas corpus on behalf of an insane person was filed by next friend, and the right to so recognized.

While in *King's Case*, 161 Mass. 46, 36 N. E. 685, in which a petition for habeas corpus was filed by a stranger on behalf of an insane person, it is said that when the person imprisoned is brought into court, if a minor or of unsound mind, a next friend or guardian *ad litem* may be appointed by the court.

An action at law on behalf of an idiot, prosecuted by next friend, was sustained in *Dennis v. Dennis*, 2 Wms' Saund. 328, 2 Keble, 691. But the old common-law rule, which, while recognizing the right of an idiot to so sue, required an action on behalf of one *non compos* to be brought by guardian or attorney, is set forth in this case.

Actions at law by a wife in the name of her insane husband, to recover a debt due him, were sustained in *Gleddon v. Trebble*, 9 C. B. N. S. 367, and *Rock v. Slade*, 7 Dowl. P. C. 22, 1 Arnold, 346, 2 Jur. 993. It is not here stated that the wife sued as next friend, but the cases are often cited to sustain the right to thus sue, and they seem to be substantially the same in principle as a case brought by one expressly designated a next friend.

VI. Conclusion.

While there is some conflict as to the right of an insane person to institute proceedings by next friend, it is pretty well settled that where a person is actually insane, but has not been judicially declared so, actions both at law and in equity may be maintained on his behalf by a next friend. In some states, as in New Jersey, it is necessary that the next friend should be appointed by the court, while in others it is held that any person may volunteer to act as next friend; though in such cases it has sometimes been said that it is in the discretion of the court to permit the suit to proceed, and that a volunteer takes the risk of being held liable for costs if the court sees fit to dismiss the suit or to account to the lunatic in case he recovers his mind.

The authorities are harmonious in holding that in all cases where a person is not actually insane, but is incapable, through age or weakness of mind, from conducting his own affairs, suits may be maintained on his behalf by his next friend.

But where a person has been judicially declared of unsound mind, and a committee appointed, a majority of the cases holds that all suits should be brought by his committee, unless the interests of the committee clash with those of the lunatic, in which case most of the authorities hold that a next friend may prosecute an action, though some declare that a special guardian should be appointed to conduct the suit.

However, notwithstanding an inquisition of lunacy and the appointment of a committee, in one case a son was permitted to file a bill as next friend to impeach a settlement made by the lunatic at a time when he was alleged to be

incompetent. *Re Gordon*, L. R. 10 Ch. 192, 44 L. J. Ch. N. S. 208, 32 L. T. N. S. 348, 23 Week. Rep. 760, *supra*, IV. a.

And actions have been maintained by next friend after a finding of lunacy and appointment of a guardian where such finding and the appointment of the guardian were made in another country or state, and there was no guardian in the jurisdiction where the action was brought. *Re De Linden* [1897] 1 Ch. 453, 66 L. J. Ch. N. S. 295, 76 L. T. N. S. 180, 45 Week. Rep. 342; *Cook v. Thornhill*, 13 Tex. 293, 65 Am. Dec. 63; *Thiery v. Chalmers*, [1900] 1 Ch. 80, 69 L. J. Ch. N. S. 122, 81 L. T. N. S. 511, 48 Week. Rep. 148; *Speck v. Pullman Palace Car Co.* 121 Ill. 33, 12 N. E. 213, *supra*, IV. f.

So, where there has been a finding of lunacy within the jurisdiction, but no committee has been appointed, it has been held that an action may be maintained by next friend. *Parsons v. Kinzer*, 3 Lea, 346, *supra*, IV. d.

But the contrary was held in *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 121, *supra*, IV. d.

The only American cases, other than those governed by statute, that deny the right of a lunatic to sue by next friend in terms broad enough to include lunatics not so found, as well as those judicially pronounced insane, are *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261, 30 N. E. 764, *supra*, II.; *Dorsheimer v. Roorback*, 18 N. J. Eq. 438, *supra*, II., IV. a; and *Palmer v. Sinnickson*, 59 N. J. Eq. 530, 46 Atl. 517, *supra*, II. But in *Covington v. Neftzger* and *Palmer v. Sinnickson* it is not clear that there had been no adjudication of lunacy, and the *Covington* Case has been practically overruled by later decisions of the same court, while in *Palmer v. Sinnickson* the denial of the right was based on the fact that the petition failed to show that the next friend had been appointed by the court, as required by the New Jersey practice. In *Dorsheimer v. Roorback* there had been an adjudication of lunacy, and, although the rule there laid down against the right to so sue expressly includes lunatics not so found, the case has been criticised in the later case of *Collins v. Toppin*, 63 N. J. Eq. 381, 51 Atl. 933, *supra*, III. a, and the rule held to be limited to cases in which the lunatic has been judicially declared such, and a guardian appointed. And, in any event, these decisions affect only suits in equity, and not actions at law.

The English cases are unanimous in holding that, before an inquisition of lunacy, an insane person may sue in a court of equity by his next friend. Under the old common-law rule a lunatic could not sue at law by next friend, but was required to appear by attorney if of full age, or by guardian if within age. But an idiot, though required to appear in person, was permitted to sue by next friend. *Cd. Litt. 135b*; *Dennis v. Dennis*, 2 Wms' Saund. 328, note; *Bacon, Abr. title, Idiots and Lunatics, g.*

But this distinction between idiots and lunatics is not observed in the United States, and the distinction between the right to sue at law or in equity has been considered in but few cases, that point being usually ignored. And, since a large number of the states have now, by statute, abolished the distinction between law and equity, this question is of little importance. In England, also, an attempt was made by the judicature act of 1873, as amended in 1875, to

do away with the distinction between legal and equitable actions, and, according to the latest English case on the subject, a lunatic may now sue by next friend in that country, either at law or in equity. *Didshelm v. London & W. Bank*, 69 L. J. Ch. N. S. 443, [1900] 2 Ch. 15, 82 L. T. N. S. 738, 48 Week. Rep. 501, *supra*, V. a.

But it has been held that a liquidation petition in bankruptcy cannot be filed by a next friend in the name of a lunatic not so found by inquisition. *Ex parte Cahen*, L. R. 10 Ch. Div. 183, 39 L. T. N. S. 645, 27 Week. Rep. 387, *supra*, III. a.

And the right of a next friend to file a bill for partition on behalf of a lunatic not so found is denied in *Halfhide v. Robinson*, L. R. 9 Ch. 373, 43 L. J. Ch. N. S. 398, 22 Week. Rep. 448, 30 L. T. N. S. 216, *supra*, III. b; but this case is no longer law.

Informations have, indeed, been exhibited by the attorney general on behalf of idiots and lunatics, considering them as under the peculiar protection of the Crown,—especially where the interests of the committee and lunatic clash. But the propriety of this form of action in the United States has been denied (*Penington v. Thompson*, 5 Del. Ch. 328, *supra*, III. a.). And it is said in *Bird v. Bird*, 21 Gratt. 712, *supra*,

IV. a, b, d, e, in regard to this question, that the practice has sometimes been pursued in England, because there the custody and the care of the persons and estates of lunatics devolve upon the lord chancellor, in virtue of his general power as holding the Great Seal and Keeper of the King's conscience; that the attorney general, as the law officer of the Crown, is authorized to institute suits in their behalf in the form of Informations, but that here the custody, control, and management of the estates of lunatics are regulated by statute, and that it is clear, therefore, there is no analogy between the practice pursued here and that followed in the English courts.

There have been some implied denials in this country of the right to sue by next friend in some of the early cases, as in *Buchanan v. Rout*, 2 T. B. Mon. 114, *supra*, II., and *Cameron v. Pottinger*, 3 Bibb, 11, *supra*, II., where it is said that a lunatic must appear by guardian if within age or by attorney if of full age. These cases were both actions at law, and the decisions may be presumed to have been limited to such actions, and not to affect suits in equity. In any case, however, they are not in accord with the present weight of authority.

F. H. L.

IOWA SUPREME COURT.

Pauline S. MURRAY

v.

J. T. WILCOX, Appt.

(.....Iowa.....)

1. A defendant in a criminal case, coming into the state to attend the trial, both as a witness and in accordance with the obligations of his bail bond, is exempt from service of process in a civil action during the pendency of the proceedings, and for such reasonable time thereafter as is necessary for his return to the state of his residence.
2. A statute prescribing in what manner appearance may be made in an action has no effect upon a rule exempting nonresidents from suit while in the state as witnesses or parties to an action.
3. Motion to set aside the service is the appropriate remedy for a nonresident who is served with process while in the state as a defendant in a criminal action.

(January 16, 1904.)

A PPEAL by defendant from a judgment of the District Court for Story County in favor of plaintiff in an action brought to

NOTE.—As to privilege from arrest of person brought into state upon requisition as fugitive until expiration of reasonable time to return to state from which extradited, see, in this series, *Re Reinitz*, 4 L. R. A. 236; *Moleitor v. Sinnen*, 7 L. R. A. 817.

As to rights and privileges of nonresident witnesses from suit, see *Mullen v. Sanborn*, 25 L. R. A. 721, and *note*.
64 L. R. A.

recover damages for alleged breach of promise of marriage, in which the process was served on defendant while in the state as a party to another action. *Reversed*.

Statement by Ladd, J.:

On January 1, 1902, the plaintiff filed her petition alleging that defendant had promised to marry her, and, because of his failure to comply, she had been greatly damaged. The original notice was duly served in Story county, and on the 14th day of the same month the defendant filed a motion to set aside the service, and that he be discharged on three grounds: (1) That the court had no jurisdiction of his person; (2) that the service of the notice conferred no such jurisdiction; and (3) that defendant, when served with the original notice, was exempt from service of civil process or notice in Iowa, and especially in Story county. This motion was supported by an affidavit of defendant to the effect that since September 1, 1901, he had been a bona fide resident of Nebraska, with home at Wood River, in that state; that at the August, 1901, term of the district court of Story county, two indictments for felonies had been returned by the grand jury against him, on which a requisition had issued by the governor of this state; that by virtue thereof he was arrested in Nebraska, and brought to Story county, where he gave bail for his appearance, and then returned to his home; that at the October, 1901, term of court in said

county said indictments were set for trial; that for the sole and only purpose of attending as a party and as a witness in his own behalf he returned from his home in Nebraska to Story county on the 23d of October, 1901, and on that day was put on trial for the offense charged in one of the indictments, and acquitted; that thereupon the other indictment was dismissed; that he intended to and did return to his home at Wood River, Nebraska, on the first railroad train leaving in that direction after these proceedings, but before he could do so the original notice herein was served upon him. This motion was overruled, Judge Kenyon then presiding, and at a subsequent term of court default and judgment were entered, Judge Richard presiding. The defendant appeals.

Mr. Tom H. Milner, for appellant:

Parties to an action are generally exempt from service of process in the jurisdiction to which they go to attend the trial of the cause.

22 Am. & Eng. Enc. Law, p. 164; *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370.

The exemption or privilege extends to both parties, plaintiff and defendant.

22 Am. & Eng. Enc. Law, p. 165; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Halsey v. Stewart*, 4 N. J. L. 366; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483.

The exemption applies particularly to witnesses who are nonresidents of the state.

22 Am. & Eng. Enc. Law, p. 164; *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Murfree, Sheriffs*, § 122; *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Matthews v. Tufts*, 87 N. Y. 568; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754.

It applies to witnesses who come voluntarily into the state.

22 Am. & Eng. Enc. Law, p. 163; *Massey v. Colville*, 45 N. J. L. 118, 46 Am. Rep. 64 L. R. A.

754; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Re Healey*, 38 Am. Rep. 717, and note, 53 Vt. 694; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Dungan v. Miller*, 37 N. J. L. 182; 1 Thompson, Trials, § 185; 1 Greenl. Ev. § 316.

The proper way in which one privileged or exempt from service must avail himself of his rights is by motion to set aside the service.

Williams v. McGrade, 13 Minn. 174, Gil. 165; 22 Am. & Eng. Enc. Law, p. 162, note; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961.

The full purpose and intention of the statute regarding appearances is carried out if it be held that, by filing this motion, we appear in the action. We say to the court: "While it is true that we are here in court both in fact and in law, yet it is also true that we ought not to be detained herein, or required to plead to plaintiff's petition because our rights have been violated in this: We were served with a notice at a time when and at place where we were privileged and exempt from service, and we came into court, and now here claim our privilege and exemption, and ask the court to recognize and enforce the same by setting aside the service of such notice, and discharge the defendant."

Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

This court would have jurisdiction in the absence of an appearance by the defendant.

Thornton v. American Writing Mach. Co. 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 679; *Matthews v. Puffer*, 10 Fed. 606; *Freeman*, Judgm. § 296; *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622; *Prentiss v. Com.* 5 Rand. (Va.) 697, 16 Am. Dec. 782; *Geyer v. Irwin*, 4 Dall. 107, 1 L. ed. 762.

The fact that the court has jurisdiction does not prevent the remedy we ask for being granted.

Fisk v. Westover, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Bradley v. Thibault*, 117 Ind. 255, 19 N. E. 336.

The policy of protection, as sound principles require, extends as well to parties as to witnesses.

Mitchell v. Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176; *People ex rel. Watson v. Superior Ct. Judge*, 40 Mich. 729; *Norris v. Beach*, 2 Johns. 294; *Sandford v. Chase*,

3 Cow. 381; *Dixon v. Ely*, 4 Edw. Ch. 557; *Clark v. Grant*, 2 Wend. 257; *Seaver v. Robinson*, 3 Duer, 622; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Ex parte Hall*, 1 Tyler (Vt.) 274; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Miles v. McCullough*, 1 Binn. 77; *Halsey v. Stewart*, 4 N. J. L. 366; *Dungan v. Miller*, 37 N. J. L. 182; *Vincent v. Watson*, 1 Rich. L. 194; *Sadler v. Ray*, 5 Rich. L. 523; *Martin v. Ramsey*, 7 Humph. 260; *Re Dickenson*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217; *May v. Shumway*, 16 Gray, 86, 77 Am. Dec. 401; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Ballinger v. Elliott*, 72 N. C. 596; *Parker v. Hotchkiss*, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; *Juneau Bank v. McSpedan*, 5 Biss. 64, Fed. Cas. No. 7,582; *Arding v. Flower*, 8 T. R. 534; *Newton v. Askew*, 6 Hare, 319, 18 L. J. Ch. N. S. 42, 13 Jur. 186; *Persee v. Persee*, 5 H. L. Cas. 671; *Re Cannon*, 47 Mich. 481, 11 N. W. 280; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Anderson v. Rountree*, 1 Pinney (Wis.) 115.

No appearance for appellee in supreme court.

Ladd, J., delivered the opinion of the court:

The immunity from service of civil process of a witness while attending a trial in a state other than that of his residence to give evidence seems to be universally recognized. The privilege protects him in coming, in staying, and in returning, if he acts in good faith, and without unreasonable delay. *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35. See note to *Mullen v. Sanborn*, 25 L. R. A. 721. As to whether a party is entitled to a like exemption there is some conflict in the authorities. In *Bishop v. Vose*, 27 Conn. 1, the defendant, a resident of another state, had come to Connecticut to attend the trial of a case which he had caused to be brought, and he was held not exempt from the service of summons; but in *Wilson Sewing Mach. Co. v. Wilson*, 23 Blatchf. 51, 22 Fed. 803, 51 Conn. 595, it was decided otherwise as to a nonresident defendant whose attendance was necessary both as a witness and to instruct his counsel; the reason for the distinction being that a plaintiff, having sought the aid of the courts of another state, ought not to shrink from being subjected to their control, while the attendance of the defendant may be said to be compulsory. In *Baldwin v. Emerson*, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. 83, 64 L. R. A.

17 Atl. 913, however, this distinction was disregarded, and the reason for exempting either a plaintiff or a defendant in a civil action, because of being a nonresident, from service of summons, was declared "fanciful, rather than substantial." See also *Ellis v. De Garmo*, 17 R. I. 715, 19 L. R. A. 561, 24 Atl. 579. But a different view has been taken by the great weight of authority, declaring both party and witness alike entitled to the privilege. *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Andrews v. Lembeck*, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. 483; *Matthews v. Tufts*, 87 N. Y. 568; *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Halsey v. Stewart*, 4 N. J. L. 367. As a party may testify in his own behalf in this state, there is no room for the distinction made between parties and witnesses, save, possibly, as suggested in the Connecticut cases. The reasons for exemption of service of process have been so often stated that repetition seems superfluous. They relate to the free and unhampered administration of justice in our courts, and are as applicable to service of summons or original notice as the beginning of an action by arrest on civil process under the old common-law practice. Said Elliott, J., in *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250, concerning the exemption: "It is his privilege, under our laws, to testify in his own behalf; and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a nonresident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state, who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an

evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right, because he is willing to trust our courts and our laws without removing his case to the Federal courts, or refusing to put himself in a position where a personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders." See also excerpts from numerous decisions collected in note to *Mullen v. Sanborn*, 25 L. R. A. 721. Of course, there may be exceptions, as *Mullen v. Sanborn*, *supra*, where a plaintiff in an attachment suit came from another state to testify, and was held not to be privileged from the service of summons while there in an action for maliciously bringing the attachment suit. Having resorted to this drastic remedy, the equal administration of justice seemed to demand recoupment of the resulting damages in the same jurisdiction. It is also to be noted that the decisions with reference to immunity of witnesses or parties from service of process or summons within the same state, but in counties other than their residence, are in conflict. See *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96. Though that question is not now involved, it may be observed that it is probably settled by the statutes of this state. Unless, then, the privilege is obviated by some provision of our Code, the defendant was entitled to the immunity claimed. Section 3541 provides that "the mode of appearance may be: . . . (1) By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery, and to be filed in the case; (2) by entering an appearance in the appearance docket or judge's calendar, or by announcing to the court an appearance which shall be entered of record; (3) by an appearance, even though especially made, by himself or his attorney, for any purpose connected with the cause, or for any purpose connected with the service or insufficiency of the notice; and an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to 64 L. R. A.

the court that he has not had the full timely notice required of the substantial cause of action stated in the petition." The object had in enacting this statute was to do away with allowing a party to specially appear for the sole purpose of advising the court that he is not there. See *Hodges v. Brett*, 4 G. Greene, 345. It relates to the acquirement of jurisdiction of the person, and not what shall be done with him after jurisdiction has been obtained. No exception was taken by the defendant to the manner of service or to the character of the notice, and he admits having been brought into court. What he objected to was being detained therein and compelled to plead to plaintiff's petition and litigate the issues in a jurisdiction into which the plaintiff had no right to bring him. The service is merely the method of invoking jurisdiction. The immunity extends further, and shields him from litigating the controversy in the place where he was exempt from service. If he had failed to appear this would have been a waiver of his privilege, and a valid and binding judgment might have been rendered against him. *Thornton v. American Writing Mach. Co.* 83 Ga. 288, 20 Am. St. Rep. 320, 9 S. E. 679; *Freeman*, Judgm. § 296; note to *Mullen v. Sanborn*, 25 L. R. A. 721. In enacting the above statute, and in authorizing suit against a nonresident in any county of the state where found, the legislature had no thought of interfering with a rule concerning exemption from service of notice. *Wilson v. Donaldson*, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250; *Fisk v. Westover*, 4 S. D. 233, 46 Am. St. Rep. 780, 55 N. W. 961. These statutes, like others, were enacted with reference to the great body of law as it existed, and should not be isolated therefrom when being construed. The suit contemplated is such as may be properly instituted, and against which the defendant is not shielded by the privileges of his situation. The circumstances were such as to bring the case clearly within the rule announced. The defendant was bound to be in attendance of court to avoid the forfeiture of his bond. He came also as a witness in his own behalf. His stay was not unreasonable, and he should have been allowed to go hence from the jurisdiction of the court, which had been illegally invoked against him. The remedy by motion, with which defendant availed himself, was that generally recognized by the authorities as appropriate. Indeed, it would seem that no other would have been effective in relieving him from in some way responding to the petition and dismissing him from the court's jurisdiction.

Reversed.

A. W. HOFF

v.

Adelaide S. SHOCKLEY, Appt.

(.....Iowa.....)

1. A property owner is not liable for injuries to a traveler caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property.
2. Assent by the agent of a property owner to the placing of sand in the street in front of it, by an independent contractor who has undertaken to erect a building on the premises, will not render the property owner liable for injuries caused to travelers on the street by failing to mark the obstruction by warning lights after dark.
3. An appellate court is not deprived of jurisdiction of a cause by failure to get it into that court for the term specified in the notice of appeal.

(February 11, 1904.)

A PPEAL by defendant from a judgment of the District Court for Polk County in favor of plaintiff, in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

Statement by **McClain, J.**:

Action to recover damages on account of personal injuries to plaintiff's wife, resulting from being thrown from a buggy on account of a pile of sand in the street in front of the premises of the defendant, Mrs. Shockley. Verdict and judgment for plaintiff. Defendant appeals.

Messrs. J. A. Merritt and J. K. Macomber, for appellant:

If Winburn was an independent contractor, the owner is not liable for his negligence in failing to guard the sand by red lights or otherwise.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his

own methods, and without being subject to the control of his employer, except as to the results of his work.

Humpton v. Unterkircher, 97 Iowa, 514, 66 N. W. 776; *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 562; *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Miller v. Minnesota & N. W. R. Co.* 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; *Hughbanks v. Boston Invest. Co.* 92 Iowa, 267, 60 N. W. 640. See *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 75; 1 Thomp. Neg. § 624.

It was no more the duty of Mrs. Shockley to guard the sand pile than it was the duty of the owner to guard the lumber pile which was left in the street by the contractor in the case of *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743.

1 Thomp. Neg. 2d ed. § 620; *Richmond v. Sitterding*, 9 Va. Law Reg. 41, 43 S. E. 562; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386.

Mrs. A. S. Shockley was not liable because G. A. Shockley told Winburn he could put the sand in the street.

Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743; *Richmond v. Sitterding*, 9 Va. Law Reg. 41, 43 S. E. 562; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776.

When the contract is for something that may be lawfully done and is proper in its terms, and the person for whom work is done is only interested in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence.

Tiffany, Personal & Dom. Rel. pp. 508, 509; *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699; *Dill. Mun. Corp.* § 1030; *Cooley*, Torts, pp. 643-647; 2 Kent, Com. p. 344, note; *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117, 6 Pac. 329; *Hes-*

NOTE.—For other cases in this series holding that employer is not liable for negligence of independent contractor, see *St. Louis, I. M. & S. R. Co. v. Yonly*, 9 L. R. A. 604, and note; *Ketcham v. Newman*, 24 L. R. A. 102; *Smith v. Milwaukee Builders' & T. Exchange*, 30 L. R. A. 504; *Leavitt v. Bangor & A. R. Co.* 36 L. R. A. 382; *Berg v. Parsons*, 41 L. R. A. 391; *Smith v. Benick*, 42 L. R. A. 277; *Norfolk & W. R. Co. v. Stevens*, 46 L. R. A. 367; *Wright v. Big Rapids Door & Blind Mfg. Co.* 50 L. R. A. 495; *Boomer v. Wilbur*, 53 L. R. A. 172; *Upington v. New York*, 53 L. R. A. 550.

For exceptions to the rule that an employer is not liable for acts of an independent contractor, see *Hawver v. Whalen*, 14 L. R. A. 828, and note; *Larson v. Metropolitan Street R. Co.* 16 64 L. R. A.

L. R. A. 330; *Carrico v. West Virginia C. & P. R. Co.* 24 L. R. A. 50; *Negus v. Becker*, 25 L. R. A. 667; *Colgrove v. Smith*, 27 L. R. A. 590; *Sanford v. Pawtucket Street R. Co.* 33 L. R. A. 564; *Werthelmer v. Saunders*, 37 L. R. A. 146; *Richmond & M. R. Co. v. Moore*, 37 L. R. A. 258; *Thompson v. Lowell, L. & H. Street R. Co.* 40 L. R. A. 345; *Bonaparte v. Wiseman*, 44 L. R. A. 482; *Moran v. Corliss Steam-Engine Co.* 45 L. R. A. 267; *Lion v. Baltimore City Pass. R. Co.* 47 L. R. A. 127; *Sebeck v. Plattdeutsche Volksfest Verein*, 50 L. R. A. 199; *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 265; *South Bend v. Turner*, 54 L. R. A. 396; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116; and *Davis v. Summerfield*, 63 L. R. A. 492.

amer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502; *Wright v. Big Rapids Door & Blind Mfg. Co.* 124 Mich. 91, 50 L. R. A. 495, 82 N. W. 829; *Berg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957; *Smith v. Benick*, 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998; *Sanford v. Pawtucket Street R. Co.* 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67; *Whittaker's Smith*, Neg. p. 171.

Messrs. Carr, Hewitt, Parker, & Wright, for appellee:

If the work is dangerous of itself unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor.

Wood v. Independent School District, 44 Iowa, 27; *Neimeyer v. Weyerhaeuser*, 95 Iowa, 497, 64 N. W. 416; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470; *Storrs v. Utica*, 17 N. Y. 108, 72 Am. Dec. 437.

McClain, J., delivered the opinion of the court:

The defendant, Mrs. Shockley, procured a building permit from the proper city authorities for the erection of a dwelling house on her lot abutting upon a paved street, and then made a written contract with one Wynburn to construct such house; the contractor to furnish all the labor and material, except the brick, which was to be furnished by defendant. In the course of the work, Wynburn caused sand to be hauled and piled up in the street in front of defendant's lot; the place for depositing it being selected with the approval of defendant's husband. This pile of sand being left unguarded and unmarked by danger signals of any kind, the plaintiff, driving along the street at night in a buggy with his wife, drove upon it, and the buggy was overturned, and plaintiff's wife was thrown out and injured. Wynburn and two others were made codefendants with Mrs. Shockley, but the action was dismissed or abated with reference to the two other defendants, and verdict and judgment for \$4,700 were returned and entered against Mrs. Shockley and Wynburn. As 64 L. R. A.

Wynburn does not appeal, the case will be treated as one against Mrs. Shockley alone.

The sole question necessary to consider is whether, under the facts, as to which there is practically no dispute, defendant is liable for what may be conceded to have been the negligence of Wynburn in allowing the pile of sand to remain in the street unguarded, and in such condition that plaintiff, in the exercise of reasonable care, drove his buggy upon and over it, and the injury complained of resulted proximately therefrom. It is clearly established by the evidence that Wynburn was an independent contractor, and it is unnecessary to cite authorities to the general proposition that one who employs another to do a piece of work according to the methods to be adopted by the latter, and without reservation of control on the part of the employer, except as to the result of the work done, is not liable for injuries suffered by a third person by reason of the negligence of the contractor in carrying on the work. There are qualifications of the rule thus broadly stated, which need not be here discussed. This case does not fall within any such qualifications or exceptions, unless it be some exception or qualification predicated upon the fact that defendant was the owner of the premises on which the improvement was being made, and allowed a dangerous obstruction, created through the contractor's negligence, to exist on the street in front of such premises. Such a state of facts was held in *Bush v. Steinman*, 1 Bos. & P. 404, to render the owner of the premises liable, and, if the doctrine there announced has been adhered to in subsequent decisions, and remains a correct exposition of the law, then the judgment against the defendant is well founded. As the case cited is typical, it will facilitate the discussion to quote the statement of facts from the report: "The defendant, having purchased a house by the roadside (but which he had never occupied), contracted with a surveyor to put it in repair for a stipulated sum; a carpenter, having a contract under the surveyor to do the whole business, employed a bricklayer under him; and he, again, contracted for a quantity of lime with a lime burner, by whose servant the lime in question was laid in the road." Under this state of facts, the lord chief justice of the English court of common pleas, before whom the case was tried, was of opinion that the defendant was not answerable for the injury sustained by the plaintiff by reason of the lime being piled in the highway. But, to get the case before the full bench, a verdict was taken for the plaintiff, with leave to defendant to move for a nonsuit. After full consideration, the court agreed that the action could

be maintained, although the chief justice still entertained doubts as to the precise principle on which the verdict should be sustained. The rule adopted by the court is most clearly stated by Rooke, J., who says: "He who has work going on for his benefit and on his own premises must be civilly answerable for the acts of those whom he employs. According to the principle of the case in [*Michael v. Alestree*] 2 Lev. 172, it shall be intended by the court that he has a control over all those persons who work on his premises, and he shall not be allowed to discharge himself from that intentment of law by any act or contract of his own. He ought to reserve such control, and, if he deprive himself of it, the law will not permit him to take advantage of that circumstance in order to screen himself from an action. . . . The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise." It will be noticed that the learned judge rendering the opinion substantially ignores the distinction between the case of master and servant and one of independent contractor. But, in view of the full recognition which the doctrine of independent contractor has received in the modern cases, the conclusion of the court in *Bush v. Steinman* is to be supported, if at all, as establishing an exception to the effect that the owner of fixed property owes a duty to make the premises safe, regardless of whether the unsafe condition complained of results from the negligence of himself or his servants, or from the negligence of an independent contractor and his servants. But, as applied to a case of a dangerous nuisance in the highway in front of the owner's premises, not caused by the act of the owner, nor of persons for whose acts he is responsible as master or employer, this doctrine has not been accepted by the authorities. The courts of England have expressly refused to follow the case of *Bush v. Steinman*, and it has been distinctly and unanimously disclaimed as authority in this country. *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743; *Boswell v. Laird*, 8 Cal. 469, 494, 68 Am. Dec. 345; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37. As is said in *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743: "*Bush v. Steinman* is no longer law in England. If ever a case can be said to have been overruled, indirectly and directly, by reasoning and by authority, this has been. No one can have examined the case without feeling the difficulty of that clear-headed judge, Chief Justice Eyre, of knowing on what ground its decision was put. It could not stand on the relation of master and servant.

That relation did not exist. It could not stand upon the ground of the defendant having created or suffered a nuisance upon his own land, to the injury of his neighbor's property. The lime was on the highway. There is no rule to include it but the indefinitely broad and loose one that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do,—a rule which ought to have been, and was, expressly repudiated." The contention of counsel for the appellee seems to be this: Defendant should have known that the carrying on of the work by the contractor would involve the deposit of sand in the street, and, while this would not necessarily and of itself constitute a nuisance, it might become a nuisance by reason of failure to properly guard it or warn against it, and the defendant should have taken pains to see that the contractor took proper precautions. But such an argument, if acceded to, would require conclusions which are wholly untenable. The defendant must have known that it would be necessary for the contractor to drive his wagons along the street in front of defendant's premises, and thereby, to some extent, obstruct the use of the street while they were being unloaded. And yet could it be claimed that the negligence of the contractor in so driving his wagons or managing them as to injure persons using the street would render the defendant liable? The street was a public highway, and the contractor used the street in carrying out his contract subject to the same limitations as those imposed upon others in the use of a public highway. But it was not the concern of the defendant how the contractor used the street, nor did defendant have any control over the use which the contractor should make of the street. He might, perhaps, have gotten permission to use the adjoining lot for the purpose of piling his material thereon, or he might have mixed his sand and lime at another place, and transported the mortar to defendant's premises as it was needed, or he might have carried out his contract in any other manner which seemed to him feasible and proper. It was not incumbent on the defendant to stipulate how he should do his work. The real negligence complained of was the failure to put out barriers of warning lights, and this was not an act as to which the defendant had any responsibility, or over which defendant had any control. Even if defendant's husband acted as her agent in approving the placing of the sand in the street, his assent did not render her liable, for the placing of the sand in the street was not a wrong in itself. *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264.

Such an act may be entirely proper, and does not necessarily give rise to a nuisance. The wrong was in leaving the pile of sand in the street at night, without barricade or danger signals, so as to imperil the safety of those using the street in the usual way. For this neither defendant nor her husband was responsible.

The conclusion which we reach—that defendant was not chargeable with the consequences of the contractor's negligence—is supported by the great weight of authority. For instance, in *Wright v. Big Rapids Door & Blind Mfg. Co.* 124 Mich. 91, 50 L. R. A. 495, 82 N. W. 829, it was held that a property owner was not liable for the act of an independent contractor in negligently piling lumber near the owner's premises. In *Sanford v. Pawtucket Street R. Co.* 19 R. I. 537, 33 L. R. A. 564, 35 Atl. 67, it was held that the defendant, a street car company, was not liable for negligence of an independent contractor in stretching rope or wire across a public street in the construction of the road. In *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998, it was held that the defendant company was not liable for damages by fire communicated from the cooking car used by an independent contractor engaged in cutting wood for the company, although the car stood on the company's track. In *Berg v. Parsons*, 156 N. Y. 109, 41 L. R. A. 391, 66 Am. St. Rep. 542, 50 N. E. 957, it was held that the negligence of a contractor in blasting rock on defendant's premises, causing damages to a building upon the adjoining lot, did not make the defendant responsible. In *Smith v. Benick*, 87 Md. 610, 42 L. R. A. 277, 41 Atl. 56, it was held that the proprietor of a public resort, employing an independent contractor to make a balloon ascension to attract visitors, was not liable for injury to a visitor by a pole which fell because of the negligence of the contractor in endeavoring to raise the pole for use in inflating his balloon. In *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065, it was held that the owner of a public building was not liable for the negligence of a contractor in putting a stairway into such temporary condition that it was dangerous to persons using it. In *Richmond v. Sitterding*, 9 Va. Law Reg. 41, 43 S. E. 562, it was held that the owner of premises was not liable for injuries resulting from negligence of an independent contractor in placing a plank in the street in front of the premises so as to create an unlawful obstruction. In *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386, it was held that the owner of a building was not liable for the negligence of the servant of an in-

dependent contractor at work on the building in dropping an iron ball from the roof to the street below. Similarly, in *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755, it was held that the owner of a building was not liable for the negligence of a contractor in allowing a plank to fall from the building, which was in process of erection, to the sidewalk below. In *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139, 55 Pac. 772, it was held that the owner of a building in process of erection, intrusting to an independent contractor the work of laying pipes in the street, connecting with the building, was not liable for the negligence of the contractor in tearing up the sidewalk in the prosecution of his work, and leaving it in such condition as to be dangerous to persons passing by. In *Harrison v. Collins*, 86 Pa. 153, 27 Am. Rep. 699, it was held that the owner of premises was not liable for an injury resulting from the negligence of an independent contractor in leaving open for a short time a coal hole in the sidewalk in front of the premises. And in *Hilliard v. Richardson*, 3 Gray, 349, 63 Am. Dec. 743, which has already been cited, it was held that the owner of land, employing a carpenter as an independent contractor to alter and repair a building, and furnish the materials for the purpose, was not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the contractor. Other illustrations are furnished by cases which are cited in Thompson, on Negligence, §§ 620 *et seq.* The conclusions which we reach are in harmony with the doctrine as announced by this author. This court has recognized the same principle in *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385, in which the court reverses on account of an instruction extending the rule of *respondeat superior* to the act of a servant or employee when the master or employer, by the terms of the employment, has no authority to control and direct the manner of the execution of the work; and the court says that, if the employer has no control over the workmen, or the manner of doing the work, he is not liable for their negligence,—such as the throwing of earth from a ditch onto a public street, or the leaving of an unfinished ditch open during the night.

In the view which we take of the case before us, the authorities relied on by appellee are not in point. They are cases where a person is charged with maintaining premises in a safe condition for others,—as, for instance, where the owner of a building is required to have his premises safe, or a city,

having control of its streets, is required to maintain them in a safe condition for the use of the public. If the thing contracted to be done involves, as a direct consequence, a danger which the owner of the premises or the city is bound to avoid or to provide against, then the delegation of the work to an independent contractor will not relieve from liability for consequences proximately resulting from negligence in doing the thing thus contracted to be done. As furnishing illustrations of this rule of liability, which is wholly distinct from the rule as to the negligence of an independent contractor in carrying on the work contracted for, see *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269; *Woodman v. Metropolitan R. Co.* 149 Mass. 335, 4 L. R. A. 213, 14 Am. St. Rep. 427, 21 N. E. 482; *Colgrove v. Smith*, 102 Cal. 220, 27 L. R. A. 590, 36 Pac. 411; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437. The cases of *Van Winter v. Henry County*, 61 Iowa, 685, 17 N. W. 94, and *Wood v. Independent School District*, 44 Iowa, 27, illustrate this distinction. The distinction is clearly pointed out in *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427, in which this language is used: "where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but, where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor, and authorizes him to do those acts, is equally liable to the injured party." And see *Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470, where the same distinction is made.

The trial court therefore erred in submitting the case to the jury on the theory that the defendant was liable for the negligence of Wynburn in not sufficiently protecting the public, including the plaintiff and his wife, from the danger incident to putting the pile of sand in the street in front of defendant's premises, and leaving it unguarded.

Counsel for appellee urge the insufficiency of the notice of appeal, on the ground that no appeal was perfected at the term of the supreme court to which, by the terms of the notice, the appeal was taken. But we have never held that failure to get the case into the Supreme Court for the term specified in the notice was a ground for dismissal, or that the notice became inoperative to give this court jurisdiction on that account. *Ob-* 64 L. R. A.

jection is also made to the form of the notice, but we find that, as set out in appellant's abstract, it is sufficient.

Reversed.

Bishop, J., takes no part.

S. W. SAYLOR, Appt.,

v.

G. W. PARSONS et al.

(.....Iowa.....)

1. A corporation is not liable for injuries to its employee in attempting to rescue one of its members, who, in superintending and working with the employee, undermines a wall so that it is about to fall upon him, when the employee springs forward from a place of safety to avert the impending accident.
2. A corporation cannot be held liable to one who is injured in attempting to save its superintendent from peril, on the ground that it ought to have anticipated that, when the superintendent placed himself in peril, someone, upon discovering that fact, would attempt to shield him, where there is nothing to show that the work undertaken by the superintendent might not have been done with safety; since the company was not bound to assume that the superintendent would needlessly expose himself, or that, in case he did so, someone would imperil his own safety to rescue him.

(February 10, 1904.)

A PPEAL by plaintiff from a judgment of the District Court for Jasper County in defendants' favor in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. J. Salmon, N. T. Guernsey, and Graham & Morgan, for appellant:

The plaintiff was not guilty of contributory negligence.

It was a question of fact for the jury whether he was negligent or not.

Liming v. Illinois C. R. Co. 81 Iowa, 246, 47 N. W. 66; 1 Sutherland, Damages, 62.

One who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another,

NOTE.—For a case in this series holding that an employer is liable to an employee injured while attempting to save the life of a third person placed in danger by the master's negligence, see *Pittsburg. C. C. & St. L. R. Co. v. Lynch*, 63 L. R. A. 504.

For other cases in this series as to negligence in incurring danger to save life of another, see *Corbin v. Philadelphia*, 49 L. R. A. 715, and *note*; *West Chicago Street R. Co. v. Liderman*, 52 L. R. A. 655; and *Becker v. Louisville & N. R. Co.* 53 L. R. A. 267.

may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the person he sought to aid.

Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692; *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376; *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463; *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721. *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Reuter v. Starin*, 73 N. Y. 601; *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 Am. St. Rep. 690, 33 N. E. 142; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 29 Am. St. Rep. 553, 28 N. E. 172; *Gilson v. Delaware & H. Canal Co.* 36 Am. St. Rep. 849, note c, 65 Vt. 213, 26 Atl. 70; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 260, 25 Pac. 562; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 71 Am. St. Rep. 441, 42 Atl. 60.

The moral obligation made it the duty of the plaintiff to go where he did go.

Spooner v. Delaware, L. & W. R. Co. 115 N. Y. 22, 21 N. E. 696; *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721.

Parsons was not a fellow servant with Saylor.

Whether one is a vice principal or a fellow servant depends solely upon the character of the work he is engaged in performing.

Newbury v. Getchel & M. Lumber & Mfg. Co. 100 Iowa, 448, 62 Am. St. Rep. 582, 69 N. W. 743; *Barnicle v. Connor*, 110 Iowa, 238, 81 N. W. 452; *Scott v. Chicago G. W. R. Co.* 113 Iowa, 381, 85 N. W. 631; *Geesen v. Saguin*, 115 Iowa, 7, 87 N. W. 745.

Messrs. C. O. McLain and W. O. McElroy, for appellees:

Negligence consists in (a) a legal duty to use care, (b) a breach of that duty, and (c) the absence of a distinct intention to produce the precise damage, if any, which actually follows.

Shearm. & Redf. Neg. 5th ed. § 5.

If there is no duty, there can be no negligence.

Shearm. & Redf. Neg. § 8; 16 Am. & Eng. Enc. Law, p. 416; *Warner v. Railroad Co.* 6 Phila. 537; *Kahl v. Love*, 37 N. J. L. 5; *Humpton v. Unterkircher*, 97 Iowa, 517, 66 N. W. 776; *Flint & P. M. R. Co. v. Stark*, 38 Mich. 717.

If a servant performs voluntarily, on his own motion, any sort of work, whether dangerous or not, which is out of the line of his employment, without the direction, order, or consent of the master, and is injured thereby, the master is not liable.

McGill v. Maine & N. H. Granite Co. 70 64 L. R. A.

N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684; 20 Am. & Eng. Enc. Law, 2d ed. p. 131.

If a servant, although a vice principal as to some of his duties, is in the performance of such duties as are not personal to, or absolute upon, the master, but the ordinary duties of a servant, his negligence in that respect will not charge the master with liability to a fellow servant.

12 Am. & Eng. Enc. Law, 2d ed. p. 949; *Newbury v. Getchel & M. Lumber & Mfg. Co.* 100 Iowa, 448, 62 Am. St. Rep. 582, 69 N. W. 743.

A master is not liable for injuries personally suffered by his servant through the ordinary risks of the business, including the negligence of a fellow servant, when acting as such, when engaged in the same common employment, unless the master is chargeable with negligence in selecting or retaining the servant in fault.

Shearm. & Redf. Neg. § 180; *Neilson v. Gilbert*, 69 Iowa, 691, 23 N. W. 666; *Baldwin v. St. Louis, K. & N. W. R. Co.* 63 Iowa, 210, 18 N. W. 884; *Troughear v. Lower Vein Coal Co.* 62 Iowa, 576, 17 N. W. 776.

A case of negligence must be made against the defendant regardless of the person who attempted the rescue.

Shearm. & Redf. Neg. 5th ed. § 85. Beach Contrib. Neg. §§ 42, 43; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 563, 53 Am. Rep. 594; *Pierce, Railroads*, p. 328; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Brown v. French*, 104 Pa. 607.

Ladd, J., delivered the opinion of the court:

The plaintiff had been employed by Parsons, Rich, & Co. as a blacksmith. That firm had concluded to enlarge its factory, and on the 11th day of November, 1898, directed plaintiff, with others, to assist in removing a one-story addition thereto. This addition was about 24 feet square, with brick walls running against, not into, the main building. After the roof had been removed, they proceeded to take down the north and east walls. The south wall was to be extended as a part of a larger building. After a portion of the east wall had been removed, the other employees went at work elsewhere, but plaintiff continued until the brick had been taken away within a few feet of the ground. He then took out a window frame, and in returning through a doorway in the east wall after setting it aside, noticed that Parsons, who had been overseeing the work, and also working with the men, bent over next to the north wall undermining it at the bottom with a 5-foot iron bar. He was but 12 or 14 feet distant, and the wall appeared to be toppling over toward

him. Believing Parsons to be in imminent danger, plaintiff seized a piece of scantling, 2 inches by 4 or 6 inches and about 7 feet long, rushed over, and threw it against the wall about 2 feet from the top, and over a window, to prevent the wall from falling. Parsons immediately rose up and withdrew without serious injury. But the brick against which plaintiffs prop had been placed gave way, letting plaintiff forward, and he was caught by the falling wall, and his leg so crushed that amputation was necessary. The wall was then about 10 feet high at one end and 8 feet at the other, with an aperture for a window about 2½ feet wide and 5 feet high. Parsons was about 3 or 4 feet west of this window. Subsequently, in expressing his sympathy with plaintiff, he said to him that, but for his coming as he did, he (Parsons) might have been crushed and killed. Upon the conclusion of the evidence in behalf of plaintiff tending to establish facts as stated, the jury, on motion, was directed to return a verdict for the defendants.

1. A person who seeks to rescue another from imminent danger, thereby imperiling his own life, is not necessarily guilty of contributory negligence. "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721. In *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376, an engineer had continued at his post in order to save life, and the court, in reversing the finding of a jury that he was negligent in not jumping from the engine, said: "According to the common appreciation of human conduct and character, this evidence presents an example of heroic bravery and fidelity to duty at the post of danger most praiseworthy and commendable, and an occurrence worthy of lasting record in the book of heroic deeds. . . . To hold as matter of law in this case that the deceased was guilty of a want of ordinary care and prudence, as the engineer in charge of the locomotive and the train, in not jumping off at this crisis and abandoning his engine, from the mere apprehension of uncertain danger, would make a legal precedent very dangerous to the railway service in life and property, and by which it would be exceedingly difficult, if not impossible, to distinguish the cases and the circumstances in which it would or would not be the duty of an engineer to jump off and desert his engine, or to determine in point of time when he should do so, and the necessity or prudence for him to do so." See also *Central R. Co. v. Crosby*, 74 Ga. 737, 58 Am. 64 L. R. A.

Rep. 463. Cases involving the rescue of adults as well as infants from imminent danger are numerous, and the principle seems to be well established that he who springs to the rescue of another, encountering great danger to himself, is not to be denounced as negligent, but that the propriety of his conduct is to be left to the judgment of the jury. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 29 Am. St. Rep. 553, 28 N. E. 172; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Becker v. Louisville & N. R. Co.* 110 Ky. 474, 53 L. R. A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 L. R. A. 842, 71 Am. St. Rep. 441, 42 Atl. 60; *Thomp. Neg.* § 198. See *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66.

2. But negligence on the part of the defendant either toward the person rescued or the party making the rescue after the attempt had been begun is essential to a recovery in all cases. This was illustrated in *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102, where a son undertook to rescue his father from in front of a moving train on a bridge, and recovery was denied for the reason that the employees of the railroad company did not observe either in time to avoid a collision. In *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560, 53 Am. Rep. 594, the court, in considering the liability of the company for injury to a mother in attempting to rescue her child, perspicuously states principles governing cases of this character: "It is to be observed that it is only when the railroad company, by its own negligence, created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person, and recover for an injury he may sustain in that attempt. For instance, if a man were lying on the track of a railroad, intoxicated or asleep, but in such a position that he could not be seen by the men managing an approaching train, and they had no warning of his situation, and another, seeing his danger, should go upon the track to save his life, and be injured by the train, he could not recover unless the trainmen were guilty of negligence with respect to the rescuer, occurring after the beginning of his attempt. If the railroad company is not chargeable with negligence with respect to the person in danger, the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct toward him and his in making the attempt. In other words, the negligence of the company as to the person in danger is imputed to the company with respect

to him who attempts the rescue, and, if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer after his efforts to rescue the person in danger commenced." See also *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684. It is not pretended that plaintiff was not assigned a safe place to do his work; nor is it claimed there was any want of care with respect to him after he began his efforts to sustain the wall with the stick. But was there any negligence on the part of defendants toward Parsons, the person rescued? The law of negligence is based on the relative rights and duties of one person toward another. Says Judge Thompson, in his Commentaries on the Law of Negligence, § 3: "An essential ingredient in any conception of negligence is that it involves the violation of a legal duty which one person owes another,—the duty to take care for the safety of the person or property of the other; and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negligence. Therefore it is reasoned that a plaintiff who grounds his action upon the negligence of the defendant must show, not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him."

These principles are of universal recognition in text-books and decisions. Undoubtedly Parsons owned the moral duty of protecting his own person from harm. But the love of life is regarded as a sufficient inducement to self-preservation; all that is deemed essential for the government of persons in matters affecting themselves alone. Where no one else is concerned, the individual may incur dangers and risks as he may choose, and in doing so he violates no legal duty. He cannot be guilty legally, though he may be morally, of neglecting himself. It matters not whether he (Parsons) was vice principal or fellow servant, as he voluntarily undertook, on his own motion, to undermine the wall. This endangered no one's life but his own. If he was in peril, it was because he placed himself there. There was no negligence on the part of either defendant as to him, and for this reason there could have been none as to his rescuer. To illustrate, suppose a person with intent to suicide should jump into the river, and another, seeing his peril, but without knowledge of his intent, should leap in after him, and in attempting to save him be injured. Would anyone contend that the latter could recover the damages resulting from the former or his administrator? Certainly not, and for the reason that negligence could not be imputed to the suicide. His was the

dereliction of a moral, not a legal, duty to himself; for to take one's own life, though a crime at the common law, is not so declared by our Code. It may be said, however, that Parsons ought, in placing himself in peril, to have anticipated that someone would, upon discovering his danger, undertake to shield him from harm. But this was a contingency which, as it seems to us, would not be likely to be contemplated. In the first place, there is nothing in the record to indicate that Parsons, in the exercise of ordinary care, could not have undermined the wall with safety to himself. That he so intended must be presumed, for the presumption in favor of prudence is always to be indulged until the contrary appears. If, then, he might have performed the work with safety to himself, neither he nor the company is chargeable with negligence for not anticipating that he would do it otherwise, and that, if he so did, somebody would attempt to rescue him. Nor is the probability of receiving such assistance a matter which a person of ordinary diligence, in undertaking a perilous enterprise, would be likely to take into consideration. Men do not expose their lives to danger with the idea that others will protect them from harm by risking their own lives. Though history teems with accounts of heroic conduct and self-sacrifice, deeds of this kind have not become so common that they are to be anticipated as likely to occur whenever opportunity is afforded. The instincts of self-preservation still so dominate human conduct that acts like that under consideration, in which life itself was risked for the protection of another, are of such rare occurrence as always to commend the special attention and admiration of the entire community, and by the common voice of mankind those who do them are singled out as worthy of enrollment on the scroll of heroes. Because of their infrequency, however, it cannot be said they should enter into the calculations of men as at all likely in the ordinary transactions of life. As they spring from magnanimity, magnanimity must be relied upon in cases like this for reparation.

Affirmed.

Edith COWAN

v.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*

(.....Iowa.....)

1. Mental anguish and suffering will

NOTE.—For conflicting authorities as to right to recover damages for mental anguish on account of default of telegraph company, see *note*

- sustain an action for breach of contract promptly to transmit and deliver a telegram.
2. An action of tort will lie against a telegraph company for breach of a contract promptly to transmit a telegram, since there is also a breach of its public duty as a common carrier.
 3. Allegation of the contract relations in an action to recover for failure accurately to transmit a telegram does not necessarily make the action one upon contract, since that matter may be pleaded by way of inducement to an allegation of facts constituting a tort.
 4. The measure of damages in actions for tort is not the amount which might reasonably be supposed to have been contemplated by the parties as the reasonable result of the wrongful act, but such amount as represents the direct injury resulting from the act, although it could not have been contemplated as the probable result of the act done.
 5. The sender of a telegram which was altered in transmission need not allege freedom from contributory negligence, in an action to recover for the injury thereby caused to her, where the statute makes telegraph companies liable for mistakes in transmitting messages, and provides that, in actions to recover damages, the burden is upon the company to prove that the mistake was not due to its own negligence.

(January 23, 1904.)

APPEAL by defendant from a judgment of the District Court for Louisa County in plaintiff's favor in an action brought to recover damages for the negligent transmission of a telegram. *Affirmed.*

The facts are stated in the opinion.

Messrs. George H. Fearons, Carr, Hewitt, Parker, & Wright, and Carskaddon & Burk, for appellant:

Recent decisions have pointed out the "confusion worse confounded" in which the supreme court of Texas has found itself involved in its efforts to stay the tide of "intolerable litigation" which has followed hard and fast upon the departure from the ancient way in which the courts had traveled prior to the decision in the *So Relle Case*, 55 Tex. 308, 40 Am. Rep. 805.

Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A.

A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L. R. A. 463, 43 S. W. 965; *Morton v. Western U. Teleg. Co.* 53 Ohio St. 431, 32 L. R. A. 735, 53 Am. St. Rep. 648, 41 N. E. 689; *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 618.

The doctrine that damages may be recovered for mental anguish alone has been expressly repudiated after a thorough and exhaustive discussion of the subject upon principle and in the light of authority, by the following states: Arkansas, California, Dakota, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New York, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, West Virginia, Virginia, Wisconsin, Washington, and the Federal courts.

Peay v. Western U. Teleg. Co. 64 Ark. 538, 39 L. R. A. 463, 43 S. W. 965; *Russell v. Western U. Teleg. Co.* 3 Dak. 315, 19 N. W. 408; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810, 14 So. 148; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Giddens v. Western U. Teleg. Co.* 111 Ga. 824, 35 S. E. 638; *Western U. Teleg. Co. v. Halton*, 71 Ill. App. 63; *West v. Western U. Teleg. Co.* 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L. R. A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; *Curtin v. Western U. Teleg. Co.* 13 App. Div. 253, 42 N. Y. Supp. 1109; *Morton v. Western U. Teleg. Co.* 53 Ohio St. 431, 32 L. R. A. 735, 53 Am. St. Rep. 648, 41 N. E. 689; *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556; *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 32 S. E. 1026; *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973; *Chase v. Western U. Teleg. Co.* 10 L. R. A. 464, 44 Fed. 554; *Crawson v. Western U.*

Western U. Teleg. Co. v. Rogers, 13 L. R. A. 859.

For subsequent cases in this series sustaining the right, see also *Mentzer v. Western U. Teleg. Co.* 28 L. R. A. 72; *Cashlon v. Western U. Teleg. Co.* 45 L. R. A. 160; *Gray v. Western U. Teleg. Co.* 56 L. R. A. 301; and *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398.

For cases denying the right, see *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172; 64 L. R. A.

Western U. Teleg. Co. v. Wood, 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* 25 L. R. A. 406; *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735; *Peay v. Western U. Teleg. Co.* 39 L. R. A. 463; *Western U. Teleg. Co. v. Robinson*, 34 L. R. A. 431; *Western U. Teleg. Co. v. Ferguson*, 54 L. R. A. 846; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663; and *Robinson v. Western U. Teleg. Co.* 57 L. R. A. 611.

Teleg. Co. 47 Fed. 544; *Tyler v. Western U. Teleg. Co.* 54 Fed. 634; *Kester v. Western U. Teleg. Co.* 55 Fed. 603; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Gahan v. Western U. Teleg. Co.* 59 Fed. 433; *Stansell v. Western U. Teleg. Co.* 107 Fed. 668; *Western U. Teleg. Co. v. Adams*, 28 Ind. App. 420, 63 N. E. 125; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679; *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 618; *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351; *Tewarkana & Ft. S. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673; *Morgan v. Southern P. Co.* 95 Cal. 510, 17 L. R. A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; *Cleveland, O. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740; *Tisdale v. Major*, 106 Iowa, 1, 68 Am. St. Rep. 263, 75 N. W. 663; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 253; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Canning v. Williamstown*, 1 Cush. 451; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Dorrah v. Illinois C. R. Co.* 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 Am. Rep. 305; *Spohn v. Missouri P. R. Co.* 116 Mo. 617, 22 S. W. 690; *Strange v. Missouri P. R. Co.* 61 Mo. App. 586; *Deming v. Chicago, R. I. & P. R. Co.* 80 Mo. App. 152; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Barnes v. Western U. Teleg. Co.* 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; *Evinc v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; *Knoxville, C. G. & L. R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 413, 40 Am. St. Rep. 866, 25 S. W. 419; *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376; *Telfer v. Northern R. Co.* 30 N. J. L. 188; *Turner v. Great Northern R. Co.* 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243.

In 1895 this court adopted the Texas doctrine.

Mentzor v. Western U. Teleg. Co. 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 92 N. W. 1.
64 L. R. A.

Twenty cases are cited in support of the conclusion reached. Of these cases nine are Texas cases. Of the remaining eleven, three have since been overruled, three are not in point, and most of the remaining cases, being those of Tennessee, Alabama, North Carolina, and Kentucky, have been more or less limited in their application.

The cases which have been overruled are:

Reese v. Western U. Teleg. Co. 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163; *Western U. Teleg. Co. v. Stratemeyer*, 6 Ind. App. 125, 32 N. E. 871; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L. R. A. 846, 60 N. E. 674, 1080.

One of the cases cited supporting the doctrine, which is not in point, is *Logan v. Western U. Teleg. Co.* 84 Ill. 468.

Since that case the Illinois court has repudiated the Texas doctrine.

Western U. Teleg. Co. v. Haltom, 71 Ill. App. 63; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *North Chicago Street R. Co. v. Duebner*, 85 Ill. App. 602.

The reason why an independent action for such damages cannot, and ought not to, be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial, depending largely on physical and nervous conditions. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages which are universally excluded because of their uncertain character.

Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973.

The present tendency of the courts is to support the doctrine of nonrecovery for mental suffering alone.

Hot Springs R. Co. v. Deloney, 65 Ark. 177, 67 Am. St. Rep. 913, 45 S. W. 351; *Tewarkana & Ft. S. R. Co. v. Anderson*, 67 Ark. 123, 53 S. W. 673; *Chicago City R. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Chicago City R. Co. v. Canevin*, 72 Ill. App. 81; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 60 Am. St. Rep. 393,

47 N. E. 88; *Albers v. Merchants' Exchange*, 138 Mo. 140, 39 S. W. 473; *O'Flaherty v. Nassau Electric R. Co.* 34 App. Div. 74, 54 N. Y. Supp. 96; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; *Knorville, C. G. & L. R. Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. 434; *Turner v. Great Northern R. Co.* 15 Wash. 214, 55 Am. St. Rep. 883, 46 Pac. 243; *Ricketts v. Western U. Teleg. Co.* 10 Tex. Civ. App. 226, 30 S. W. 1105.

There did not exist between the sender and the sendee that close relationship which it has frequently been held must exist before there can be a recovery.

Western U. Teleg. Co. v. Ayers, 131 Ala. 391, 90 Am. St. Rep. 92, 31 So. 78; *Western U. Teleg. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western U. Teleg. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *Western U. Teleg. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198; *Western U. Teleg. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649; *Western U. Teleg. Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. 829; *Davidson v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1292, 54 S. W. 830; *Western U. Teleg. Co. v. Birchfield*, 14 Tex. Civ. App. 864, 38 S. W. 635.

In actions for damages because of negligent acts, before a plaintiff can recover he must allege and prove his own freedom from negligence.

Joyce, Electric Law, § 821.

Messrs. Courts & Tomlinson and W. E. Blake for appellee.

Weaver, J., delivered the opinion of the court:

The evidence tends to establish the following state of facts: James Henry Cowan died in Louisa county, Iowa, on or about January 12, 1901. Immediately upon his death, his widow, the plaintiff herein, prepared to take his body to the home of his parents and other family relatives near Seaton, Illinois, for burial. To apprise these friends of the decease of her husband, and to insure their meeting her at the station upon her arrival with the body, and accompanying her to the family home, some miles in the country, she sent a message by the defendant to one Robert Swearingner, who was an acquaintance of the family, and the manager of a telephone exchange at Seaton, as follows:

Harry dead. Arrive with corpse at 6 A. M. Tell Thomas.

[Signed]

Edith Cowan.

The message was received by Swearingner in the evening, in time to have notified the parties; and he would have given the notice, and plaintiff would have been met at the 64 L. R. A.

station and cared for as expected by her, but for the mistake or negligence of the telegraph company. As delivered by the telegraph company, the message was signed, "Edith Erwin," and Swearingner, not knowing and being unable to learn of any person of that name, and not knowing for whom the message was in fact intended, did nothing with it. The relatives of the deceased, having received no notice of his death or of the coming of the widow, did not meet her at the station. Arriving there, and finding none of the friends in waiting, and no preparation made for the conveyance of herself and of the body of her husband to their destination in the country, plaintiff was much distressed in mind, and, to some extent, broken down in bodily strength. She was thereupon taken to a hotel by a brother, who accompanied her, and placed upon a couch, where she remained three or four hours, until her friends had been notified, and arrived with conveyances for her accommodation. These allegations are not in serious dispute, and upon them plaintiff seeks to recover damages. The jury returned a verdict in her favor of \$275, and from the judgment entered thereon defendant appeals.

1. It will be observed that the basis of plaintiff's claim for damages is mental anguish and suffering resulting to her from the failure of defendant to properly transmit the message to Swearingner. That such damages are recoverable in a proper case was held by this court in *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, and, unless we abandon that precedent, plaintiff's right of action must be conceded. Anticipating this suggestion, counsel for appellant submit an able and elaborate argument in support of their contention that the *Mentzer Case* should be overruled. The decision of that case was reached only after much deliberation and a careful review of the authorities. Most of the cases now so exhaustively marshaled were then called to our attention, and their bearing and value duly considered. We are still satisfied with the result there announced, and recognize its authority as a precedent in the case before us. The opinion accompanying that decision sets forth very fully the principles upon which it is founded, and there is no occasion for their re-statement at this time. We are reminded by counsel that *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163, cited by us in support of our decision in the *Mentzer Case*, has since been overruled by the Indiana court. This appears to be the case, but we must be permitted to say that, being satisfied with the strength of the reasoning and soundness of the principles announced in the first case, we are not disposed

to concur in their recantation. Uniformity in judicial holdings throughout the various jurisdictions of the nation is much to be desired, and, where it prevails, no court should lightly disregard it, or introduce confusion into the precedents. But where, as upon the questions raised by this appeal, there is an irreconcilable conflict in the decisions, and respectable courts are arrayed upon either side of the controversy, we feel at liberty to adopt the theory which seems to us most logical, reasonable, and just, without special reference to the numerical preponderance of the authorities. As suggested in the *Mentzer Case*: "One of the crowning glories of the common law has been its elasticity and adaptability to new conditions and new states of fact. . . . Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into." It is nevertheless true that every demonstration of this elastic quality of the common law, and every readjustment made necessary by changing conditions, has been accomplished over the insistent protest and opposition of those who have professed to find in it a subtle and dangerous attack upon fundamental principles. The recognition of the right of a party under certain circumstances to recover substantial damages for physical and mental suffering has been no exception to this rule, and even yet it is the subject of much controversy. Recovery of such damages was at first sought to be confined to cases of mental suffering arising from physical injury wrongfully or negligently inflicted. So strictly and literally has this rule been applied, that in some jurisdictions it has been held that a wrongful act producing nervous shock or fright, which results in physical prostration, insanity, and death, affords no cause of action against the wrongdoer. *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604, 45 N. E. 354; *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Evinc v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 30 Am. St. Rep. 709, 23 Atl. 340. The doctrine thus approved is so manifestly unjust, and so out of harmony with the general spirit of the law, that many courts have wholly repudiated it, while still others have limited and modified it by important exceptions. In direct opposition to the cases above cited as to damages arising from fright or nervous shock in the absence of immediate physical injury, we may note *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L. R. A. 325, 77 Am. St. Rep. 856, 54 S. W. 944; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034; *Hill v. Kimball*, 76 Tex. 210, 7 L. R. A. 64 L. R. A.

A. 618, 13 S. W. 59; *Oliver v. La Valle*, 36 Wis. 596; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769, 40 N. W. 653; *Watkins v. Kaolin Mfg. Co.* 131 N. C. 536, 60 L. R. A. 617, 42 S. E. 983; *Watson v. Dills*, 116 Iowa, 249, 57 L. R. A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068. Recovery has also been permitted for the mental suffering of a husband on account of the illness of his wife, occasioned by the negligent act of a railroad company in causing them to alight from the train at an unreasonable distance from the proper station (*Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 51, 11 N. W. 356, 911); also for mental suffering occasioned by the malicious prosecution of a civil action (*Cohn v. Sidel*, 71 N. H. 558, 53 Atl. 800); for mental and bodily suffering sustained by a sick person while awaiting the arrival of a physician, whose coming had been delayed by failure of a telegraph company to deliver a message sent him (*Western U. Teleg. Co. v. Church* [Neb.] 57 L. R. A. 905, 90 N. W. 878); for nervous shock and mental distress of a woman who was wrongfully required to leave the train upon which she was a passenger, though no physical force or violence was used in excluding her (*Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320); for humiliation by wrongful arrest in the presence of family and friends (*Flam v. Lee*, 116 Iowa, 289, 93 Am. St. Rep. 242, 90 N. W. 70; *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921); and for injury to feelings of one whose property has been wrongfully attached (*City Nat. Bank v. Jeffries*, 73 Ala. 183). Under a California statute permitting the father to maintain an action for the death of a minor child, and providing that such damages may be given as, under all the circumstances, may be just, it is held that the parent's mental anguish may be considered by the jury in finding its verdict. Practically parallel in point of fact with this case is *Western U. Teleg. Co. v. Giffin*, 27 Tex. Civ. App. 306, 65 S. W. 661, and a recovery of substantial damages is there sustained. For further reaffirmation of the same principle, see *Bennett v. Western U. Teleg. Co.* 128 N. C. 103, 38 S. E. 294; *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; *Western U. Teleg. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830; *Western U. Teleg. Co. v. Crocker*, 135 Ala. 492, 69 L. R. A. 398, 33 So. 45.

Some of the foregoing cases go much farther than is necessary for us to go in disposing of this appeal, and we cite them, not as adopting all their conclusions, but as indicating that the rule asserted by the appellant is not to be considered as of universal application. In the case now sought

to be overruled, we called attention to the proposition (often overlooked in discussing this much-vexed question) that in an action sounding in tort the rule allowing recovery for mental suffering is much more liberal than in actions on contract. Many of the decisions which deny the soundness of the rule adopted in the *Mentzer Case* expressly plant their finding upon the principle that mental suffering cannot be presumed to have been within the contemplation of the parties to the contract as a necessary or natural result of its breach. For instance, the supreme court of Minnesota, in an action for damages on account of nondelivery of a telegram, says: "This action is not one of tort, but on contract. . . . We are therefore left to determine the question here presented according to the rules of common law applicable to actions for damages for breach of contract." *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078. If this premise be admitted, it must also be conceded that the conclusion announced by that eminent court is supported by many precedents. We cannot agree, however, that, in a case of this kind, plaintiff is limited to his damages as for a breach of contract. True, appellant's undertaking to transmit the message was a contract obligation; but negligence in the performance of that obligation, by which injury results to the sender, is a tort, damages for which are not restricted by rules applicable to ordinary actions for breach of contract. The appellant company is engaged in a public employment, and is, within certain limits, to be considered and treated as a common carrier. *Gillis v. Western U. Teleg. Co.* 61 Vt. 461, 4 L. R. A. 611, 15 Am. St. Rep. 917, 17 Atl. 736; *Parks v. Alta California Teleg. Co.* 13 Cal. 422, 73 Am. Dec. 589. As such, it is charged with a common-law duty, and "an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment." *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264. A breach of duty of a common carrier is a breach of the law, for which an action lies, and which wants not a contract to support it. *Bretherton v. Wood*, 3 Brod. & B. 54, 6 J. B. Moore, 141, 9 Price, 408, 23 Revised Rep. 556; *Burkle v. Ellis*, 4 How. Pr. 288; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 362, 43 L. R. A. 214, 70 Am. St. Rep. 205, 78 N. W. 63. This principle is discussed with great clearness and thoroughness in *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 348, 11 N. W. 358, where it is said, in reference to the facts pleaded as constituting actionable negligence: "All these matters are a breach of the contract to carry 64 L. R. A.

the passenger safely; yet the carrier is held liable in an action for tort. . . . All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon contract, alleging the . . . negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the . . . negligence of the company the ground of his right of recovery." The allegation by the plaintiff of contractual relations with the defendant does not necessarily make the action one upon contract, for these matters are often properly pleaded by way of inducements preliminary to an allegation of facts constituting a tort. Nor is this rule peculiar to actions against carriers. *Britt v. Pitts*, 111 Ala. 401, 20 So. 484; *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711; *Carter v. Glass*, 44 Mich. 154, 38 Am. Rep. 240, 6 N. W. 200; *Stanley v. Bircher*, 78 Mo. 245; *Ashmore v. Pennsylvania Steam Towing & Transp. Co.* 28 N. J. L. 180; *Dungan v. Read*, 167 Pa. 393, 31 Atl. 639; *Harvey v. Skipwith*, 16 Gratt. 393; *Nelson v. Harrington*, 72 Wis. 591, 1 L. R. A. 719, 7 Am. St. Rep. 900, 40 N. W. 228. If, then, we may treat this action as one *ex delicto*, rather than *ex contractu*, it becomes important to note the enlarged scope of the claim for recoverable damages. In an action upon contract it is usually laid down that no damages can be recovered save those which may reasonably be supposed to have been contemplated by the parties as the probable result of a breach of the agreement, and this is the principle almost invariably appealed to or relied upon by the courts which deny the liability of telegraph companies for damages on account of mental suffering. Recovery in tort is not thus limited. The rule applicable to such cases is that a "party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done." *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 51, 11 N. W. 356, 911; *Keenan v. Cavanaugh*, 44 Vt. 268; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Hill v. Winsor*, 118 Mass. 251; 1 Sedgw. Damages, 130, note; *Bowae v. Pioneer Tow Line Co.* 2 Sawy. 21, Fed. Cas. No. 1,713. Under this rule it has often been held that damages for mental suffering may be recovered, and such allowance has not been strictly confined to wrongs involving bodily injury. The Minnesota court, which, as we note in the *Francis Case*, 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, denies the right of such recovery

against a telegraph company on the theory that the action is *ex contractu*, has not hesitated to allow damages of this nature in certain actions in tort. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 28 Am. St. Rep. 370, 50 N. W. 238. In the cited case, plaintiff alleged the wrongful dissection by the defendant of the dead body of her husband, and asked for damages on account of mental suffering alone. The court, after noting the confusion which has arisen in the cases "as to when, if ever, mental suffering, as a distinct element of damages, is a subject for compensation," says: "But where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. . . . That mental suffering . . . would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument." The decisions which recognize the right to recover damages for mental pain and anxiety caused by negligence of a telegraph company in transmitting messages involving matters of life and death need no better justification than is found in the principles here so clearly stated. The thought urged upon our attention, that claims of this nature should be disallowed because of the impossibility of providing any exact standard or measure of compensation for injured feelings, and that recognition of such right of recovery will be followed by an enormous increase of litigation, does not impress us as a persuasive consideration. It is no more difficult to fix a compensation for mental anguish in cases

like the one at bar than in cases of mental suffering arising from physical injury, and very few persons, we think, will be found ready to say the latter, when wrongfully occasioned, should not afford a ground of recovery. As to the prospect of vastly increased litigation, the fears expressed by the appellant find little foundation in the judicial history of the state. The *Mentzer Case* was decided ten years ago, and the present is the first occasion we have had in that decade to again consider the precise question there presented. This showing is a pretty fair indication that the doctrine there affirmed has not proved, and is not likely to prove, the opening of a Pandora's box of evil for the vexation or destruction of legitimate business.

2. It is finally insisted that plaintiff's petition does not state a cause of action, because, while it alleges the negligence of defendant, it does not allege the absence of contributory negligence on her own part. We think the rule contended for is not applicable in this case. Our statute provides (Code, § 2164) that a telegraph company is liable for all mistakes or delay in transmitting or receiving messages over its lines, and that, in actions brought to recover damages thus caused, the burden is upon the company to prove that the mistake or delay is not due to its own negligence. This, we think, relieves the plaintiff from the necessity of alleging that she did not contribute to her own injury.

We find no error in the record, and *the judgment of the District Court is affirmed.*

Rehearing denied.

MAINE SUPREME JUDICIAL COURT.

Harry N. TWOMBLY

v.

CONSOLIDATED ELECTRIC LIGHT COMPANY of Maine.

(98 Me. 353.)

1. The jury may disregard testimony as to the condition of appliances by the breaking of which a servant is injured, where, if it is reliable, it is utterly incomprehensible how the accident can have happened.
2. The master, and not the servant for whose use it is furnished, is bound, in the absence of special circumstances changing

NOTE.—As to master's duty to inspect appliances and place of work, and the assignability of such duty, see also note to *Walkowski v. Penokee & G. Consol. Mines*, 41 L. R. A. 74, 109, and the later case of *Smith v. Erie R. Co.* 59 L. R. A. 302.
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ing the rule, to inspect and repair a ladder furnished for the use of the servant, which is of such length that a defect in it will imperil the servant's life or limb.

3. The master cannot, by delegating to a servant the duty of inspecting long ladders furnished for the use of employees, and replacing rotten rounds, escape liability for injuries caused by neglect of the duty, on the ground that the neglect was that of a fellow servant of the one injured by a fall caused by the breaking of a rotten round.
4. One employing servants whose duties require the use of long ladders cannot relieve himself from liability for injuries to a servant through the breaking of a rotten round, by showing that he had a foreman who had general oversight of all the appliances used in the business, with the general duty of seeing that repairs were made when necessary.
5. The court will not interfere with an award of \$3,000 as damages for injuries

to a competent lineman of an electric light company earning at the time of injury \$60 per month, where he had been able to do but little work prior to the trial, which occurred about a year after the injury, and there was evidence which would justify a conclusion that he had not at that time recovered from the effect of the accident.

(December 21, 1903.)

MOTION by defendant for a new trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which was tried in Cumberland County and resulted in a verdict in plaintiff's favor. *Overruled.*

The injuries were received January 1, 1902, and the case came on for trial at the January term of court, 1903. The facts upon which the action is founded sufficiently appear in the opinion.

The defendant moved for new trial upon the grounds that the verdict was against the law and the charge of the court, that it was manifestly against the weight of evidence, and that the damages were excessive.

Messrs. Bird & Bradley, for defendant:

If the master provides suitable appliances and competent persons to attend to them, he has done his duty.

Johnson v. Boston Tow-Boat Co. 135 Mass. 209, 46 Am. Rep. 458; *Rogers v. Ludlow Mfg. Co.* 144 Mass. 203, 59 Am. Rep. 68, 11 N. E. 77; *Rice v. King Philip Mills*, 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101.

There is no duty resting on the master to inspect those common tools and appliances with which everyone is conversant.

14 Am. & Eng. Enc. Law, Master & Servant.

Nor is the master to be held for his negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master.

Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497; *Miller v. Erie R. Co.* 21 App. Div. 45, 47 N. Y. Supp. 285.

A new trial should be ordered because the verdict of the jury was against the evidence in the case, and manifestly against the weight of the evidence therein.

Pellerin v. International Paper Co. 96 Me. 388, 52 Atl. 842.

The damages are excessive. To entitle the plaintiff to recover damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Mr. William Lyons, for plaintiff:

Plaintiff is not a manufacturer of, neither does he know, or pretend to know, anything 64 L. R. A.

about, ladders, and it was not his duty, and the circumstances did not afford him an opportunity, to examine the ladder before ascending it.

Buzzell v. Laconia Mfg. Co. 48 Me. 116, 77 Am. Dec. 212.

If the employer knowingly makes use of defective and unsafe machinery, when an injury is done to a servant ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect.

Dixon v. Rankin, 14 Ct. Sess. Cas. 420; *Shanny v. Androscoggin Mills*, 66 Me. 425; *Donnelly v. Booth Bros. & H. I. Granite Co.* 90 Me. 114, 37 Atl. 874; *Gilman v. Eastern R. Co.* 13 Allen, 440, 90 Am. Dec. 210; *Hall v. Emerson-Stevens Mfg. Co.* 94 Me. 450, 47 Atl. 924.

The damages are not excessive. The evidence was ample to warrant the jury in finding that plaintiff would not be able to resume the same occupation, or to engage in any other hard labor, for a long time subsequent to the trial, if, indeed, he would ever be able.

Hunter v. Stewart, 47 Me. 421; *Wyman v. Leavitt*, 71 Me. 229, 36 Am. Rep. 303; *Blackman v. Gardiner & P. Bridge*, 75 Me. 216; *Murdock v. New York & B. Despatch Exp. Co.* 167 Mass. 549, 46 N. E. 57; *Braithwaite v. Hall*, 168 Mass. 39, 46 N. E. 398; *Filer v. New York O. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327; *Matteson v. New York C. R. Co.* 35 N. Y. 491, 91 Am. Dec. 67.

Plaintiff is entitled to the judgment of the jury, and not of the court, upon the question of his damages.

Kimball v. Bath, 38 Me. 222, 61 Am. Dec. 243; *Donnelly v. Booth Bros. & H. I. Granite Co.* 90 Me. 114, 37 Atl. 874; *Frye v. Bath Gas & Electric Co.* 94 Me. 26, 46 Atl. 804.

Savage, J., delivered the opinion of the court:

Case by servant against master to recover damages for personal injuries.

The plaintiff was employed upon a ladder about 25 feet from the ground, and, in reaching for a rope with one hand, nearly his whole weight was suspended from a round in the ladder which he held with the other hand. The round broke, and he fell to the ground, sustaining injuries. No complaint is made that the plaintiff himself was not in the exercise of due care. But after a verdict for the plaintiff the defendant now contends, upon a motion for a new trial, that the case shows no want of due care on its own part.

The ladder in question was a 40-foot extension ladder, and was extended at the time of the accident to the plaintiff. There was

evidence that an examination of the round after the accident showed it to be dozy on the outside, and rotten. The ladder had been in use somewhat more than three years. It seems that the defendant company had no regular rules governing the inspection of appliances. Such inspection and repairs consequent upon it were usually reserved for rainy weather, when the men could not work out of doors. The foreman of construction had general oversight over the appliances, and was under the duty of keeping them in repair. A man was especially delegated to make general repairs, but it does not appear that it was his duty to make inspections. It is true that the testimony of the defendant tended to show that the rounds of the ladder were of white ash, and sound; that an examination of the round after the accident showed it to be well seasoned and sound; that it broke off at both ends by the sides of the ladder, showing fresh breaks, and leaving alivers or "burrs" on the edges of the holes through which the ends of the round had passed; and the defendant's evidence tended further to show that the ladder had been inspected only a few days before it broke, and was found to be all right. And in respect to this testimony we may add that, if it be reliable, it is utterly incomprehensible how the accident could have happened. The jury certainly were warranted in finding, as they undoubtedly did, that this testimony was not reliable, and that the round was not sound and reasonably safe. And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected; not, perhaps, by such an inspection as would naturally be given to it by the workman upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty, but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it was reasonably safe.

The plaintiff testified that the round looked all right as he worked upon the ladder. But even that fact does not show that it was all right, or that the unsafe condition might not have been discovered by suitable inspection, such as was incumbent upon the master, unless in some way relieved from the duty.

But it is contended, as a matter of law, that the defendant is not liable upon the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which everyone is conversant;

that, if they wear out and become defective, the employer may rely upon the presumption that those using them will first detect the defect; and that the employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. And the defendant cites authorities in support of these propositions. But it seems to us that a 40-foot extension ladder is not a common tool or appliance within the meaning of these rules. A defect in a ladder, arising from age or decay, might not be discoverable by such inspection as a workman is expected to make, and might be upon more careful inspection. To replace a dozy round of a ladder is not, we think, such "ordinary repairs" as a workman using it is usually expected to make, and certainly not unless the defect is brought to the knowledge of the servant. Of course, a master may furnish suitable materials for such renovations, and the circumstances in a given case may show that the workman is expected to make his own repairs. And in such case the master is not responsible for the neglect of the workman. But that is not this case. This plaintiff was under no special duty to inspect or repair this ladder, except as rainy-day work in common with his fellow laborers, when he might be directed specially to do so.

But the defendant further says that it provided proper persons to see that the ladder was kept in proper condition and to make ordinary repairs and renewals, and that such persons were fellow servants of the plaintiff; and from this the defendant contends that if, by the negligence of any of these persons, the ladder was not suitably inspected and properly repaired, it was the negligence of the plaintiff's fellow servants, for which the defendant is not responsible.

While it is generally the duty of the master to use reasonable care in seeing that appliances furnished are reasonably safe, and by repairs are kept reasonably safe, doubtless there are some duties respecting the repair of appliances which the master may so delegate to a servant as to escape responsibility for the negligence of the servant in performing them, and doubtless there are some duties which the master may not thus delegate. The line between these classes of duties must necessarily be shadowy, and any rule stating them must be indefinite. *Rogers v. Ludlow Mfg. Co.* 144 Mass. 198, 59 Am. Rep. 68, 11 N. E. 77. As was said in *Rice v. King Philip Mills*, 144 Mass. 229, 235, 59 Am. Rep. 80, 11 N. E. 101, 104. "It is the duty of the master to exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair; and the master can-

not wholly escape responsibility by delegating these duties to a servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to perform his duty if he furnishes suitable materials, and employs competent servants, and instructs them to keep the machinery in repair, although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be intrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must from time to time need." This case is cited and relied upon by the defendant here. But we think the distinction is obvious. If the test be as suggested in the last sentence quoted, it is that ordinarily, at least, the repairs which the master may delegate are those arising incidentally from the use of properly constructed appliances, such ordinary repairs as they must naturally require from time to time by reason of their use. To replace a rotten round of a ladder is not, as we have said, such an ordinary repair. The rottenness, such as is complained of here, is not incidental to the use of a well-constructed ladder.

Besides, we think the jury were warranted in finding that the master had not delegated his duties with respect to the inspection and repair of this ladder. It had a man to make repairs; so does every mas-

ter using machinery. But this man had no duty of inspection. It had a foreman of construction of its lines, and this foreman had general oversight over all the appliances, as we have already stated, and the making of repairs when needed. So it is in the case of every corporate master using appliances and employing men. To say that a master can escape the consequences of the breaking of a rotten round in a ladder by merely showing that he had a foreman, and that that foreman had the general oversight of all appliances, with the general duty, among others, of seeing that repairs were made, when necessary, would excuse practically all masters from responsibility in respect of keeping appliances in sound or safe condition. We do not think this is the law. The jury, therefore, upon the whole, were warranted in finding the defendant liable.

The defendant contends that the verdict for \$3,000 was too large, and that it should be set aside on that account. The plaintiff was a competent lineman, earning \$60 a month at the time of his injury. There was testimony that between the time of the accident and the time of the trial he had been able to do but comparatively little work. His present condition and his probable future condition were also matters for the jury to take into consideration. The defendant says that the medical testimony shows that he had virtually recovered. The jury, however, were not confined to the medical testimony, and they evidently thought he had not recovered. We cannot say that the evidence did not justify them in their conclusion. And, while the verdict seems large, it is not clearly shown to be so extravagant as to justify the interference of the court.

Motion overruled.

CALIFORNIA SUPREME COURT.

Re ESTATE OF Mrs. M. A. WILLARD, Deceased.

(139 Cal. 501.)

1. A decree of a probate court allowing compensation to a broker for services to an estate may be amended so as primarily to make the allowance to the

administrator under a motion to strike the item altogether from the account.

2. A motion for new trial is not the sole remedy to cure an error in the amendment of a decree of a probate court allowing compensation to a broker who had rendered services to an estate, so as to make the allowance to the administrator, but the question is open upon appeal from a decree

NOTE.—Liability of estate for commissions of broker or agent who sells property.

I. When employment of broker or agent is permitted by the will, 554.

II. Statutes.

a. In general, 555.

b. Effect of allowance for brokerage upon executor's commissions, 555.

III. Right at common law to employ broker, 556.

IV. Right at common law to employ auctioneer, 557.

64 L. R. A.

I. When employment of broker or agent is permitted by the will.

The right of an executor or administrator to employ a broker or agent to sell the property of the estate seems to be clear if authority so to do is directly or indirectly given by will, notwithstanding the existence of an otherwise controlling statute to a contrary effect.

Thus, the contract by an executor to pay brokerage was held valid, even in the face of a statute prescribing the fees an executor might receive for the sale of real estate, in *Ingham v.*

settling the account and ordering distribution of the estate.

3. An administrator may, in the discretion of the probate court, be allowed a reasonable amount to compensate for the services of a real-estate broker who succeeded in securing for the property belonging to the estate a materially greater amount than was bid for it at the attempted auction sale.

(July 3, 1903.)

A PPEAL by the heirs of Mrs. M. A. Willard, deceased, from a judgment of the Superior Court for Mendocino County making an allowance to the administrator for services of a broker in the disposition of the estate. *Affirmed.*

The facts are stated in the opinion.

Ryan (Colo. App.) 71 Pac. 899, where the testator had, by his will, authorized the sale of real estate of which he might die seised at such times and prices as might seem wise to his executor. The court said that such a contract, even though in excess of the statutory rate, was within the power conferred by the will, and that, upon default in its performance, the executor could be sued thereon.

Clear and unequivocal language on the part of the testator does not seem necessary to obtain a construction of the will by the court permitting the employment of brokers by the personal representative, as a mere power to sell land, with the provision that it be sold as soon as practicable for cash and at a fair price, seems to be considered sufficient in *O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681, an action brought by real-estate agents against executors to recover commissions for the sale of land. The question arose upon demurrer to the petition, as to its sufficiency in regard to the power of the executors to employ brokers; but the court held that the power given by the will to sell the land of the estate, and hence to make the contract with the agents to sell, was alleged with sufficient definiteness.

The will in *McWhorter v. Benson*, Hopk. Ch. 28, authorized the executor to appoint an agent to take charge of and manage the estate, and an agent was therefore appointed for that purpose, and to sell parcels of the land. The court, upon final accounting, held that the executor was liable to the agent for a reasonable compensation, and entitled to reimbursement out of the estate.

II. Statutes

a. In general.

If governing statutes exist, the personal representative may exercise the privilege of employing a broker or agent only in harmony with them, in the absence of some power given in the will under which he may claim the right.

In view of a statute which pointed out the only manner in which the real property of a decedent's estate could be sold, and provided that all the money derived from its sale became the assets of the estate and subject to disposition only in accordance with law, it was held, in *Danielwitz v. Sheppard*, 62 Cal. 339, that the administratrix or heir had no power to dispose of the proceeds of sale in any other way, and 64 L. R. A.

Mr. Robert Duncan, for appellants:

The administrator had no authority or power to bind the estate by any contract whatever.

Re Page, 57 Cal. 238.

If the paper signed by the administrator in this case bound anybody at all, it bound the administrator personally, and not the estate.

Sterrett v. Barker, 119 Cal. 495, 51 Pac. 695.

The purported contract made between the administrator and F. B. Mulgrew is against public policy and absolutely void.

Danielwitz v. Sheppard, 62 Cal. 339; *Re Page*, 57 Cal. 238; *Jones v. Hanna*, 81 Cal. 509, 22 Pac. 883.

That part of the original decree of distri-

therefore that a written agreement whereby the administratrix and the heir of an estate promised to pay a broker all the money in excess of a certain sum which had been bid for real estate directed by the probate court to be sold, as a commission for obtaining a purchaser for the property, was unauthorized by statute, and contrary to the policy of the law.

Upon the authority of the above decision, *Danielwitz v. Sheppard*, 62 Cal. 342, in which the facts were the same, was decided without opinion.

But, under a statute providing that executors and administrators may be allowed all reasonable charges incurred in the administration of the estate of the person deceased, it was held, in *Shepard v. Shepard*, 19 Fla. 300, that an allowance for a sum paid an auctioneer for selling the personal property was a proper credit to the administrator. The court says: "It is a reasonable charge and disbursement for the benefit of the estate. Sale of the personal property by an experienced auctioneer will result, generally, in great benefit to the estate."

The commissions paid the auctioneer, however, must not be at a higher rate than allowed by statute, as, in *Re Dunn*, 8 N. Y. S. R. 766, it was held that the compensation paid by administrators to auctioneers for making sale of decedent's stock of goods should have been limited to the amount allowed by statute, which was 2½ per cent of the amount of the sales.

b. Effect of allowance for brokerage upon executor's commissions.

Where a statute provided that the 5-per cent commission allowed executors and administrators should be as full compensation for their services and trouble, it was held, in *Jacobs v. Jacobs*, 99 Mo. 427, 12 S. W. 457, that the statute was the measure of the executrix's compensation for the discharge of her duties, whether they were discharged by her or her agents; and, therefore, that credit for commissions paid agents for effecting sales of real estate should not have been allowed her in addition to the statutory commission of 5 per cent.

And, partly in view of the fact that brokers' commissions for the sale of personal property had been paid out of the estate, the executors' commissions were cut down from 5 per cent on the amount of the estate which came into their hands to be administered to 3¼ per cent, in *Pomeroy v. Mills*, 35 N. J. Eq. 442, and, upon

bution directing the administrator to pay to Mulgrew, who was a stranger to the record, the sum of \$1,000 was void.

Sharon v. Sharon, 75 Cal. 37, 16 Pac. 345; *Re Ogier*, 101 Cal. 385, 40 Am. St. Rep. 61, 35 Pac. 900; *Re Levinson*, 108 Cal. 454, 41 Pac. 483; *Re Brignole*, 133 Cal. 164, 65 Pac. 294.

A judgment void upon its face, or shown to be void by an inspection of the judgment roll, may be set aside at any time.

People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *People v. Thomas*, 101 Cal. 574, 36 Pac. 9; 1 Black, Judgm. § 307.

That part of the decree ordering \$1,000 to be paid to Mulgrew is shown to be void by a mere inspection of the judgment roll in this case, and the court should have set that portion of it aside on motion of the heirs.

Re Page, 57 Cal. 239; *Re Levinson*, 108 Cal. 454, 41 Pac. 483.

The superior court had no authority or power to set aside the whole of the first de-

creed of distribution on the ground of the mistake and inadvertence of the court.

Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22.

An administrator cannot bind an estate at all by any contract, though the contract made by him be for the benefit of the estate.

Johnson v. Leman, 131 Ill. 609, 7 L. R. A. 656, 19 Am. St. Rep. 67, 23 N. E. 435; *Schlicker v. Hemenway*, 110 Cal. 579, 52 Am. St. Rep. 119, 42 Pac. 1063; Schouler, Exrs. & Admsrs. §§ 256, 257.

A court cannot set aside its judgments or decrees on account of error or mistake as to what the law is.

1 Black, Judgm. § 329; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174.

Clerical misprisions in a judgment or decree may be corrected at any time, but judicial errors can be remedied only by a motion for a new trial or appeal.

Egan v. Egan, 90 Cal. 15, 27 Pac. 22; *San Joaquin Land & W. Co. v. West*, 99 Cal. 345, 33 Pac. 928.

the subsequent hearing (37 N. J. Eq. 578), were further reduced to 2 per cent on the aggregate of the estate.

In *Sloan's Estate*, 7 Pa. Co. Ct. 377, it appearing that an agent, employed with the consent of all the parties in interest, made a sale of real property belonging to the estate, and was paid therefor, a claim of the executor for commissions on the same sale was disallowed on the ground that he had done nothing more than the rest of the heirs in regard to the sale, for which he should be allowed commissions.

III. Right at common law to employ broker.

In the absence of controlling statutes or power given by the will, the few cases reported seem to favor the right of a personal representative to avail himself of the services of a broker under proper circumstances.

In *Dey v. Codman*, 89 N. J. Eq. 258, the court declared that there was no good ground for disallowing administrators the sum of \$300, which they had paid to one who was their attorney and counsel, and who, having interested himself to secure a purchaser for the estate's property for the executors and having secured one at \$1,500, had demanded \$300 as brokerage, which was paid to him accordingly.

The court, in declining to enter upon a consideration of the question of an executor's right to employ a broker to sell land, in *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268, which was a subsequent hearing of *O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681, *supra*, I., upon the ground that the question had been previously disposed of, said: "The executors would be allowed all reasonable expenses necessarily incurred by them in the preservation, safe-keeping, and management of the estate, and all reasonable attorneys' fees that may be necessarily incurred by them in the course of the administration."

Upon the authority of *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268, and *O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681, the court 64 L. R. A.

says, *arguendo*, in *McCown v. Terrell*, 9 Tex. Civ. App. at page 74, 29 S. W. 484, that it has been held that independent executors may lawfully employ agents to negotiate sales of lands for them.

It was contended in *Lewis v. Reed*, 11 Ind. 289, that a contract of purchase of a title bond upon which the action turned, made with an agent of an administrator, was void, because an administrator could not appoint an agent for the sale of property, but the court, in refusing to sustain this contention, declared that there was no doubt an administrator might appoint an agent to do particular acts; that if he was authorized by the court to sell property at private sale he could appoint an agent to negotiate the sale within the limits fixed by the court.

But, according to 11 U. S. Dig. N. S. 355, it is held, in *Ballentine's Estate*, Myrick, Prob. (Cal.) 86, that "an executrix has no authority to bargain with brokers to give them all they may receive above a certain sum on their sale of realty. The court determines their compensation."

This decision is in harmony with *RE WILLARD'S ESTATE*, where the court says that it is within the discretion of the judge to make an allowance to the administrator for an agent employed to assist in making sale of the estate property.

In order to charge the estate there must be no doubt of the liability of the executor, or the fact that the services were actually rendered. Thus, in *Tucker v. Tucker*, 29 N. J. Eq. 286, the fact that a judgment was recovered by a broker against an executor, not in his representative capacity, however, for commissions for the exchange of real property belonging to the estate, was held not to constitute a good reason for charging the estate with the payment thereof, when the executor swore it was for compensation which he never agreed to pay, and for services which were never rendered.

On petition for rehearing in banc.

The superior court could not set aside, annul, and vacate its original decree of distribution upon the ground of "inadvertence and mistake of court."

Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22; *Re Leonis*, 138 Cal. 194, 71 Pac. 171; *Hudson's Estate*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473.

Mr. Arthur J. Thatcher, for respondent F. B. Mulgrew:

An administrator may employ an agent or broker for the performance of services requiring appliances or a degree of skill not within the command of ordinary persons, and the reasonable expenses of such agents are a proper charge against the estate.

2 Woerner, Am. Law of Administration, 2d ed. §§ 514, 529; 2 Beach, Trusts & Trustees, § 460; 7 Am. & Eng. Enc. Law, p. 434, and notes; *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *O'Gara v. Clearkin*,

58 N. Y. 663; *Wells v. Disbrow*, 48 N. Y. S. R. 746, 20 N. Y. Supp. 518; *Teague v. Dendy*, 2 M'Cord Eq. 207, 16 Am. Dec. 643; *Vanderheyden v. Vanderheyden*, 2 Paige, 287, 21 Am. Dec. 86; note to *Fletcher v. American Trust & Bkg. Co.* 78 Am. St. Rep. 203; *Ballentine's Estate*, Myrick Prob. (Cal.) 86.

The administrator may be allowed the commissions paid by him to agents for negotiating the sale of real estate.

Dey v. Codman, 39 N. J. Eq. 258; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; 2 Woerner, Law of Administration, 2d ed., § 514; 7 Am. & Eng. Enc. Law, p. 434, and notes.

The allowance to the administrator of moneys paid by him for the services of collectors, expert accountants, bookkeepers, auctioneers, etc., is in the discretion of the court.

Re Levinson, 108 Cal. 451, 41 Pac. 483; *Re Moore*, 72 Cal. 336, 13 Pac. 880; *Re More*, 121 Cal. 609, 54 Pac. 97; *Hall v. Pegram*, 85 Ala. 522, 5 So. 209, 6 So. 612;

IV. *Right at common law to employ auctioneer.*

In England, where, at common law, the office of executor or administrator is regarded as honorary, and its duties are performed without compensation, no decisions have been found discussing the right to employ brokers or agents to sell the estate property. The only instance discovered in which the point is touched upon, even incidentally, is *Edmonds v. Peake*, 7 Beav. 239, 13 L. J. Ch. N. S. 18, where executors were held not personally liable for a loss caused to the estate by reason of the insolvency of an auctioneer employed by them to sell leaseholds at auction, it not appearing that the money was lost by any want of diligence on their part. The master of the rolls remarks that the executors, in the discharge of their duties, were under the necessity of employing an auctioneer.

In the United States, where the rights and duties of executors and administrators are governed very largely by statutes, and their reasonable compensation for services incurred in the management of the estate is expressly provided for in almost every state, the employment of auctioneers to aid in the necessary disposition of the estate's property is a most ordinary practice, unquestioned by the courts, except where the sales were not made bona fide, or were, for some other reason, irregular.

Thus, it appearing in *Garrett v. Garrett*, 2 Strobh. Eq. 272, that the amount paid an auctioneer for selling personal property was not unreasonable, the court held that it should be allowed the executor, and stated that it was the custom to allow such charges for the benefit of the estate, it not being expected that executors and administrators were to perform such services, few trustees being qualified to so act.

And the administratrix, in *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590, was allowed a credit of \$5, paid an auctioneer. The court stated that for extraordinary services, and for such as in their nature require a degree of skill or appliance not within the command of

ordinary persons, the administrator might employ agencies; and that reasonable expenses incurred in this way for the benefit of the estate are a proper charge against it.

Also, in *Pinckard v. Pinckard*, 24 Ala. 250, an administrator was allowed the expense of two days' services of a crier at a sale of cotton belonging to the estate.

And it is stated, *arguendo*, in *Lewis v. Reed*, 11 Ind. 239, that, if an administrator is authorized by the court to sell goods at public sale, he may appoint an auctioneer to sell them.

The expenses incident to the sale of real estate, including auctioneer's charges, were held not to be "costs of administration" in the sense of being chargeable, in the first instance, upon the personalty, but were declared to be the costs of raising a fund which fell upon the fund itself, upon the ground that the duty to apply for an order of sale implies the right to employ all the agencies necessary to obtain the order and to carry it into execution. *Teaf's Estate*, 7 Pa. Co. Ct. 463.

The only instances where the amounts paid for auctioneers' services have been disallowed, were where it appeared that the sale and proceedings had thereunder were not conducted in entire good faith on the part of the personal representative.

In *Re Quin*, 1 Connolly, 381, 5 N. Y. Supp. 261, the amount paid an auctioneer for offering real property for sale at a time at which it was bid in by the executors was disallowed, it not appearing that a price offered for the property at a prior sale was not a full and fair one.

And, in *Navarro's Succession*, 24 La. Ann. 105, the fees of an auctioneer, who had sold real estate under an order obtained by the curator on the ground that the succession was vacant, were upon its appearing that the succession was not in fact vacant, held improperly charged to the estate, and the auctioneer was directed to look to the curator individually for compensation.

M. M. M.

McWhorter v. Benson, Hopk. Ch. 28; *Schmidt's Succession*, 16 La. Ann. 256; *Vanderheyden v. Vanderheyden*, 2 Paige, 287, 21 Am. Dec. 86; *Glover v. Holley*, 2 Bradf. 291; *Pinckard v. Pinckard*, 24 Ala. 250; *Sherrell v. Shepard*, 19 Fla. 300; *Garrett v. Garrett*, 2 Strobh. Eq. 272; *Wells v. Diabrow*, 48 N. Y. S. R. 746, 20 N. Y. Supp. 518; *Shillaber's Estate*, Coffey Prob. Dec. (Cal.) 103.

Assuming that the vacating and setting aside of the first order and decree were not invited by the appellants, still the court below had ample power, independent of statutory provisions, to annul and vacate said, or any, order, judgment, or decree inadvertently made.

Wiggin v. Superior Court, 68 Cal. 398, 9 Pac. 646; *Burris v. Kennedy*, 108 Cal. 340, 41 Pac. 458; *Re Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; *Re Shaver*, 131 Cal. 219, 63 Pac. 340; *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578; *City Sav. Bank v. Enos*, 135 Cal. 167, 67 Pac. 52; *Brovelli v. Bianchi*, 136 Cal. 612, 69 Pac. 416.

Messrs. White & Thomas for respondent administrator.

Per Curiam:

Appeal by the heirs at law of deceased from the amended decree of settlement of account and final distribution in so far as the account allows the sum of \$1,000 to the administrator for the services of one F. B. Mulgrew in effecting a sale of the real estate of said estate. The administrator presented his final account and petition for distribution on May 1, 1902. The account showed, among other sources of the money sought to be distributed, an item of \$20,000 for sale of real estate; and in his petition for allowance of the account the administrator stated "that F. B. Mulgrew rendered valuable assistance in effecting a sale of the real estate in securing Burns & Waterhouse as purchasers of said land, and he would ask that your petitioner be allowed a reasonable compensation to be paid to said F. B. Mulgrew for his services in said matter." The heirs at law filed objections to the allowance of any sum for the services of said Mulgrew. Upon the hearing the court, on May 12, 1902, made its decree allowing the account and ordering distribution, and on May 17th the decree was filed. In an amended decree, from which this appeal is taken, it is recited: "And said objecting heirs, through their said attorney, having on the 20th day of May, 1902, filed in this court a notice of motion (three days after the first decree was filed) to vacate and set aside said order settling said final account and the aforesaid decree of distribution, together with certain affidavits in support thereof, and said mo-

tion coming on regularly to be heard on the 26th day of May, 1902, . . . and it appearing to his court that by mistake and inadvertence of this court the said order settling the final account of said administrator in the said decree of distribution did not express the true intent and meaning of the court, and was not and is not such order as should have been made, it is therefore ordered," etc.

1. It is urged that the part of the original decree ordering \$1,000 to be paid Mulgrew was void, and the court should have set aside that portion on motion of the heirs; whereas the court amended the decree in that regard, but did not disallow that item. Furthermore, it is claimed that the court had no authority to set aside the original decree on the ground of inadvertence and mistake of the court. The only substantial difference between the two decrees is that in the first one the court ordered that the sum of \$1,000 be paid by the administrator, out of the funds of the estate, to Mulgrew, as a commission for services rendered to the administrator in securing a purchaser; while in the second or amended decree, after reciting the services of Mulgrew, the court ordered that the administrator be allowed (in addition to the items of expenditure set out in his account) the sum of \$1,000 in compensation for the said services of said F. B. Mulgrew in effecting said sale. Presumably the court made the change in the decree because this court has held that the court could not allow for such services directly to the person rendering them, but could only, in a proper case, make the allowance to the administrator as expenses incurred by him. At the hearing of the motion the same evidence was before the court respecting Mulgrew's services as when the original decree was entered. Instead of allowing to the administrator the amount found to be reasonable for such services, the court made the allowance to Mulgrew, and in so doing made an order in such form as showed on its face that it was unauthorized, and that it was not in accordance with the prayer of the petitioner. The objecting heirs made the motion for the purpose, no doubt, of having the court reconsider the matter and deny the allowance in any form. But the court, thinking it a just expenditure, instead of striking out this provision from the decree, so amended the decree as to make it accomplish what the court intended, holding, of course, that the expenditure was a proper one to be allowed. The amendment simply amounted to changing the allowance from Mulgrew to the administrator, or from the wrong person to the right one. The intention of the court to make the allowance appears on the face of

the decree, and the amendment does no more than to effectuate that intention, which the original decree had failed to do. In *Leviston v. Swan*, 33 Cal. 480, the judgment was defective in not designating the defendants who were personally liable for the debt in a foreclosure case. The court held that "inasmuch as the record shows who they were, the court had the power to amend the judgment at any time by adding a clause designating the defendants who were personally liable." In *Re Schroeder*, 46 Cal. 304, a personal judgment was entered against the administrator, and it appeared on the record that it should have been made payable in due course of administration. It was held that, even after the adjournment of the term, the court could direct an amendment of the judgment so as to make it correct. In the case here the court made an order which was a nullity, and which, therefore, failed to dispose of the issue presented by the petition. The attention of the court having been called to it by the motion, we think the court could so amend this judgment or order as to correctly dispose of the issue presented by the petition. And this the court could do, although the purpose of the motion was to have the item stricken out altogether. The contestants are still in position to test the correctness of the item, and whether it should have been allowed at all. We do not think the amendment was such a judicial error as could be remedied only by motion for new trial, as was the case in *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22. See the subject considered in *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646.

2. It appears from the evidence that the property was sold at public auction, and was struck off to one Vassar for \$15,500, that being the highest and best bid. Return of sale was made, stating, among other things, that the sum bid was not disproportionate to the value of the property sold, and that a sum exceeding such bid at least 10 per cent, exclusive of expenses of sale, could not be obtained; that the administrator did not think he could get an increased bid of 10 per cent. After the sale the administrator met Mulgrew, and told him of the bid, and was informed by Mulgrew that he thought he could find a purchaser at an increased bid of 20 per cent, and asked the administrator if he would agree to pay him all in excess of that amount, or \$18,600 net to the estate. The administrator replied that he did not know what authority he had to make such a contract, but would agree to this in so far as he could so act, and would agree to call attention of the probate court to all the circumstances, and ask the court to ratify what he had agreed to do

in the interest of the estate. Thereupon a contract was signed by the administrator reciting the sale and the assurance of Mulgrew that he could obtain a purchaser who would pay \$18,600, and further providing as follows: "Now, therefore, I agree that, if said F. B. Mulgrew procures said increased bid, that I will deem he has earned a commission of all of such sum in excess of \$18,600, namely, \$1,400, so procured, and to that end shall ask said new bidders \$20,000 for said property, and, if obtained, I shall ask the judge of said probate court, in fairness to said F. B. Mulgrew, to make an order to pay to him the said sum of \$1,400, or 5 per cent on amount of sale." It appears that Mulgrew then took the matter up with Burns & Waterhouse, who were looking elsewhere for a certain kind of property. Burns went personally, as a result of these efforts of Mulgrew, to examine the Mendocino property, and, being pleased with it, appeared at the confirmation, and, after some competition by others, bid in the property at \$20,000, and the sale was confirmed to Burns & Waterhouse. The contestants of the account offered no evidence, and there is no evidence tending to impeach the good faith of the administrator. There was evidence justifying the court in finding that the sale to Burns & Waterhouse was the result of Mulgrew's efforts. *Re Page*, 57 Cal. 238, and *Danielwitz v. Shepard*, 62 Cal. 339, are cited by appellants as decisive of the question in favor of their contention. In the first of these cases the agreement was to pay a contingent fee to an attorney of one third of the rents and one third of the real property recovered to the estate by means of his services. The administrator embodied these agreements in his account, and asked the court to allow the amounts therein agreed to be paid. It was held that the administrator could not dispose of the property of the estate in this manner. But it was not decided that the administrator could not be allowed anything as expenses of administration by way of fees of an attorney fixed by the court. On the contrary, it was said that the law authorized this to be done. In the other case cited the action was on a contract not unlike the one now here, except that it was made by defendants as heirs, and not in any representative capacity, as found by the lower court. It was signed by the administratrix as such, and by another heir. The action was against them as heirs of the estate. The agreement was held to be invalid, even if the agreement should be treated as the individual contract of the signers thereto. In the case before us the administrator agreed to bring the matter to the attention of the court, and ask the judge,

in fairness to Mulgrew, to pay him the amount agreed on. The court, in a decree, found that certain services were rendered by Mulgrew at the request of the administrator, "and that said services were such as required unusual exertion and extraordinary skill, experience, and ability," and that the agreement was that the administrator "would request this court, in the settlement of his accounts, to allow a reasonable sum and amount as compensation for said services," and the court found "that said services were and are of the reasonable value of \$1,000." The court did not attempt to enforce the contract, but awarded to the administrator what it deemed a fair compensation to the broker or agent. The fact that the award happened to concur in part with the terms of the contract does not necessarily imply an enforcement of the contract. Mr. Woerner states it as a general rule "that executors and administrators are allowed, as proper credits in their accounts, all disbursements made in good faith for any liability of the estate, either arising in the course of the administration, or existing against the deceased at the time of his death, and paid in the manner prescribed by law;" giving numerous illustrations. 2 Woerner, Am. Law of Administration, § 514. Where the expenditure is for the benefit of the estate, and is necessary, and is for services which it is the duty of the administrator to perform, but

which he cannot himself perform, it is within the discretion of the judge to make an allowance to the administrator for such expenditure. No rule can be laid down which shall catalogue the various kinds of these expenditures or classify them. Much will depend upon the nature of the estate and upon the character of the services for which the charge is made. For example, it was said in *Re Moore*, 72 Cal. 335, 13 Pac. 880: "We cannot lay down as a universal rule that in no case should an administrator be allowed to employ a bookkeeper. This may properly be left to the probate judge." Nor can we lay down as a universal rule that an administrator may not employ an agent to assist him in the sale of estate property. In a sense an auctioneer is such an agent, and compensation for services of an auctioneer has often been allowed. Money paid by the administrator to expert accountants for examining the books of a partnership was held a proper expenditure. *Re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479. So of attorney's fees; they cannot be allowed to the attorney, but the probate judge may allow in the account of the administrator a reasonable amount to compensate for the necessary services of an attorney.

The judgment is affirmed.

Petition for hearing in banc denied July 29, 1903.

KANSAS SUPREME COURT.

Mary CROSS, by Guardian, *et al.*, *Plffs. in Err.*,
v.

A. W. BENSON, Receiver of First National Bank of Emporia.

(.....Kan.....)

- *1. The constitutional exemption of a homestead from forced sale under process of law may survive to the family of its owner after his death.
2. If a husband and wife occupy a tract of land belonging to him as a homestead, she is the family of the owner, within the meaning of the Constitution and his death does not deprive her of the right to continue to be so designated, in order to maintain the homestead, to which she takes title, and which she continues to occupy, free

*Headnotes by BURCH, J.

from forced sale under process of law for the payment of his debts.

3. The purpose of the statute of descents and distributions is to provide for the transmission of title at death in case of intestacy, and to regulate the division of estates among heirs; it is not primarily an exemption or homestead law; and, though it may enlarge the right to an exemption of real estate from appropriation to the payment of debts, it cannot restrict the constitutional guaranty.
4. Upon the death of her husband, a wife may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts.
5. The use of merely formal phrases will not make a devise of a homestead subject to the payment of the testator's debts. To do so, the language employed must be unequivocal and imperative.

NOTE.—As to rights of child or children in homestead of parent, see, in this series, *Battery v. Barker*, 56 L. R. A. 83, and *note*.

As to what constitutes a family within the meaning of the homestead laws, see *Miller v.* 64 L. R. A.

Finegan, 6 L. R. A. 813, and *note*; *Moyer v. Drummond*, 7 L. R. A. 747; *Bosquette v. Hall*, 9 L. R. A. 351; *Holloway v. Holloway*, 11 L. R. A. 518; and *Lyons v. Andry*, 55 L. R. A. 724.

8. A trust deed examined, and held not to be testamentary in character.

7. A minor child, who resides with her grandparents under such circumstances that she becomes in fact dependent upon them, and they become morally responsible for her nurture, becomes a member of their family, within the meaning of the homestead provision of the Constitution, without formal adoption; and this is true even though her father, who is divorced from her mother, still lives, and has a decree of court awarding her custody to him.

(February 6, 1904.)

ERROR to the District Court for Lyon County to review a judgment in favor of plaintiff in an action brought to subject property claimed to be exempt as a homestead to the payment of the debts of H. C. Cross, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. Kellogg & Madden and Lambert & Huggins, for plaintiffs in error:

The homestead exemption laws are to be liberally construed, and creditors are not to lend their money, or otherwise extend credit, with the expectation of having the same paid out of the homestead.

Morris v. Ward, 5 Kan. 239; *Monroe v. May*, 9 Kan. 475; *Vandiver v. Vandiver*, 20 Kan. 505; *Mallory v. Berry*, 16 Kan. 293.

The exemption of homesteads for the benefit of the family is not limited in its operation to the lifetime of the owner.

Shirack v. Shirack, 44 Kan. 653, 24 Pac. 1107; *Wilson v. Fridenburg*, 19 Fla. 461, 21 Fla. 386; *Brokaw v. McDougall*, 20 Fla. 212.

The provision in the will that the just and lawful debts of the testator should first be paid out of the estate is limited to property not exempt by law from the payment of debts.

Martindale v. Smith, 31 Kan. 270, 1 Pac. 569; *Myers v. Myers*, 89 Ky. 442, 12 S. W. 933; *Pendergast v. Heekin*, 94 Ky. 384, 22 S. W. 605; *Re Rochester*, 110 N. Y. 159, 17 N. E. 740; *Kinnier v. Rogers*, 42 N. Y. 531; *Brill v. Wright*, 112 N. Y. 130, 8 Am. St. Rep. 717, 19 N. E. 628; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232; *Barbe v. Hyatt*, 50 Kan. 86, 31 Pac. 694.

The conveyance of the property in controversy by Mrs. Cross during her lifetime, and while she and Mary were occupying the same as a residence, and while the homestead character still pertained to the property, to F. C. Newman, as trustee for Mary Cross, conveyed a good and perfect title, freed from the right to subject the same to the payment of the debts of H. C. Cross.

Morris v. Ward, 5 Kan. 239; *Monroe v. May*, 9 Kan. 466; *Dayton v. Donart*, 22 64 L. R. A.

Kan. 256; *Gatton v. Tolley*, 22 Kan. 678; *First Nat. Bank v. Warner*, 22 Kan. 537.

Conveyances of the homestead are fully protected.

Wilson v. Taylor, 49 Kan. 774, 31 Pac. 697; *Roser v. Fourth Nat. Bank*, 56 Kan. 129, 42 Pac. 341; *German Ins. Co. v. Nichols*, 41 Kan. 136, 21 Pac. 111; *Ellwell v. Hitchcock*, 41 Kan. 132, 21 Pac. 109; *Winter v. Ritchie*, 57 Kan. 214, 57 Am. St. Rep. 331, 45 Pac. 595; *Hixon v. George*, 18 Kan. 260.

The deed in terms purported to convey the title in fee with full covenants of warranty, with the simple reservation of a life estate in Mrs. Cross, which said life estate was terminated by her death; and the instrument was and is a deed, and not testamentary in character.

Reed v. Hazleton, 37 Kan. 321, 15 Pac. 177; *Love v. Blawie*, 61 Kan. 496, 48 L. R. A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059; *Bevins v. Phillips*, 6 Kan. App. 324, 51 Pac. 59; *Knowlson v. Fleming*, 165 Pa. 10, 30 Atl. 519; *Kelley v. Shimer*, 152 Ind. 290, 53 N. E. 233; *Laluck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Martin v. Faries*, 22 Tex. Civ. App. 539, 55 S. W. 601; *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378.

The trust deed to Newman for Mary's benefit, having been fully executed and delivered prior to the making of the codicil, the subsequent codicil to the will can have no possible effect upon the deed.

Darling v. Emery, 74 Vt. 167, 52 Atl. 519; *Wade v. Button*, 72 Vt. 136, 47 Atl. 406; *Haston v. McClaren*, 132 Ind. 235, 31 N. E. 48; *Vining v. Willis*, 40 Kan. 612, 20 Pac. 232.

There can be no question whatever but that Mary was a member of the family.

Zimmerman v. Franke, 34 Kan. 654, 9 Pac. 747; *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40; *Calhoun v. Williams*, 32 Gratt. 18, 34 Am. Rep. 760; *Race v. Oldridge*, 90 Ill. 250, 32 Am. Rep. 27; *Moyer v. Drummond*, 32 S. C. 165, 7 L. R. A. 747, 17 Am. St. Rep. 850, 10 S. E. 952; *Holloway v. Holloway*, 86 Ga. 576, 11 L. R. A. 518, 22 Am. St. Rep. 484, 12 S. E. 943; *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Parsons v. Livingston*, 11 Iowa, 104, 77 Am. Dec. 135; *Brown v. Brown*, 68 Mo. 388; 7 Am. & Eng. Enc. Law, p. 804; *Batley v. Barker*, 62 Kan. 519, 56 L. R. A. 33, 64 Pac. 79.

Messrs. Graves & Hamer and Rosington, Smith, & Histed, for defendant in error:

The children that are sought to be protected by the homestead law, or some of

them, at least, must be minor children to obtain the benefits of the exemption act.

Batley v. Barker, 62 Kan. 517, 56 L. R. A. 33, 64 Pac. 79; *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569.

If Charles S. Cross had been a minor occupying the homestead at the time of his father's death, and afterwards reached the age of an adult, the property would have been subject to partition and distribution, subject to the debts of the deceased owner.

Dayton v. Donart, 22 Kan. 256; *Batley v. Barker*, 62 Kan. 520, 56 L. R. A. 33, 64 Pac. 79.

The homestead must have an inception, and such inception, to protect this property from the claims of creditors, must be at the very instant of the death of the intestate. It cannot subsequently accrue or be created. The fact that Mrs. Sue S. Cross continued to occupy this property, and sought to adopt a minor child, cannot throw the *axis* of homestead protection over it for her benefit, or for the benefit of her heirs.

Vining v. Willis, 40 Kan. 609, 20 Pac. 232.

Mrs. Sue S. Cross abrogated her homestead right, if she had any, by taking under the will.

When the owner of the homestead dies testate, the right of alienation vests instantly, and the homestead estate is destroyed.

Allen v. Holtzman, 63 Kan. 42, 64 Pac. 966; *Vining v. Willis*, 40 Kan. 614, 20 Pac. 232; *Vandiver v. Vandiver*, 20 Kan. 501.

The provision of the exemption law must not, through a desire to be liberal to the debtor, be warped out of all harmony with each other.

George v. Hunter, 48 Kan. 651, 30 Am. St. Rep. 325, 29 Pac. 1148; *Rothschild v. Boelter*, 18 Min. 361, Gil. 331.

The trust deed to Newman was not a conveyance, but was testamentary in its nature, and therefore, upon the grantor's death, the rights of the creditors attached.

Barbe v. Hyatt, 50 Kan. 86, 31 Pac. 694; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232; *Comstock v. Adams*, 23 Kan. 524, 33 Am. Rep. 191; *Jarman, Wills*, 6th ed. p. 19; *Williams v. Tolbert*, 66 Ga. 127; *Lawson, Rights, Rem. & Pr.* § 3141; *Schouler, Wills*, § 272; *Frew v. Clarke*, 80 Pa. 170; *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203; *Carcy v. Dennis*, 13 Md. 1; *Jordan v. Jordan*, 65 Ala. 301; *Re Lautenschlager*, 80 Mich. 285, 45 N. W. 147; *Crocker v. Smith*, 94 Ala. 298, 16 L. R. A. 576, 10 So. 258; *Sprerber v. Balster*, 66 Ga. 317; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Grigsby v. Willis*, 25 Tex. Civ. App. 1, 59 S. W. 574; *Chestnut Street Nat. Bank v. Fidelity Ins. Trust & S. D. Co.* 186 Pa. 333, 65 64 L. R. A.

Am. St. Rep. 860, 40 Atl. 486; *Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886; *Frederick's Appeal*, 52 Pa. 338, 91 Am. Dec. 159; *Rick's Appeal*, 105 Pa. 528; *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Lacy v. Comstock*, 55 Kan. 86, 39 Pac. 1024; *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Robertson v. Smith*, L. R. 2 Prob. & Div. 43, 39 L. J. Prob. N. S. 41, 22 L. T. N. S. 417.

On petition for rehearing.

The widow elected to take under the will and *ipso facto* waived her homestead rights. Having necessarily and inevitably waived them, she could not still retain them.

Coudrey v. Hitchcock, 103 Ill. 262; *Stuns v. Stuns*, 131 Ill. 210, 23 N. E. 407; *Warren v. Warren*, 148 Ill. 641, 36 N. E. 611; *Wells v. Congregational Church*, 63 Vt. 116, 21 Atl. 270; *Watson v. Christian*, 12 Bush, 524; *Taylor v. Loller*, 8 Ky. L. Rep. 773, 3 S. W. 165.

Burch, J., delivered the opinion of the court:

On the 4th day of September, 1894, H. C. Cross, of the city of Emporia, died testate, leaving as his heirs at law his widow, Sue S. Cross, and an adult son, Charles S. Cross. At the time of his death he was the owner of certain contiguous lots of ground within the limits of the city, which in their entirety were less than 1 acre in extent, and which were occupied as a residence by himself and wife. Their infant granddaughter, Mary, the child of Charles S. Cross, lived with them. Charles S. Cross had been divorced from Mary's mother. The decree dissolving their marriage awarded the legal custody of the child to her father, but, by an understanding of the parties, it was arranged that Mary should make her home with her grandparents. Thenceforth they assumed the care and the responsibility of her nurture, and she was treated as their child. The will of H. C. Cross expressed the desire that his debts and funeral expenses be first paid, and devised the homestead to his wife. Upon its probate the widow elected to take under the will. After the death of her husband Mrs. Cross and Mary continued to reside upon the homestead property. Mrs. Cross continued to sustain the same cherishing relation toward Mary as before, and ultimately adopted her by formal proceedings in the probate court. Charles S. Cross survived his father little more than a year. Upon February 5, 1902, Sue S. Cross died, leaving a will, which was afterward properly probated, in which the homestead was devised to F. C. Newman, as executor, to be sold, however, and the proceeds to be invested in interest-bearing securities,

which with the income to accrue from them, were to be the property of Mary. On the day following that of the execution of the will, Mrs. Cross executed a deed purporting to convey in fee the homestead, with full covenants of warranty, to F. C. Newman, as trustee, for the benefit of Mary; reserving to herself, however, a life estate, and providing that after her death the property should be sold, and the proceeds devoted to the same uses as the will prescribed. A subsequent codicil to the will annulled a specific request, and changed the beneficiaries of the residual portion of the estate, but did not disturb the devise of the homestead, upon which Mary continued to abide alone.

Creditors of the estate of H. C. Cross have secured a judgment subjecting this property to the payment of their claims, and the question for determination is whether that judgment is authorized by our Constitution and laws. In support of the judgment, the following claims are made:

"(1) The constitutional exemption does not survive the death of the owner of the homestead. Any extension of the homestead estate beyond the death of the owner must be found, if at all, in the statute of descents and distributions.

"(2) Under the statute of descents and distributions, a homestead estate does not survive for the benefit of a widow and child or children who have reached the age of majority, there being no minor heirs.

"(3) After the death of the homestead owner, who dies testate, leaving children who have attained the age of majority, and without minor heirs, his widow may elect to take under the statute of descents and distributions, or under the will. If she elects to take under the will, she thereby abrogates her right to claim any homestead exemption against the debts of her husband.

"Applying the foregoing propositions of law to the case at bar, our position may be summarized:

"(a) At the time of the death of H. C. Cross, he leaving a widow and one son, who had attained the years of majority, the homestead character of the property ceased and determined, and his widow and son, if he had died intestate, would have been entitled each to a moiety of the property under the statute of descents and distributions. Inasmuch as the only living adult son could not claim the integrity and protection of the homestead, neither could the widow.

"(b) But H. C. Cross died testate, and, in his will, devised the whole of the property in question to his widow; and, she

electing to take thereunder, it follows that she thereby took the same subject to the *ante mortem* debts of her husband, the payment of which was expressly directed by his will.

"(4) Assuming, however, but merely for the purpose of argument, that Sue S. Cross did acquire a homestead under the will, exempt from the debts of her husband, such homestead, affected by such exemption, could continue only during her life; and while she might sell or convey the property in her lifetime, free from the obligations of her husband, she could not devise it, nor could her heirs inherit it, exempt from the payment of her husband's debts.

"(5) The trust deed to F. C. Newman, of March 2, 1901, was not a conveyance, but amounted merely to a testamentary disposition of her property in accordance with the terms of the will already made, and this is made conclusively apparent by her subsequent change in the disposition of her property by the codicil of November 21st."

The principal question here proposed for determination is one of constitutional interpretation.

Out of the womb of history there has come to us an institution known as the "family." Its establishment has been believed to be by the ordinance of Divinity itself. "God setteth the solitary in families." The pagan Plato understood its fundamental importance. "Whatever is most excellent in the state must always begin at the fireside." And when the modern critical method of inquiry made it the subject of investigation, and the sciences of biology and anthropology and sociology, and the rest, had summed up and compared the results of their exhaustive researches, they concurred in proclaiming that, aside from its efficiency as an economic arrangement for the promotion of race and individual progress, the moral virtues which constitute the bright, consummate flower of our humanity all had their origin, received their nurture, and attained their perfection within and through the family. Therefore the present age, with its keener insight and its ampler understanding, regards the family with an enthusiasm and respect more tender, more intense, and more profound than ever before; and the courts will abate none of their jealousy to see that laws intended for its conservation and protection are administered in a spirit as beneficial and as kind as the language of the instrument will bear.

A consideration of the origin and purpose of the homestead right, and of its establishment in the Constitution of this state, will show that the provisions made in that document were intended to be complete, and

that all legislative action in attaining the desired end was intended to be dispensed with. With a higher appreciation of the function and importance of the family came more liberal sentiments towards its submerged element, the wife, and her elevation, through an amelioration of the law. The word "family" has its root in the Oscan word *famul*, which signifies a slave. Much of this primary meaning was applicable to the status of married women at the common law with reference to property. Marriage amounted to a spoliation of the woman, and an investiture of the man with property in her personality, and the possession and enjoyment of her realty, and her individuality of management and control of whatever was hers at marriage was completely merged in that of her husband. Under the same common law the creditor could seize and appropriate to the satisfaction of his debt the goods and the estates of his debtor, without distinction as to whether they were held by virtue of his marital right, or by other methods of acquisition and ownership. As a result, wives found themselves stripped of their possessions by the folly or misconduct of spendthrift husbands, reduced to penury without any fault of their own, and rendered powerless to retrieve their fortunes by the incapacity which the law imposed. To eradicate these evils, hoary with the sanction of centuries, two remedial measures were proposed,—the married woman's separate estate, and the homestead right; the one seeking to restore to women their just share in the management and control of their own property, and the other seeking to guard against the sufferings of women and children, who, through ill conduct or misadventure, were deprived of support, by segregating a modicum of property for undisturbed occupation as a home, entirely exempt from the ordinary incidents of ownership,—the right of free alienation by the owner, and the liability to seizure and sale for his debts. Article 15 of the Constitution contains provisions upon both these subjects. But the saving of a home to the family, free from alienation without joint consent, and beyond the reach of process of the law, was of overshadowing importance. Therefore, while § 6 directs the legislature to provide for the protection of the rights of women in acquiring and possessing property, real, personal, and mixed, separate and apart from the husbands, § 9 itself creates, limits, and defines the homestead right. The difference in treatment of the two subjects is strikingly shown by bringing the sections of the Constitution relating to them in juxtaposition:

"Sec. 6. The legislature shall provide for the protection of the rights of women, in 64 L. R. A.

acquiring and possessing property, real, personal and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children."

"Sec. 9. A homestead to the extent of 160 acres of farming land, or of 1 acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon: Provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife."

Sections 6, 9, art. 15, State Const.

Upon the matter of homestead not only is legislative aid dispensed with, but legislative interference is foreclosed. Without any statute upon the subject, no forced sale of any homestead occupied in the manner prescribed could be lawful, and no conditions may be imposed by statute upon the enjoyment of the right. Since this is true, it is not apparent why the framers of the Constitution, with all their admirable solicitude for the poverty and pain of the innocent victims of weakness and folly and unpropitious fate, should forget the desolation and disaster which follow in the wake of death; why a wife and children should be so zealously screened so long as a husband and father lives to beat up the stream of the world's unkindness with them, but that a widow and orphans should be left to the whim and caprice of inconstant legislation. Indeed, it would seem to be something of an imputation to assert that the constitutional convention stopped short in its labors, and left the most delicate and the most urgent portion of its work unguarded to the legislature. The language of the Constitution itself forbids such an interpretation. By its terms the area and appurtenances of the homestead are expressly limited; the beneficiary of the right is expressly limited; the manner of its enjoyment is expressly limited; the method of transferring the estate in the land it covers is expressly limited; the charges which may be made against it are expressly limited, and the character of process upon which it may be sold is expressly limited; but the time during which occupation by the family of the owner shall be a barrier to its appropriation for the payment of debts is not limited. There is

no time appointed beyond which it shall not endure.

To satisfy the creditors who press this suit, it is necessary to ingraft upon the words of the Constitution, "shall be exempted from forced sale under any process of law," the alien phrase, "during the lifetime of the owner whose family occupies it." The Constitution itself forbears to express any such limitation. Such an interpretation can scarcely be made in a document which enumerates its own exceptions and prescribes its own limitations, and much less should it be undertaken when the result would be to abridge the scope and curtail the benignant power of a remedial charter.

Whenever, therefore, a homestead is once established, it will endure as long as the enumerated elements essential to its existence continue to co-ordinate. The homestead may be voluntarily abandoned by those entitled to its privileges, it may be conveyed away, and the family itself may be dissolved, until there is no one left to invoke the constitutional protection, as in *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529; but, so long as family occupation as a residence persists, no creditor may obtrude upon the sanctity of the homestead demesne.

Applying these propositions to the case at bar, and, for the purpose of the application, excluding Mary Cross from the family of her grandfather, it may be observed that, before the death of H. C. Cross, his wife, Sue S. Cross, constituted his family. That he had an adult son living apart from him in no way disparaged that fact. She was "the family of the owner" of the lots. Because she was his family, and occupied the lots as a residence, it was exempt from the payment of his debts. When her husband died, the conditions in respect of which the Constitution gave her a home were not improved. The gaunt gray wolf of debt, that had been skulking in the shadows of her habitation and crouching at its door, could ravage still. She continued, as before, to be the constituent element of the family of H. C. Cross; she continued in the rightful occupation of the homestead as her residence; and it would turn into mockery the constitutional provision prepared against the days of her adversity to say that her husband's creditors might enter as soon as his hearse had left the door.

It is said, however, that, in the light of the statute of descents and distributions, the homestead must be regarded as ceasing at the death of H. C. Cross. The statute of descents and distributions can shed no light upon the subject. The Constitution creates the homestead. This court is the final interpreter of that instrument, and no 64 L. R. A.

legislative misconception of its scope, if any such should become manifest, can be permitted to diminish the field of its operation. However, the purpose of the statute of descents and distributions must be taken to be what its name imports,—a statute providing for the transmission of title at death in cases of intestacy, and regulating the division of estates among heirs. It is not an exemption or homestead law. Upon the death of the owner, the title to his land must vest anew, or escheat to the state. If there be no will, the law alone accomplishes the transfer, and names the persons who take. With this devolution of title the Constitution has nothing to do. Property descending to heirs must be distributed, to be properly enjoyed. With this distribution the Constitution has nothing to do. These are matters left by the Constitution to the legislature. But homestead interests are disturbed by them no more than the division of the title and the division of the land necessarily require, and the rights of creditors are enlarged no further than these circumstances necessarily compel. Neither descent nor distribution can make subject to execution for payment of debts any portion of the homestead inherited and occupied by a person who is not by death or by subsequent circumstances taken from the category of the family of the owner. If in this case there had been no will, upon the death of H. C. Cross the title to the homestead would have descended to Sue S. Cross, the widow, and the adult son, Charles S. Cross. It may be granted, for the purpose of the illustration, that, because the latter was of mature age, partition could have been compelled. But, because Sue S. Cross was the beneficiary of a homestead right in the property, her share upon a division would have retained its homestead character so long as she chose to observe the requirements making it such. The primary function of the statute of descents and distributions, therefore, is the transfer of title and the partition of the estate among its inheritors; and, while it may enlarge the privilege of freedom from appropriation to the payment of debts, it cannot restrict the constitutional guaranty. If it be said that this construction of the Constitution is not in harmony with those provisions of the statute of descents and distributions which seem to permit no homestead privilege to a widow when adult children also survive the owner's death, it can only be replied that the Constitution is the paramount law, and its mandates must be obeyed.

It is further claimed that the taking of title under the will of a homestead owner necessarily abrogates the homestead right, because a person must devise his lands

"subject, nevertheless, to the rights of creditors." § 7937, Gen. Stat. 1901. This proposition ignores the persistence of the exemption from forced sale, independent of changes in the title already illustrated in the case of descent. In this case Sue S. Cross occupied the lots in question as a residence, and as the family of the owner, H. C. Cross. By the will of the owner the title was devised to her, and she elected to take under the will. But there was no hiatus in her occupation of the premises as a residence and as the family of H. C. Cross. The homestead privilege was no more disturbed than it would have been, had H. C. Cross deeded the lots to his wife in his lifetime, and while she was occupying them as a homestead. She continued in the enjoyment of precisely the same right to immunity from the loss of her hearthstone at the suit of her husband's creditors as before his death. And since the lots in question were continually impressed with the homestead interest of Sue S. Cross in the lifetime of her husband, at the date of his death, and during the following years, until her own demise, creditors enjoyed no rights to which such lots were subject, or to which the making of a will of them was subject.

It is asserted that since Sue S. Cross elected to take the property in question under the terms of a will, in which a request that the testator's debts and funeral expenses be first paid was expressed, she held it subject to the payment of such charges. In England the validity of the rule that a general direction for the payment of debts creates a charge upon real estate is now doubted. "Such, then, is the long line of cases in which it has been held that a general direction by a testator that his debts shall be paid charges them upon his real estate. Though certainly in some of the wills there were expressions which might fairly be considered to sustain the construction independently of any such doctrine, it seems to be generally admitted that the courts have allowed their anxiety to prevent moral injustice by the exclusion of creditors, 'and that men should not sin in their graves,' to carry them beyond the limits prescribed by established general principles of construction." Jarman, Wills, § 1397. In Bigelow on Wills, 317, it is said: "Indeed, as a new question, there would be ground for question whether a direction to pay debts and legacies should be deemed a charge upon land devised." In *Re Rochester*, 110 N. Y. 159, 17 N. E. 740, it is said: "Payment of debts will not be charged upon a devise of real estate without clear evidence of such an intent in the will. The intention may not be presumed merely from the use of formal words, or the presence of

commonly employed phrases." Other American cases are to the same effect. *Starks v. Wilson*, 65 Ala. 576; *Ooock v. Ooock*, 5 Houst. (Del.) 540, 1 Am. St. Rep. 161; *Re Bingham*, 127 N. Y. 296, 27 N. E. 1055; *Re Powers*, 124 N. Y. 361, 26 N. E. 940. Much more imperative and unequivocal must be the language of a will which would subject to the payment of debts that property toward which the eye of the creditor need never be turned.

Finally, it is said that, even though Sue S. Cross might have the right to enjoy the property in question free from her husband's debts during her lifetime, and might have the right to convey it disencumbered of such obligations, yet the Newman trust deed was insufficient for such purpose, because it was testamentary in character. A policy to be followed in the construction of doubtful instruments of the character under consideration was adopted in *Love v. Blauw*, 61 Kan. 496, 48 L. R. A. 257, 78 Am. St. Rep. 334, 59 Pac. 1059, and applied in *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567. It will not now be departed from. The codicil to the will, executed after the relations of the parties to the deed had become fixed, could not alter their rights.

The constitutional question discussed above is a new one. Because of the diversity of their provisions, and the contrariety of view of the courts construing them, little assistance has been derived from the Constitutions and laws of other states. No previous decision of this court has been made with the interpretation of the Constitution here adopted in mind. Many expressions of opinion to be found in earlier cases point the way. Some affirmations by way of argument and illustration appear to be opposed to the view here taken. But upon a careful discrimination of the precise points determined, it will appear that no former decision need now be overturned. The case of *Batley v. Barker*, 62 Kan. 517, 56 L. R. A. 33, 64 Pac. 79, is most in conflict. The doctrine there applied is the strict one upon which *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529, is based. In the latter case it was held that a sole adult remnant could not himself constitute his own family, so as to preserve land exempt from the payment of his own debts. Thus, it might be argued that, after the death of H. C. Cross, Sue S. Cross could not herself be her own family, as against the claims of her creditors. If, however, this be admitted, a single individual, Sue S. Cross, was sufficient to constitute the family of H. C. Cross, and, because of her sole existence, the precincts of her home were inviolable by his creditors. H. C. Cross and Sue S. Cross alone exhibited the clear distinction of the Constitution be-

tween an owner, whose property is liable for his debts, and his family, who would be unhoused if the liability were enforced; and his death could not deprive her of the right to continue to be designated the family of H. C. Cross, as against the claims of those same creditors.

In order that the ground of this decision might not be misunderstood, the relation of Mary Cross to this homestead has been excluded from consideration. If, however, a plurality of persons were required to form the family of H. C. Cross, the condition was fulfilled. Even though her father was alive, and held a court decree for her custody, by the conduct of the parties Mary Cross became a member of the family of H. C. Cross, within the meaning of the homestead provision of the Constitution. Formal adoption was not necessary. The fact of her actual dependence upon her grandparents, and their consequent moral responsibility for her nurture, was sufficient. "It is also well settled that it is not necessary that the relation of husband and wife, nor that of parent and child, should exist, in order to constitute a family. *Bradley v. Rodelsperger*, 3 S. C. N. S. 226; *Garaty v. Du Bose*, 5 S. C. N. S. 493; *Moore v. Parker*, 13 S. C. 486; *Rollings v. Evans*, 23 S. C. 316. . . . Nor do we think that it is necessary that there should be any legal obligation on the part of one claiming to be the head of a family to support the members thereof, but a moral duty, arising from ties of blood, or possibility other similar relations, will be sufficient. As is said in 7 Am. & Eng. Enc. Law, p. 804, note 2, 'the test of a legal duty has been rarely applied, and unquestionably a moral duty to support the members of a family is sufficient to constitute one its head;' citing *Thomp. Homesteads & Exemptions*, § 45. Accordingly we find that it has been held in *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40, that an unmarried woman, keeping house, and there bringing up two children of her deceased sister, is the head of a family, though she has taken no steps to adopt said children under the statute of that state; in *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584, that a brother living with his widowed sister and her four small children, and providing for them, is the head of a family; in *Bailey v. Comings*, 16 Nat. Bankr. Reg. 382, Fed. Cas. No. 733, that a bachelor who supports a widowed sister, who keeps house for him, may be the head of a family. We are inclined to agree with what is said by Anderson, J., in *Calhoun v. Williams*, 32 Gratt. 18, 34 Am. 64 L. R. A.

Rep. 759: "The whole theory and policy of the homestead [law] is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent on him, towards whom he stands almost *in loco parentis*, which is, if not paramount, equal, to his obligation to pay his debts. . . . The family may consist of a wife and children, or of other persons who may stand in a state of dependence in the family relation, or it may consist of persons standing in either of these relations, whether the father or mother, or a brother or a sister, or other relation, is the head; but they must be persons who are dependent in some measure on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption." *Moyer v. Drummond*, 32 S. C. 165, 168, 7 L. R. A. 747, 17 Am. St. Rep. 850, 10 S. E. 952. "While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that, inasmuch as she undertook to keep them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, . . . and, under the laws of this state, she was entitled to a homestead, as the head of a family. See *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836, where it was held that, on the death of his wife, a widower, together with his minor stepchildren, was entitled to a homestead in an entire lot of land which he had held in common with his wife. Moreover, when Mrs. Holloway took the minor children under her care and custody, she stood in the relation of a parent to them, and took upon herself that obligation. She then was under a moral obligation to support and maintain these children, and the authorities hold that such a moral obligation is sufficient to entitle her to have a homestead set apart for the benefit of herself and the minor children." *Holloway v. Holloway*, 86 Ga. 576, 578, 11 L. R. A. 518, 22 Am. St. Rep. 484, 12 S. E. 943.

From all this it follows that *the judgment of the District Court must be reversed*, with direction to that tribunal to enter judgment upon the agreed facts in favor of the defendants, and it is so ordered.

All the Justices concur.

Petition for rehearing overruled February 16, 1904.

John Charles BIRKET, *Plff. in Err.*,
v.

John H. ELWARD *et al.*

(.....Kan.....)

An indorsee of a negotiable note taken as collateral security for a pre-existing debt, there being no extension of time of payment or other new consideration, except such as may be deemed to arise from the acceptance of the paper, is a holder for value and in due course of business; and, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee.

(January 9, 1904.)

ERROR to the District Court for Reno County to review a judgment in favor of defendants in an action brought to enforce payment of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. Carr W. Taylor and J. U. Brown, for plaintiff in error:

If the defendants in error believed that the note had been stolen by Gilliam, the payee thereof, and pledged as collateral security by him to plaintiff in error, and that plaintiff in error had knowledge of Gilliam's *mala fides*, it was their duty to allege the facts supporting their belief.

Halbert v. Ellwood, 1 Kan. App. 95, 41 Pac. 67; *Jones, Pledges & Collateral Securities*, 2d ed. § 104; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Maitland v. Citizens' Nat. Bank*, 46 Md. 540, 17 Am. Rep. 620.

The transfer of negotiable paper before maturity raises the presumption of the want of notice of any defense to it; and this presumption prevails until overcome by proof.

Carpenter v. Longan, 16 Wall. 271, 21 L. ed. 313.

The evidence proved, conclusively, that the plaintiff in error was the owner of said collateral note and mortgage; that he acquired the same in good faith, for full value, in the usual course of business, before maturity, and without notice of any circumstance that would impeach its validity.

Mann v. Second Nat. Bank, 34 Kan. 746, 10 Pac. 150.

The holder of a note transferred as collateral security for a loan made prior to its transfer is a holder for value.

Jones, Pledges & Collateral Securities, 2d

ed. § 108; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Re Wiley*, 4 Biss. 171, Fed. Cas. No. 17,655.

This is the doctrine in the following states:

California: *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Robinson v. Smith*, 14 Cal. 94; *Naglee v. Lyman*, 14 Cal. 450; *Sackett v. Johnson*, 54 Cal. 107; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Frey v. Clifford*, 44 Cal. 335.

Connecticut: *Brush v. Scribner*, 11 Conn. 388, 29 Am. Dec. 303; *Savings Bank v. Bates*, 8 Conn. 505; *Bridgeport City Bank v. Welch*, 29 Conn. 475; *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308; *Osgood v. Thompson Bank*, 30 Conn. 27.

Delaware: *Bush v. Peckard*, 3 Harr. (Del.) 385.

Georgia: *Gibson v. Conner*, 3 Ga. 47; *Bond v. Central Bank*, 2 Ga. 92; *Meadow v. Bird*, 22 Ga. 246; *Bonaud v. Genesi*, 42 Ga. 639.

Illinois: *Hancock v. Hodgson*, 4 Ill. 329; *Mayo v. Moore*, 28 Ill. 428; *Manning v. McClure*, 36 Ill. 490; *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Bowman v. Millison*, 58 Ill. 36; *Doolittle v. Cook*, 75 Ill. 354; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Mia v. National Bank*, 91 Ill. 20, 33 Am. Rep. 44; *McIntire v. Yates*, 104 Ill. 491.

Indiana: *Spencer v. Sloan*, 108 Ind. 183, 58 Am. Rep. 35, 9 N. E. 150; *Straughan v. Fairchild*, 80 Ind. 598; *Valette v. Mason, Smith* (Ind.) 89, 1 Ind. 288; *Work v. Brayton*, 5 Ind. 396; *Rowe v. Haines*, 15 Ind. 445, 77 Am. Dec. 101; *Babcock v. Jordan*, 24 Ind. 14; *McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364.

Iowa: *Tomblin v. Callen*, 69 Iowa, 229, 28 N. W. 573; *Robinson v. Lair*, 31 Iowa, 9.

Louisiana: *Giovanovich v. Citizens' Bank*, 26 La. Ann. 15; *Dolhonde's Succession*, 21 La. Ann. 3; *Louisiana State Bank v. Gaiennie*, 21 La. Ann. 555; *Smith v. Isaacs*, 23 La. Ann. 454.

Maryland: *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Cecil Bank v. Heald*, 25 Md. 563.

Massachusetts: *Blanchard v. Stevens*, 3 Cush. 162, 50 Am. Dec. 723; *Chicopee Bank v. Chapin*, 8 Met. 40; *Culver v. Benedict*, 13 Gray, 7; *Stoddard v. Kimball*, 6 Cush. 469; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Merriam v. Granite Bank*, 8 Gray, 254; *Gardner v. Gager*, 1 Allen, 502; *Paine v. Furnas*, 117 Mass. 290; *Fisher v. Fisher*, 98 Mass. 303; *Le Breton v. Peirce*, 2 Allen, 8; *Woodruff v. Hill*, 116 Mass. 310; *National Revere Bank v. Morse*, 163 Mass. 383, 40 N. E. 180; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 189, 25 N. E. 100;

*Headnote by MASON, J.

NOTE.—As to effect of payment of note to original payee on rights of one to whom it had been assigned as collateral security, see also, in this series, *Vann v. Marbury*, 23 L. E. A. 325.

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Spaulding v. Kendrick, 172 Mass. 71, 51 N. E. 453; *Merchants' Nat. Bank v. Haverhill Iron Works*, 159 Mass. 158, 34 N. E. 93.

Michigan: *Bostwick v. Dodge*, 1 Dougl. (Mich.) 413, 41 Am. Dec. 584; *Outhwaite v. Porter*, 13 Mich. 533.

Mississippi: *Fellows v. Harris*, 12 Smedes & M. 462.

Missouri: *Boatman's Sav. Inst. v. Holland*, 38 Mo. 49; *Grant v. Kidwell*, 30 Mo. 455.

New Hampshire: *Williams v. Little*, 11 N. H. 86; *Whitcher v. Dexter*, 61 N. H. 91.

New Jersey: *Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175; *Armour v. McMichael*, 36 N. J. L. 92.

North Carolina: *Reddick v. Jones*, 28 N. C. (6 Ired. L.) 107, 44 Am. Dec. 68.

Pennsylvania: *Beckhaus v. Commercial Nat. Bank (Pa.)* 11 Cent. Rep. 189, 12 Atl. 72.

Rhode Island: *Bank of the Republic v. Carrington*, 5 R. I. 515, 73 Am. Dec. 83; *Cobb v. Doyle*, 7 R. I. 550.

South Carolina: *Bank of Charleston v. Chambers*, 11 Rich. L. 657.

Texas: *Alexander v. Bank of Lebanon*, 19 Tex. Civ. App. 620, 47 S. W. 840; *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168; *Liddell v. Crain*, 53 Tex. 549; *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632, 18 S. W. 428; *Heffron v. Cunningham*, 76 Tex. 312, 13 S. W. 259; *Kauffman v. Robey*, 60 Tex. 308, 48 Am. Rep. 264.

Vermont: *People's Nat. Bank v. Clayton*, 66 Vt. 541, 29 Atl. 1020; *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342; *Atkinson v. Brooks*, 26 Vt. 569, 62 Am. Dec. 592; *Dixon v. Dixon*, 31 Vt. 450, 76 Am. Dec. 129; *Michigan State Bank v. Leavenworth*, 28 Vt. 209; *Russell v. Splatter*, 47 Vt. 273; *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284.

Virginia: *Negotiable Instruments Acts* 1898.

West Virginia: *Hotchkiss v. Fitzgerald Patent Prepared Plaster Co.* 41 W. Va. 357, 23 S. E. 576.

Messrs. George A. Vanderveer and F. L. Martin for defendants in error.

Mason, J., delivered the opinion of the court:

John H. Elward and William A. R. Elward on September 25, 1894, executed to George T. Gilliam a negotiable note due in five years, and William A. R. Elward executed as security for the note a mortgage on real estate in Reno county. On June 24, 1901, John Charles Birket sued the Elwards upon the note and mortgage, claiming to have acquired them by indorsement and under such circumstances as to make him an innocent purchaser. The defendants answered with a general denial, which put in

issue the question whether plaintiff was a bona fide holder, and an allegation that the note had been fully paid to Gilliam by the makers without knowledge or notice of any transfer to plaintiff. A reply was filed, consisting of a general denial. Upon the trial plaintiff testified that he acquired the note April 28, 1896, at the time of making a loan of \$2,000 to Gilliam, as collateral security for such loan. The evidence of defendants showed that on May 25, 1896, the Elwards executed a new note and mortgage to Gilliam in consideration of the satisfaction of the old debt and an additional loan of \$500; that the old papers were surrendered to John H. Elward, who placed them in a box, which he left in the custody of Gilliam; that on June 25, 1896, a release of the first mortgage, executed and acknowledged by Gilliam, was filed for record with the register of deeds. The amount due plaintiff from Gilliam was shown to be \$814. The court instructed the jury that the only question for their determination was the date at which plaintiff acquired the note; that if he acquired it before June 25, 1896 (the date of the record of the satisfaction of the mortgage), he should recover; that otherwise the verdict should be for defendants. The jury found specially that plaintiff acquired the note after that date, and judgment followed for the defendants, which plaintiff now seeks to reverse.

The theory upon which the trial court held the date of the recording of the mortgage release to be important is not discussed in the briefs, and is not material, since the instruction and judgment are now defended on the ground that, if plaintiff took the note as collateral security for Gilliam's debt at any time after such debt was created (namely, April 28, 1896), he took it subject to any defense that could be made against the original payee. It is obvious that plaintiff could only recover on the theory that he was an innocent purchaser, and the sole question here involved, therefore, is whether one who takes commercial paper as collateral security for an existing debt, without an agreement for an extension of time or other new consideration, is ever entitled to protection as a bona fide holder. If so, the judgment must be reversed; otherwise it must be affirmed.

The rule in the Federal courts, as well as in those of England and Canada, is that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder for value in due course of business, and as such is protected against all latent equities of third parties. The state courts that have passed upon the question are in irreconcilable conflict. The cases are collected in 4 Am. & Eng. Enc. Law, 2d

ed. pp. 290-293, and in 7 Cyc. 932-935. The lists there given indicate with substantial but not absolute correctness the line of cleavage. It is to be noted that in each of them Kansas is wrongly placed among the states that are committed to the rule stated, upon the strength, respectively, of the cases of *National Bank v. Dakin*, 54 Kan. 656, 45 Am. St. Rep. 299, 39 Pac. 180, and *Best v. Crall*, 23 Kan. 482, 33 Am. Rep. 185. While these cases have a tendency in that direction, they do not go the full length indicated. In *National Bank v. Dakin* the note involved was transferred as collateral security for a debt created at the time of, and in reliance upon, such transfer, which was therefore supported by a new consideration, sufficient upon any theory of the law. In the opinion a number of cases are cited as supporting the proposition that even a pre-existing debt would afford a sufficient consideration for the purpose, and among them was included *Best v. Crall*. In that case the collateral note was in fact transferred as security for a debt that already existed; but this was done pursuant to a promise made when such original debt was created, so that the effect was the same as though the transfer had actually been made at that time. A careful examination of the cases cited in the lists referred to discloses that in the following states the rule of the Federal court has been adopted: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and West Virginia. In California and Nevada the matter is affected by statutory provisions that the acceptance of the security forfeits a right to attach. Nebraska is also now committed to this doctrine. *Lashmett v. Prall* (Neb.) 96 N. W. 152. Such citations further show that in the following states the rule has been denied: Alabama, Arkansas, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, Wisconsin. North Carolina also should now be placed in this list, but there, as well as in Tennessee and Virginia, the legislature has lately changed the rule by statute. See *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822; *Bank of Charleston v. Johnson*, 105 Tenn. 521, 59 S. W. 131; *Norfolk County v. Cox*, 98 Va. 270, 36 S. E. 380. In New York, in 1897, in a revision of the law of negotiable instruments, it was enacted that "value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value." It was held in *Brewster v. Shrader*, 26 Misc. 480, 57 N. Y. Supp. 606, that this statute changed the law 64 L. R. A.

as formerly administered in that state, and that under it an indorsee of a note taken as collateral to a pre-existing indebtedness is a holder for value, unaffected by equities between the original parties. But in *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504, this was denied, and it was said that the new statute was purely declaratory. We do not discover that the New York court of appeals has passed upon the effect of this legislation. What may fairly be called the minority doctrine originated in New York in *Bay v. Coddington*, 5 Johns. Ch. 54, 9 Am. Dec. 268, the opinion being written by Chancellor Kent. The leading case in this country on the majority side is *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865, the opinion being written by Justice Story. It was there declared that one who took negotiable paper in payment of or as security for a pre-existing debt was a holder for value and in due course of business, and the argument was made in support of that express proposition. But the reference to paper taken as security was not required by the facts of the case, and Justice Catron dissented on this ground. In *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61, the same reasoning was adopted and applied in a case where the transfer was made merely to secure an antecedent debt. The note there involved had several indorsers, and the obligation assumed by the last holder to give them notice of nonpayment was treated as a part of the consideration of the transfer; but the decision did not turn upon this treatment. And in *American File Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149, 4 Sup. Ct. Rep. 90, the principle was applied where there were no prior indorsers. In the opinion in *Brooklyn City & N. R. Co. v. National Bank*, it was noted (citing 3 Kent's Commentaries, p. 81, note b) that Chancellor Kent, after the decision in *Swift v. Tyson*, indicated that he was inclined to concur in it, as the plainer and better doctrine. The *Bay-Coddington Case* and the *Swift-Tyson Case* are cited in almost every opinion in which the merits of the question under consideration are discussed, and the state courts have ordinarily taken sides upon the matter as the arguments of the one decision or the other have appealed to them with the greater force. In the former case it is said: "It is the credit given to the paper, and the consideration bona fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." In the latter case it is said: "Receiv-

ing it [a negotiable instrument] in payment of, or as security for, a pre-existing debt is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts."

Among other arguments advanced in behalf of the majority view are, that the question is really one of the law merchant,—the custom of merchants,—and that a "transfer by a debtor to his creditor of a negotiable instrument, to pay or only to secure a prior debt, makes the creditor a holder for value, by the custom" (Bigelow, Bills, Notes, & Checks, 247); that the creditor, in accepting a negotiable note, whether or not there are parties to be charged by notice, does undertake to exercise some degree of diligence (2 Randolph, Com. Paper, § 804), thereby affording a new consideration, or, at all events, that he "is naturally lulled into security and inactivity by crediting the face of the note, and he should not be made to suffer by the maker for confidence which his own promise created" (1 Dan. Neg. Inst. § 831a); that the true consideration for the transfer is the debt due from the indorser to the indorsee, and the obligation to pay or secure said debt; that such transfer is a sufficient consideration, because "security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property" (separate opinion of Justice Bradley in *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61). That the policy of the law is to facilitate the transfer of negotiable paper free of equities is illustrated by the fact that it is almost universally held that

one who acquires it in payment of an antecedent debt is a bona fide holder (*Draper v. Cowles*, 27 Kan. 484; 4 Am. & Eng. Enc. Law, 2d ed. p. 285), whereas the ordinary rule in reference to protection under recording acts is that one who accepts property in satisfaction of an existing debt is not an innocent purchaser (4 Am. & Eng. Enc. Law, 2d ed. p. 490; *Dolan v. Van Demark*, 35 Kan. 304, 10 Pac. 848; *Henderson v. Gibbs*, 39 Kan. 680, 18 Pac. 926). Even where the New York doctrine is accepted, an exception is made against the plea of lack of consideration when made by an accommodation party to the paper transferred as security. (*Grocers' Bank v. Penfield*, 69 N. Y. 502, 25 Am. Rep. 231; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Smith v. Wachob*, 179 Pa. 260, 36 Atl. 221.

If the question were a new one, to be determined upon consideration of equitable principles, there would be strong reasons for holding that he who takes a note merely as security for an existing debt acquires no greater right than his debtor had. The reasons given in *Mann v. Second Nat. Bank*, 30 Kan. 412, 1 Pac. 579, for applying this rule to a bank that receives a note from a depositor, and adds the amount to his account, which is not overdrawn, would seem to apply to the case of one who receives the paper as collateral for an indebtedness already existing. He parts with nothing, and is in no worse situation than he was before. It requires no variation of usual procedure to save him from loss. But on the other hand, the same arguments would reach the case of him who takes commercial paper in payment of an existing unsecured debt. He likewise is in no way placed in any worse situation than he was before, since, while the original debt may be regarded as technically canceled, he at all events has his remedy upon the collateral against the person from whom he received it, whatever defense might be available to the maker. He still has a valid claim against his original debtor, and that is all he had in the first place. See Randolph on Commercial Paper, §§ 461-465. Yet, as has just been said, one acquiring commercial paper under such circumstances is held to be protected as an innocent purchaser.

But the question before us is peculiarly one in which great weight should be given to the authorities, and especially to the decisions of the courts of the national government, which do not recognize any local law in such matters. *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580. The question is one likely to arise frequently in transactions between inhabitants of different states. It is important that the law should be uniform in the different jurisdic-

tions. It was doubtless in recognition of this consideration that the legislatures of North Carolina, Tennessee, Virginia, and possibly New York, as already noted, have lately by statute brought their local law on the subject into harmony with the general law as administered by the Federal and by the greater number of the state courts. We prefer to hold, in accordance with the weight of authority, that an indorsee of negotiable paper taken as security for a pre-existing debt is a holder for value and in due course of business, and therefore, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee.

It is to be noted that the petition in this

case alleges that the note in question was indorsed by Gilliam to plaintiff. This statement was not denied under oath, and was therefore not put in issue. The record shows that the note, with all indorsements, was offered in evidence as a part of plaintiff's deposition, but the purported copy does not show any indorsement. In the state of the pleadings, this is not material; but, of course, if the note was not actually indorsed by Gilliam, plaintiff was not in fact a bona fide holder.

The judgment is reversed, and the cause remanded for a new trial.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

Wesley TWYMAN, Admr., etc., of James Twyman, Deceased, *Appt.*,
v.

Board of Councilmen of FRANKFORT.

(.....Ky.....)

1. A municipal corporation is not liable for the acts of its officers, who, in attempting to guard the public health, remove a smallpox patient to a pesthouse so overcrowded and illly adapted to its purpose that he dies from the consequent exposure.
2. Failure of a municipal corporation to appoint a board of health will not render it liable for injuries to private individuals through the efforts of its other officials to enforce its health ordinances.
3. That a municipal corporation has passed an ordinance directing the removal to a pest house of persons afflicted with smallpox does not render it liable for the negligent acts of its officials in enforcing the provisions of the ordinance.
4. A municipal corporation is not rendered liable for the result of acts undertaken for the preservation of the public health, by a statute providing that in case of death by wrongful act damages may be recovered from the corporation causing it.

(February 3, 1904.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Franklin County

NOTE.—As to liability of municipality for act of officer in arresting and quarantining person exposed to smallpox, see, in this series, *Levin v. Burlington*, 55 L. R. A. 396.

As to quarantine regulations by health authorities generally, including liability of municipality for injury caused thereby, see *note* to *Hurst v. Warner*, 26 L. R. A. 484.

As to powers and liabilities of municipalities in time of epidemics, see *note* to *Thomas v. Mason*, 26 L. R. A. 727.
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in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. John W. Ray and B. G. Williams for appellant.

Mr. Ira Julian for appellee.

Settle, J., delivered the opinion of the court:

The appellant, Wesley Twyman, as administrator of the estate of James Twyman, deceased, sued the appellee, city of Frankfort, in the Franklin circuit court, for \$20,000 damages for the death of his intestate, alleged to have been caused by the negligence of its police officers in wrongfully exposing the intestate to inclement weather while he had smallpox, by removing him from a comfortable home to the pesthouse used for smallpox patients, which was badly crowded, poorly ventilated, and wholly unfit for the purpose for which it was used. It was averred, in substance, in the petition, that the appellee, as a city of the third class, is empowered to enact ordinances to prevent the introduction of contagious diseases in its corporate limits, to adopt quarantine laws and enforce the same within 10 miles of its limits, establish hospitals, boards of health, and make all necessary regulations for the protection of the public health; that, in pursuance of the powers enumerated, the appellee has enacted many ordinances for the protection of the public health, and it has established a pesthouse for persons afflicted with contagious diseases, but has never appointed a board of health, for which reason it directed its mayor, other officers, and agents to enforce the ordinances, and to remove any and all persons afflicted with smallpox to its pesthouse, and such officers

and agents acted under the authority thus conferred in doing the negligent acts complained of, whereby the intestate lost his life. A demurrer was filed to the petition by appellee, and, the same having been sustained by the lower court, the appellant refused to plead further. The petition was thereupon dismissed, and appellee given judgment for its costs.

The case is now before this court, and the only question presented upon the appeal is, Does the petition state a good cause of action?

If the acts complained of in the petition were done by the appellee in the effort to protect the public health, which is a duty that appertains to the city in its public, and not in its corporate or private, capacity, it would seem that there can be no liability upon its part, even though such duty was negligently performed by those to whom its performance was intrusted. "The power, or even duty, on part of a municipal corporation to make provision for the public health, and for the care of the sick and destitute, appertains to it in its public, and not corporate, or, as it is sometimes called, private, capacity; and, therefore, where a city, under its charter, and the general law of the state, enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein." Dill. Mun. Corp. §§ 977, 989, 981, 982; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151. Perhaps no better statement of the law on this subject can be made than is found in the following quotation from 15 Am. & Eng. Enc. Law, p. 1141, viz.: "While the difficulties surrounding all attempts to state a rule embracing the torts for which a private action will lie against a municipal corporation have been often deplored, yet it is believed that the following formula is both accurate and complete: So far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws, made to enforce the general policy of the state,—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters, they should stand as does sovereignty whose agency they are, subject to be sued only when the state, by statute, declares they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the lo-

cality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit, and measure of actual damage, to which an individual or private corporation exercising the same powers for purposes essentially private, would be liable." We find the same principle announced in *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948, wherein it is said by this court: "The municipal corporation in all these and the like cases represents the state or the public. The police officers are not the servants of the corporation, and hence the principle of *respondeat superior* does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability." In the same case it is further said: "The [above] principle . . . is sustained by almost an unbroken line of decisions of the courts of this country, and by this court in the cases of *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Jolly v. Hawesville*, 89 Ky. 279, 12 S. W. 313; *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585."

We do not regard the cases of *Clayton v. Henderson*, 103 Ky. 228, 44 L. R. A. 474, 44 S. W. 667; *Paducah v. Allen*, 111 Ky. 361, 63 S. W. 981, and *McGraw v. Marion*, 98 Ky. 673, 47 L. R. A. 593, 34 S. W. 18, cited by counsel for appellant, as authorities in point. The two cases first mentioned involved the illegal action of the boards of councilmen of the cities of Henderson and Paducah in improperly locating pesthouses in violation of the statute, thereby creating nuisances, to the injury of the property rights of contiguous residents, and endangering the lives of their families; and towns and cities can always be held liable for nuisances created or maintained by them. And in the case last mentioned, though the city of Marion was held liable in damages for the arrest and prosecution of McGraw for peddling without license, the arrest was made under a void ordinance, which was enacted for municipal revenue, of which the city of Marion was the sole beneficiary. It is well settled that a city may be held liable for an act resulting in injury to another, where the city derives some special benefit from such act. Counsel for appellant relies upon *Aaron v. Broiles*, 64 Tex. 318, 53 Am. Rep. 764, and *Dallas v. Allen* (Tex. Civ. App.) 40 S. W. 324. The former was an action against the board of health, mayor, and marshal of Ft. Worth, and not against the city; and, upon the state of facts presented, it was held that the persons sued were liable. We have been unable to find or examine the case of *Dallas v. Allen* (Tex. Civ. App.) 40 S. W. 324; but, conceding that the Texas doctrine is as conceded by counsel for appellant, it has not

been accepted in this state, and is, we think, against the weight of authority outside of it.

We are unable to see how the failure of the appellee city to appoint a board of health can affect the question under consideration. A board of health would be but an instrumentality or agency in the hands of the municipal government to be employed in protecting and maintaining the public health. Any other means to the same end that would prove as effective as a board of health might be employed by the city, and still the duties to be performed would be such as grow out of the exercise of powers purely governmental.

It is insisted for the appellant that the appellee city participated in the alleged negligent acts of its officers in the manner of removing the intestate to the pesthouse, because it directed the removal. It is not, however, contended that the city council gave any special direction to remove the intestate to the pesthouse, though it is conceded that it adopted proper ordinances under which to care for the public health. It cannot be denied that it is the duty of the city authorities to enforce these ordinances by removing those who are afflicted with contagious diseases to the place provided for them. We fail to see, therefore, how, in performing these duties, the city can become a participant in the negligent acts of those who simply have in hand the removal to the pesthouse of persons thus afflicted. At most, only the officers or agents guilty of such negligence may be held liable therefor. Taking all that is alleged in the petition to be true,—and it must be so considered for the purposes of the demurrer,—it shows beyond question that the acts complained of were such as appertained or were incidental to appellee's duty to the public, and were done for the protection of the public health. The power exercised was therefore solely for the public good.

Finally, it is insisted for appellant that in any event this action was authorized by § 6, Ky. Stat. 1903, which provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same." The statute was enacted to conform to § 241 of our present Constitution, which confers the same right. We cannot believe that the statute and provision of the Constitution *supra* were intended to give a right of action against a municipal corporation for the death of a person occurring as the result of the act done, as in this case, in the perform-

ance of a duty which the municipality owed to the public, and the doing of which was but the exercise of power purely governmental. It seems to us that to hold otherwise would practically do away with municipal authority in the matter of preserving the public health, which would result in consequences disastrous to the public welfare, and ruinous to every city in the state.

For the reasons indicated, *the judgment is affirmed.*

Rehearing denied.

LOUISVILLE & EVANSVILLE MAIL
COMPANY, *Appt.*,

v.

John T. BARNES, Admr., etc., of Clara R.
Barnes, Deceased.

(.....Ky.....)

1. A peremptory instruction to find for defendant cannot be given in an action for wrongful death, where the testimony tends to show that, while deceased was attempting to pass from a barge to a wharf boat, defendant made an unusual, unsafe, and dangerous landing at the wharf boat with its steamer in such a way as to cause the barge to separate from the boat and precipitate deceased into the water.
2. Failure to give proper instructions as to contributory negligence, in an action to recover damages for wrongful death, is not reversible error, where there was no evidence upon which to base any instruction upon the subject.
3. That the death of a person drowned by falling into the water while attempting to disembark from a barge in charge of a steamboat was caused partly by the negligence of the steamer whose passenger he was does not preclude a recovery for the death from another steamboat company whose negligence was also responsible for such death.
4. The receipt from one joint tortfeasor of a sum in part satisfaction of the demand, and his release from further liability, do not operate to release the other from liability for the residue of the damages inflicted.

(March 16, 1904.)

NOTE.—For other cases in this series as to effect of release of one joint tortfeasor upon liability of another, see *Abb v. Northern P. R. Co.* 58 L. R. A. 293, and *note*; *McBride v. Scott*, 61 L. R. A. 445; and *Gilbert v. Finch*, 61 L. R. A. 807.

As to effect of concurring negligence of third party on liability of one sued for negligently causing injury, see also *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 17 L. R. A. 33, and *note*; *City Electric Street R. Co. v. Conery*, 31 L. R. A. 570; *Stone v. Boston & A. R. Co.* 41 L. R. A. 794; *Bartram v. Sharon*, 46 L. R. A. 144; *Walrod v. Webster County*, 47 L. R. A. 480; and *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416.

A PPEAL by defendant from a judgment of the Circuit Court for Daviess County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles F. Taylor, with **Messrs. Powers & Anderson**, for appellant:

The petition does not state a cause of action against appellant. There is nothing in the petition to show that appellee's intestate was stepping towards, or onto, or standing on, the wharf boat which appellee alleges was struck with great force by appellant: To say that the boat landed at the wharf boat for the purpose of discharging its passengers does not necessarily mean that the passengers were discharged on to, or were stepping towards, the wharf boat.

Louisville, C. & L. R. Co. v. Case, 9 Bush, 728; *Chiles v. Drake*, 2 Met. (Ky.) 149, 74 Am. Dec. 406; *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 527.

Appellee's intestate was a trespasser. She was attempting to disembark onto the wharf boat at an unusual, an unsafe, and an unprovided place, and appellant was under no duty to keep a lookout for her, or to anticipate her presence on the forward end of the wharf boat.

1 Thomp. Neg. §§ 239, 990, 1006, pp. 228, 908, 923; *Lackat v. Lutz*, 94 Ky. 287, 22 S. W. 218; *Oatts v. Cincinnati, N. O. & T. P. R. Co.* 15 Ky. L. Rep. 87, 22 S. W. 330; *Louisville & N. R. Co. v. Kellen*, 14 Ky. L. Rep. 734, 21 S. W. 230; *Woodyard v. Kentucky C. R. Co.* 12 Ky. L. Rep. 800, 15 S. W. 178; *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Gresham v. Louisville & N. R. Co.* 15 Ky. L. Rep. 599, 24 S. W. 869; *McDermott v. Kentucky C. R. Co.* 93 Ky. 408, 20 S. W. 380; *Shackelford v. Louisville & N. R. Co.* 84 Ky. 43, 4 Am. St. Rep. 189; *Louisville & N. R. Co. v. Cox*, 8 Ky. L. Rep. 961; *Vertress v. Newport News & M. Valley R. Co.* 95 Ky. 314, 25 S. W. 1.

The proximate cause of the accident was the failure of the Marsden Company to provide gang planks or stages for its passengers to walk upon from the barges to the wharf boat.

1 Thomp. Neg. § 50, p. 54; *Setter v. Maysville*, 24 Ky. L. Rep. 828, 69 S. W. 1074; *Martin v. Louisville & N. R. Co.* 95 Ky. 612, 26 S. W. 801; *Shields v. Louisville & N. R. Co.* 97 Ky. 103, 27 L. R. A. 680, 29 S. W. 978; *Louisville & N. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117; *Illinois C. R. Co. v. Mizell*, 100 Ky. 235, 38 S. W. 5; *Franke v. Head*, 19 Ky. L. Rep. 1128, 42 S. W. 913; *Louisville Gas Co. v. Kaufman*, 105 Ky. 131, 48 S. W. 434.

The court failed to submit to the jury the question of appellant's negligence.
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Sandy River Cannel Coal Co. v. Caudill, 22 Ky. L. Rep. 1175, 60 S. W. 180.

The law of comparative negligence does not obtain in this state.

Ibid.

The questions of contributory negligence and of the proximate cause of the accident were taken from the jury.

Paducah & M. R. Co. v. Hahl, 12 Bush, 41; *Jacobs v. Louisville & N. R. Co.* 10 Bush, 267; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82; *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Illinois C. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010.

If the promise to pay was accepted by appellee, it was a present satisfaction, and such a promise that the appellee, by suit, could have compelled the Marsden Company to fulfil.

Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534.

There can be but one satisfaction for the same injury, and the acceptance of the promise made by the Marsden Company, to pay appellee \$1,000, was a present satisfaction, which, when followed by the dismissal of the suit as to the Marsden Company, was a release as to the Marsden Company, and therefore a release as to appellant.

Riley v. M'Gee, 1 A. K. Marsh. 432; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; 2 Co. Litt. § 376; Bacon, Abr. title *Release*, B; *Partridge v. Emson*, Noy, 62; *Cooke v. Jen-nor*, Hobart, 66; *Kiffin v. Willis*, 4 Mod. 380; *Ellis v. Eason*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Urton v. Price*, 57 Cal. 270; *Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Brown v. Marsh*, 7 Vt. 320; *Eastman v. Grant*, 34 Vt. 390; *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Stanley v. Leahy*, 87 Ill. App. 467; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135; *Goss v. Ellison*, 136 Mass. 503; *Brown v. Cambridge*, 3 Allen, 474; *Tompkins v. Clay Street R. Co.* 66 Cal. 163, 4 Pac. 1165; *Bailey v. Berry* (Ohio) 8 Am. L. Reg. N. S. 270; *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Gould v. Gould*, 4 N. H. 173; *Brown v. Kencheloe*, 3 Coldw. 192; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704; *Schramm v. Brooklyn Heights R. Co.* 35 App. Div. 334, 54 N. Y. Supp. 945; *Ransom v. Farish*, 4 Cal. 386; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Johanson v. New York*, 71 App. Div. 561, 76 N. Y. Supp. 119; *Seither v. Philadelphia Traction Co.* 125 Pa. 397, 4

L. R. A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; *Ruble v. Turner*, 2 Hen. & M. 38; *Mitchell v. Allen*, 25 Hun, 543; *Smith v. Consolidated Gas Co.* 36 Misc. 131, 72 N. Y. Supp. 1084; *Williams v. Le Bar*, 141 Pa. 149, 21 Atl. 525; *Pugh v. Chesapeake & O. R. Co.* 101 Ky. 77, 72 Am. St. Rep. 392, 39 S. W. 695; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L. R. A. 293, 92 Am. St. Rep. 864, 68 Pac. 954; *Sellards v. Zomes*, 5 Bush, 90; Ky. Stat. § 12; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 579, 9 Am. St. Rep. 309, 6 S. W. 441; *Bonte v. Postel*, 109 Ky. 64, 58 S. W. 536.

Even if the offer and promise of the Marsden Company to pay \$1,000 was not accepted at the time the suit was dismissed as to it, the payment and acceptance of the \$1,000, while a motion for a new trial was pending against appellant, was an election by appellee to accept the \$1,000 in settlement of the damages to the estate of his intestate, and was a cancellation and satisfaction of the judgment rendered against appellant.

Pugh v. Chesapeake & O. R. Co. 101 Ky. 77, 72 Am. St. Rep. 392, 39 S. W. 695; *United Society of Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214; *Gross v. Pennsylvania, P. & B. R. Co.* 65 Hun, 191, 20 N. Y. Supp. 28; *Lewy v. Fow*, 22 Jones & S. 397.

On petition for rehearing.

The instructions were erroneous, in that they did not state the law of contributory negligence.

Jacobs v. Louisville & N. R. Co. 10 Bush, 267; *Paducah & M. R. Co. v. Hoehl*, 12 Bush, 41; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 82; *Johnson v. Louisville & N. R. Co.* 91 Ky. 651, 25 S. W. 754; *Illinois C. R. Co. v. Dick*, 91 Ky. 441, 15 S. W. 665; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Louisville & N. R. Co. v. Cummins*, 23 Ky. L. Rep. 681, 63 S. W. 594; *Chesapeake & O. R. Co. v. Riddle*, 24 Ky. L. Rep. 1687, 72 S. W. 22; *Chesapeake & O. R. Co. v. Gunter*, 108 Ky. 362, 56 S. W. 527.

A tort is an entire thing, and indivisible. Where two commit a tort, as is alleged in the petition in this case, by their joint and concurring negligence, one is as liable as the other. The Marsden Company was liable for the tort, and the appellant was liable for the same tort; they might have been sued separately, or sued jointly as they were.

The appellee could not have made a separate estimate of the injury committed by each, and then have obtained judgment accordingly; he must sue jointly for his whole damages or he may sue separately for his whole damages. There can be but one satisfaction. This satisfaction was made, so 64 L. R. A.

far as the Marsden Company was concerned, by the payment of the \$1,000. Appellant was not a party to this agreement and compromise; it never agreed that the damages to the estate of appellees intestate were more than \$1,000.

The \$1,000 having been paid and accepted, and the Marsden Company having been fully released from any and all damages it had brought on appellee's intestate, it could never be made to pay further damages; the dismissal and release as to it were a release of appellee's cause of action.

Bronson v. Fitzhugh, 1 Hill, 185; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L. R. A. 293, 92 Am. St. Rep. 864, 68 Pac. 954.

All the courts from the time of the reign of King James I. (*Brown v. Wooton*, Cro. Jac. 73) down to the present time have uniformly held (with the exception of *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140) that a satisfaction made by one co-tortfeasor, and a release to him, would operate as a release to all, though the parties to the release intended that it should not so operate.

Bronson v. Fitzhugh, 1 Hill, 185; *Schramm v. Brooklyn Heights R. Co.* 35 App. Div. 334, 54 N. Y. Supp. 945; *Mitchell v. Allen*, 25 Hun, 543; *Johanson v. New York*, 71 App. Div. 561, 76 N. Y. Supp. 119; *Smith v. Consolidated Gas Co.* 36 Misc. 131, 72 N. Y. Supp. 1084; *Brogan v. Hanan*, 55 App. Div. 92, 66 N. Y. Supp. 1066; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Aldrich v. Parnell*, 147 Mass. 409, 18 N. E. 170; *Goss v. Ellison*, 136 Mass. 503; *Brown v. Cambridge*, 3 Allen, 474; *Urton v. Price*, 5 Cal. 270; *Tompkins v. Clay Street R. Co.* 60 Cal. 163, 4 Pac. 1165; *Chetwood v. California Nat. Bank*, 113 Cal. 414, 45 Pac. 704; *Ransom v. Farish*, 4 Cal. 386; *Seither v. Philadelphia Traction Co.* 125 Pa. 397, 4 L. R. A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; *Williams v. LeBar*, 141 Pa. 149, 21 Atl. 525; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Bailey v. Berry* (Ohio) 8 Am. L. Reg. N. S. 270; *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441; *Brown v. Kencheloe*, 3 Coldw. 192; *Brown v. Marsh*, 7 Vt. 320; *Eastman v. Grant*, 34 Vt. 390; *Rogers v. Cox*, 66 N. J. L. 432, 50 Atl. 143; *Allen v. Craig*, 14 N. J. L. 102; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125; *Hubbard v. St. Louis & M. River R. Co.* 173 Mo. 249, 72 S. W. 1073; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135; *Turner v. Hitchcock*, 20 Iowa, 310; *Long v. Long*, 57 Iowa, 497, 10 N. W. 875; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Gilpatrick v. Hunter*, 24 Me. 18, 41 Am. Dec. 370; *Stanley v. Leahy*, 87 Ill. App. 465; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Ayer v. Ash-*

mead, 31 Conn. 447, 83 Am. Dec. 154; *Gould v. Gould*, 4 N. H. 173; *De Bose v. Marx*, 52 Ala. 506; *McGehee v. Shafer*, 15 Tex. 198; *Werner v. Edmiston*, 24 Kan. 153; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L. R. A. 293, 92 Am. St. Rep. 864, 68 Pac. 954.

Messrs. George W. Jolly, W. T. Owen, and Horace Jolly, for appellee:

If it took the concurrent negligence to bring about the result, then the negligence of each was in part the cause, though they were jointly and severally liable for the result.

Louisville & C. Packet Co. v. Mulligan (Ky.) 77 S. W. 706.

A plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendants; or, where no one of them is able, or can be compelled, to pay the whole of the judgment rendered against him, may accept part satisfaction from one, and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered.

United Society of Shakers v. Underwood, 11 Bush, 265, 21 Am. Rep. 214.

The mere dismissal or release of one or more joint trespassers is no bar to proceedings against the others.

Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129.

Where several have jointly trespassed on real estate the receipt of money from one will not bar an action against the others; the amount received being less than the damage, and it not being understood to be in full satisfaction.

Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *McCrillis v. Hawes*, 38 Me. 568; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *Chamberlain v. Murphy*, 41 Vt. 110; *Sloan v. Herrick*, 49 Vt. 328; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 712; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Shaw v. Pratt*, 22 Pick. 307; *Pond v. Williams*, 1 Gray, 630; *Bank of Catskill v. Messenger*, 9 Cow. 37; *Lane v. Nelson*, 38 N. J. L. 358; *Irvine v. Milbank*, 15 Abb. Pr. N. S. 378; *Solly v. Forbes*, 2 Brod. & B. 38, 4 J. B. Moore, 448, 22 Revised Rep. 641; *Thompson v. Laok*, 3 C. B. 540, 16 L. J. C. P. N. S. 75; *Merchants' Bank v. Curtiss*, 37 Barb. 319; *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *Sellards v. Zomes*, 5 Bush. 90; *Cooley, Torts*, pp. 160, 161, and notes; *Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 814, 36 N. E. 498; *Shearm. & Redf. Neg.* § 31; *Louisville & C. Packet Co. v. Mulligan* (Ky.) 77 S. W. 704; *Danville, L. & N. Turnp. Road Co. v. Stewart*, 2 Met. 64 L. R. A.

(Ky.) 119; *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728; 7 Am. & Eng. Enc. Law, p. 446.

Numm, J., delivered the opinion of the court:

This appeal is from a judgment of the Daviess circuit court, rendered at its October term, 1902, against the appellant, Louisville & Evansville Mail Company, and in favor of John T. Barnes, administrator of Clara R. Barnes, deceased. The judgment was for \$2,000.

The facts of the case, as they appear of record, are, in substance, as follows: About 11:30 o'clock on the night of the 12th of July, 1901, Clara R. Barnes lost her life by drowning in the Ohio river at Owensboro, Kentucky. The young lady, together with about 400 other persons, embarked early in the night on an excursion boat of the Marsden Company called the "Fawn," with two barges attached, for a pleasure trip up the Ohio river to Rockport, Indiana, and return. On the return, and for the purpose of disembarking its passengers, this steamer landed at Owensboro, Kentucky, at the upper end of appellant's wharf boat, the barges lying "head on" at the forward end of the wharf boat. The proof of appellee showed that the barges were properly and securely fastened to the wharf boat with a rope attaching the Fawn to the bank or shore to keep her from swinging out into the stream. In this situation there was no space between the barges and the wharf boat. The passengers left the barges by stepping down 15 or 16 inches onto the front of the wharf boat. About 50 of the passengers had disembarked, when the deceased, Clara Barnes, in attempting to make this step from the barge to the wharf boat, fell between them, and was drowned. According to appellee's proof, this separation was caused by one of the boats of appellant coming in to the wharf boat "head on," striking the wharf boat at the upper end, thereby forcing the separation at the place and the time she made her step; that this was an improper and negligent landing of the appellant's boat; that those in charge of it saw the situation of the boat and barges of the Marsden Company and the disembarkation of its passengers. On the other hand, appellant claims that it did not make its landing in that manner; that it made a proper, easy, and safe landing, and did not cause the separation of the barges and the wharf boat; that the separation was produced from some other cause; that in fact the deceased fell between the two and lost her life before appellant's boat made its landing, or even touched the wharf boat;

that the deceased lost her life by reason of the negligence of the Marsden Company in making an improper landing at the wharf boat, by failure of the Marsden Company to use a stage plank for the use of the passengers to pass from the barge to the boat, or by the contributory negligence of the deceased herself in not using ordinary care for her own safety. Appellee sued both companies, charging joint and concurring negligence, but just before the trial dismissed, without prejudice, his petition against the Marsden Company, and proceeded with the trial against the appellant.

The appellant complains that the court erred in overruling its motion for a peremptory instruction to the jury at the conclusion of the evidence. In this the appellant is mistaken. There was proof introduced by many witnesses that the landing made by the appellant with its boat was a very unusual, unsafe, and dangerous one, and that the force with which it struck the upper end of the wharf boat forced the separation of the boat and barge just at the moment the deceased was making her step from the one to the other, and caused her death.

The appellant complains that the court failed to give a proper instruction on the question of contributory negligence on the part of the deceased. There is not anything in the record showing the slightest neglect or want of care on the part of the deceased by which she lost her life, and, if the court had failed to give any instruction on this point, it would not have been prejudicial to appellant, as there was no evidence upon which to base it. Appellant also complains of the following words in the first instruction: "And if they shall further believe that said drowning was caused by the negligence in whole or in part of the defendant Louisville & Evansville Mail Company's officers or servants," etc. In the case of *Louisville & C. Packet Co. v. Mulligan* (Ky.) 77 S. W. 704, the court, in discussing an instruction with similar words embodied in it, said: "Appellee, being a passenger on the White Dove, and having no control over the boat, may recover of the Cincinnati, although those in charge of the White Dove were more negligent than those in charge of the Cincinnati. For the negligence of a carrier is not imputed to a passenger who is injured by the concurrent negligence of the carrier and another, and he may recover against both. *Danville, L. & N. Turnp. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, O. & L. R. Co. v. Case*, 9 Bush, 728; 7 Am. & Eng. Enc. Law, p. 446, and cases cited. The court, by his instructions, told the jury that both boats were governed by the same rules

and regulations. . . . Also that appellant was not liable to appellee unless the plaintiff was injured by reason of the negligence, in whole or in part, of the officers in charge of the Cincinnati." The court in that case approved this instruction.

The most serious question involved in this case grows out of an issue made by an amended answer which was filed during the trial in the lower court, in which it was, in substance, alleged that the appellee had, in consideration of \$1,000 paid to him by the Marsden Company, dismissed his action against the Marsden Company, this appellant's joint tortfeasor, and had accepted the \$1,000 in satisfaction of his cause of action; that he had no further right to prosecute his action against this appellant. This was traversed by the appellee, and the proof introduced upon this question showed the following state of facts: The president of the Marsden Company, prior to the convening of the court when the trial was had, desired to avoid further litigation of the matter, and authorized the attorneys for the Marsden Company to endeavor to bring about a settlement and compromise of the litigation in so far as it was concerned, and authorized them to pay as much as \$1,000, if it took that much, to effect a compromise, and placed this money in a bank subject to the order of its attorneys. These attorneys approached the attorneys for appellee, and made a proposition for a compromise, and eventually offered the \$1,000. The attorneys for the appellee refused, stating that, while they believed that the Marsden Company was, possibly, not liable for any negligence,—at least they believed its negligence was not as great as that of appellant company's,—yet they were afraid, if they accepted this compromise settlement, appellee's right to prosecute the action against the appellant, their joint tortfeasor, would be barred. Thus matters stood until six or seven days after verdict and judgment against appellant, when the attorneys for the Marsden Company paid the attorneys for the appellee this money, and they immediately entered a credit upon the judgment against the appellant for this amount of \$1,000. We are convinced from all the proof in the case that there was an understanding between the attorneys for the Marsden Company and the appellee's attorneys prior to the trial, that this amount was to be offered and accepted, and the Marsden Company was to be released, and the case dismissed against it, and that the dismissal was in conformity with this understanding. The question to be determined is whether this operated as a release of the appellant, it being a joint tortfeasor.

Our opinion is that, if the appellee had accepted this \$1,000 in satisfaction of his cause of action or claim for damages, then it would have operated as a release and a bar to any other proceeding against appellant on account thereof. But it is shown by the proof, without contradiction, that it was accepted as only part satisfaction, and a release of the Marsden Company, but not in satisfaction of his cause of action and claim for damages. It is a universal rule of law that joint tort feors are jointly and severally liable to the injured party. He may sue anyone or all, at his election; but when he once receives satisfaction for the injury done him from one or more of the tort feors, he is barred from proceeding against the other joint tort feors. This is upon the idea that he is only entitled to one satisfaction, and to avoid his getting more than one compensation for his injury. There are authorities in many states which hold that any satisfaction from and a release of one joint tort feor releases all. But on a close investigation of these cases,—or at least the most of them,—it will be found that they were cases where the proof showed that the injured parties had received full satisfaction for their injuries or cause of action. Such are the cases of *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125; *Hubbard v. St. Louis & M. River R. Co.* 173 Mo. 249, 72 S. W. 1073; *Brown v. Cambridge*, 3 Allen, 474; *Urton v. Price*, 57 Cal. 270; *Donaldson v. Carmichael*, 102 Ga. 40, 29 S. E. 135; and other cases cited in these opinions. The sole reason given in these opinions for the rule as stated is that it is to prevent the injured party from receiving more than one compensation or satisfaction for his injury. We are unable to understand why a part satisfaction and release of one tort feor can be considered as complete satisfaction of his claim for damages, and operate as a bar to his cause of action against the other tort feors. There can be no good reason for this. The collection of part satisfaction from one tort feor is a benefit to the others. Under the law there is no right of contribution existing between tort feors. The law does not look with favor upon wrongdoers, and they are unlike obligors in an ordinary contract, where the right of contribution is given. The law ought not to be that a release of one tort feor, by his making a partial satisfaction for the wrong done, should operate as a release of the other wrongdoers. The law looks with favor upon compromises and settlements. It is not the intention of the law to force people into litigation and prevent settlements out of court. To uphold the rule contended for by appellant, such a re-

sult would follow. If ten persons commit a joint tort, and injure a person to the extent of \$1,000, and if nine of them recognize that fact, and are willing to pay \$100 each for the purpose of remunerating the injured party and to avoid the expense and annoyance of litigation, and the tenth man refuses to pay his \$100, according to appellant the injured party cannot accept the \$900 in part satisfaction and sue the stubborn tenth man. He would plead the settlement as a satisfaction and a bar. Such a construction of the law would be unreasonable and unjust. All that such a person should be allowed to take advantage of would be to require that in any judgment that should be rendered against him it should be rendered for one satisfaction of the claim for damages, less any sums that might have been paid by his joint tort feors as a partial satisfaction.

In the case of *Ellis v. Eason*, 50 Wis. 152, 36 Am. Rep. 830, 6 N. W. 523, the court said: "The contract set up in this case shows that the plaintiff did not receive the \$200 from Comstock in satisfaction or as full compensation for the injury he had sustained by the trespass, and that it was not the intention to release the other joint trespassers from liability for the trespass. The plaintiff's agreement not to sue Comstock for the trespass, under the circumstances disclosed by the evidence in this case, does not, therefore, discharge the other joint trespassers, except *pro tanto*. The court below properly rendered judgment in favor of the plaintiff for the damages he had sustained by reason of the trespass, less the sum of \$200 received of Comstock. This rule is, we think, supported by the great weight of authority, as will be seen by an examination of the large number of authorities cited. . . . *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *McCrillis v. Hawes*, 38 Me. 568; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *Chamberlin v. Murphy*, 41 Vt. 110; *Sloan v. Herrick*, 49 Vt. 328; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 712; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Shaw v. Pratt*, 22 Pick. 307; *Pond v. Williams*, 1 Gray, 630-636; *Bank of Catskill v. Messenger*, 9 Cow. 37; *Line v. Nelson*, 38 N. J. L. 358; *Irvine v. Milbank*, 15 Abb. Pr. N. S. 378; *Solly v. Forbes*, 2 Brod. & B. 38, 4 J. B. Moore, 448, 22 Revised Rep. 641; *Thompson v. Lack*, 3 C. B. 540, 16 L. J. C. P. N. S. 75; *Merchants' Bank v. Curtiss*, 37 Barb. 319; and *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504." Again, in the same case, the court said: "Certainly the receipt of a partial satisfaction from one of two joint tort feors is no injury to the other who is after-

wards sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint wrongdoer to proceed at all against his associate, and his refusal to proceed against him is no ground of defense. As it is wholly optional with the injured party to proceed against one or two joint wrongdoers for the whole of his damages, there is no equity in holding that, because he has received a part satisfaction for his injury from the one not proceeded against, upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defense to the action. He is benefited and not injured, by such proceeding."

The case of *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140, was one where Chandler and one George Holt committed an assault and battery upon Snow. Holt, being a minor, applied to one White to procure a settlement with Snow for the injury he had received. Snow accepted \$20 as part satisfaction of his cause of action and injury, and agreed to look to Chandler for the balance of his compensation. Snow sued Chandler, and this settlement with Holt was pleaded in bar of the prosecution of the action, claiming that the release of Holt released him. The court said: "The evidence is that at the time of receiving the money from Holt the plaintiff declared that he would not settle with Chandler for \$500. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this: That the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a part satisfaction of the damage, and the plaintiff may sue or omit to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage until satisfaction is made. If the individual receiving the injury sees fit to visit the penalty upon any one guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve 64 L. R. A.

to deter him from such wrongful acts. At the same time any partial payment by a cotrespasser avails so far for his benefit. Such was the ruling in this case. To this extent the defendant can avail himself of plaintiff's arrangement with his cotrespasser, but there was nothing in that contract which constitutes a bar to this suit."

The case of *Lovejoy v. Murray*, 3 Wall. 17, 18 L. ed. 134, was one in which Murray had recovered judgment on a claim for damages for several thousand dollars, and had received \$800 thereon. He then sued the other joint wrongdoers, Lovejoy, etc., and they pleaded the judgment and Murray's acceptance of \$800 thereon in bar of his right to prosecute the action against them. The case was appealed to the supreme court of the United States. In an opinion by Justice Miller the court said: "But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his cotrespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser, or a release to his cotrespasser, do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such. We are therefore of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment."

In the case of *Bloss v. Plymale*, 3 W. Va. 409, 100 Am. Dec. 752, the court said: "As the cause of action is against all the joint trespassers, the plaintiff may sue all or either of them, at his election; and he is entitled to full satisfaction, but he is entitled to but one satisfaction. So, where there are different findings in the same verdict when all the trespassers are sued, the successful party must choose *de melioribus damnis*. He cannot claim to collect all. It follows, then, if the damages are satisfied in part by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain in the record. And in such case it was but right and proper that the jury should deduct in their finding whatever sum the plaintiff had al-

ready received on account of the alleged trespasses from any of the joint parties who were afterwards dismissed. This would be the just application of the rule that there cannot be a double remuneration for the same wrong."

We have been unable to find where the precise question before us has been considered or passed upon by this court, but the trend of the cases seems to support the conclusion at which we have arrived. The two cases of *Bullock v. Beemiss*, 1 A. K. Marsh. 433, and *Oalmes v. Ament*, 1 A. K. Marsh. 459, in effect decide that in suits on tort, where several are liable, nothing short of a full satisfaction from one will be a bar to further proceedings against the other joint tortfeasors. In the case of the *United Society of Shakers v. Underwood*, 11 Bush, 272, 21 Am. Rep. 214, this court quoted with approval the quotation above from *Lovejoy v. Murray*, 3 Wall. 17, 18 L. ed. 134, and then said: "It thus appears that, while the plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendant, or, in case no one of

them is able or can be compelled to pay the whole of the judgment rendered against him, may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet ordinarily, when he has made his election, he will be concluded by it. The collection of one judgment extinguishes the entire claim for damages." In the case of *Sellards v. Zomes*, 5 Bush, 91, the court said: "The liability of joint trespassers is several, and any one or all of them may be sued for the entire wrong. Consequently, since our statute of 1836, authorizing several judgments, a dismissal or release of one or more who are sued cannot *per se* release the others."

In view of the fact that the \$1,000 received from the Marsden Company was received only as part satisfaction of appellee's cause of action, and not in full satisfaction thereof, the appellee was not barred from proceeding further against appellant.

Wherefore the judgment of the lower court is affirmed, with damages.

Petition for rehearing denied.

KANSAS SUPREME COURT.

D. W. STEWART, *Plff. in Err.*,
v.

C. E. PRICE.

(64 Kan. 191.)

*One holding by written assignment a verified, itemized account is not the real party in interest, and cannot maintain an action thereon in his own name, where it is shown that by a contemporaneous

*Headnote by GREENE, J.

oral agreement he had agreed to pay the full amount thereof, when collected, to his assignor; and this is true notwithstanding the assignor testifies that the defendant in the action does not owe her anything, and that the whole amount is due her from the plaintiff, and that he is to pay her provided he recovers in the action.

(*Greene, Johnston, and Cunningham, JJ., dissent.*)

(January 11, 1902.)

NOTE.—Who is the real party in interest within the meaning of statutes defining the parties by whom an action must be brought.

- I. Transfers to be paid for if collected, 582.
- II. Transfers for collection and suit, 585.
- III. Equitable owner, 592.
- IV. On contracts for benefit of third parties, 595.
- V. On claims and accounts for work and labor, and goods sold, 597.
- VI. On claims not arising on contracts for payment of money, 599.
- VII. Bills, notes, and bonds, 599.
- VIII. Joint obligees and partial assignments, 603.
- IX. Fictitious payees, 605.
- X. Bonds given in judicial and other proceedings.
 - a. On appeal, 605.

X.—continued.

- b. In attachment, 605.
- c. In replevin, 606.
- d. Other bonds, 606.
- XI. Judgments, 608.
- XII. Corporations, stockholders, and associations, 609.
- XIII. Receivers, 609.
- XIV. Assignments for creditors, 610.
- XV. Husband and wife, 610.
- XVI. Infants; parent and child, 610.
- XVII. Executors and administrators; wills, 611.
- XVIII. Landlord and tenant, 611.
- XIX. Partnership, 612.
- XX. Principal and agent, and parties claiming title therefrom, 612.
- XXI. Insurance, 615.
- XXII. Against carriers of goods, 617.
- XXIII. On collateral and pledge, 617.
- XXIV. Chattel mortgages, 618.
- XXV. Foreclosure, 618.

ERROR to the District Court for Allen County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on certain accounts. *Reversed.*

The facts are stated in the opinion.

Messrs. Oscar Foust & Son, for plaintiff in error:

Every action must be prosecuted in the name of the real party in interest.

2 Kan. Gen. Stat. 1897, p. 91, § 20, art. 4, Code Civ. Proc.; *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822; *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999.

A judgment without proof of possession or ownership cannot be sustained.

- XXVI. *Relating to counties*, 619.
- XXVII. *Taxes and taxpayers*, 619.
- XXVIII. *For possession of land; rents and profits*, 620.
- XXIX. *On covenants*, 621.
- XXX. *For conversion and trover*, 621.
- XXXI. *For seduction*, 622.
- XXXII. *Mandamus and ex rel. proceedings*, 622.
- XXXIII. *For use of another*, 623.
- XXXIV. *Summary*, 623.

The Code provision requiring actions to be brought by the "real party in interest" was intended to change the rule of common-law pleading requiring an action to be brought by the party holding the legal title. It was not intended to give a new cause of action where none existed, but to allow the beneficial owner of the claim sued upon to maintain the action. Its tendency was simplicity, uniformity, and clearness. This result has, in a large measure, been attained in most of the states adopting this provision. At common law the assignee of a chose in action could only sue in the name of his assignor. This is changed by the Code rule. In some of the states there is a separate provision authorizing the assignee to sue in his own name. When the new form of pleading in regard to the real party in interest came to be applied, it was found that there was already an exception ingrafted on the common-law rule, in that the holder and indorsee of commercial paper was recognized by the law merchant as the legal holder, although he was not the holder of the legal title. So before any Code provision it was already recognized in the courts that the indorsee of commercial paper could maintain an action thereon. Then, when actions were brought under the Code, the question arose whether or not this rule as to commercial paper was altered by the Code, and it was insisted that the holder of commercial paper could not sue if he was not entitled to the proceeds, and that the action must be brought by the beneficiary. Some cases held that either party could sue, and that the Code did not intend to change the rule at commercial law. On this there is quite a conflict. The early New York cases held that the equitable owner only could sue, but afterwards held that either could sue. This is now the weight of authority, and it has been applied in cases of assignments of choses in action without noting the distinction between that class of cases and negotiable instruments. But only 64 L. R. A.

Hutchison v. Myers, 52 Kan. 290, 34 Pac. 742.

There must be some beneficial interest in the subject of action to entitle the plaintiff to recover.

Williams v. Norton, 3 Kan. 295.

Mr. Chris Ritter for defendant in error.

Greene, J., delivered the opinion of the court:

The defendant in error, C. E. Price, commenced this action before a justice of the peace in Allen county against D. W. Stewart, doing business under the firm name of the People's Telephone Company, to recover on two causes of action. The first was on an

a small proportion of the cases relating to insurance, carriers, principal and agent, and actions by a person for whose benefit a promise is made, refer to the Code provision, as in the bulk of these cases the question as to who may maintain the action is confounded with the question as to whether plaintiff has a cause of action, although the fact that a cause of action exists necessarily implies that there is a particular person in whom the right to sue also rests. These cases generally apply the common-law rules with their many and varied exceptions, to which reference should be had by the pleader, as this note is not intended to include cases which do not discuss the Code provision. In some of the cases the reason for allowing the assignee, and also the equitable owner, to maintain the action is that the latter can maintain the action as the "real party in interest" and the former under a statutory exception providing for actions by a "trustee of an express trust;" but this distinction is not noticed in many cases. This note is not intended to include the cases arising under the statutory exceptions. The recent negotiable-instrument law allows an action on commercial paper by the holder thereof.

There is some conflict of authority as to whether the holders of negotiable instruments could sue thereon in their own name, in the absence of such provision as is found in the negotiable instrument law. In *Rock County Nat. Bank v. Hollister*, 21 Minn. 385, where the indorsement was to the "Rock County National Bank, Janesville, Wisconsin, for collection, Goodsell Bros.," it was held, under Minn. Gen. Stat. chap. 66, § 26, providing that every action shall be prosecuted in the name of the real party in interest, that such holder was not vested with such a title as to make him a proper party plaintiff in an action on this note.

I. *Transfers to be paid for if collected.*

In *STEWART v. PRICE* it was held that one holding by written assignment a verified, itemized account is not the real party in interest, and cannot maintain an action thereon in his own name, where it is shown that by a contemporaneous oral agreement he has agreed to pay the full amount thereof, when collected, to his assignor; and this was held notwithstanding the assignor testified that the defendant in the action did not owe her anything, and that the

account due from Stewart to himself. The second was on an account due from Stewart to Mrs. A. Thompson. The latter account was itemized, verified, and assigned in writing to Price. The assignment was regular and admitted. To this second cause of action the plaintiff in error answered that Price was not the owner of the account, and therefore not the real party in interest. There was no defense to the account; nor was there any claim that it had been assigned for the purpose of acquiring or giving the court jurisdiction over the defendant, when otherwise it could not have acquired such jurisdiction. The Thompson account was assigned to Price that he might join it with his own in an action he contemplated bringing against Stewart, and when collected he was to pay Mrs. Thompson the entire proceeds thereof. Mrs. Thompson testified that all money due on said account belonged to her; that Stewart did not owe her anything; that it was due from Price. The plaintiff in error demurred to the evidence as to the second cause of action on the ground that it showed the plaintiff was not the owner of the account, and therefore not the real party in interest. The demurrer was overruled, and judgment rendered in favor of Price on both causes of action.

The only question presented for our consideration is whether Price could maintain this action in his own name on the second

whole amount was due her from the plaintiff, and that he was to pay her provided he recovered in the action. In this case three of the judges dissented, and Greene, J., in his dissenting opinion has followed the rule of law laid down by the weight of authority. This case in effect overrules *Krapp v. Eldridge*, 33 Kan. 106, 5 Pac. 372, "in so far as it expresses a doctrine contrary hereto," which case held that where an account was transferred in writing it was immaterial to the debtor whether the assignor had given or sold it to his assignee, and after such transfer the assignee was the only person entitled to maintain an action thereon. This case also overruled *Linney v. Thompson*, 3 Kan. App. 718, 45 Pac. 456, which held that the indorsee and holder of a note was the real party in interest, and it was immaterial what were the equities between the indorsee and his indorser as to the proceeds. All that the case of *Millis v. Murry*, 1 Neb. 327, cited in the prevailing opinion, holds, is that the assignee of a chose in action is the party in interest. There are cases in Nebraska, *infra*, showing that the law is not settled on the question of assignments for creditors. In the case of *Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316, the answer set up that the assignment to the plaintiff was to secure \$250 which the assignor owed plaintiff; that the defendant paid the plaintiff that sum, and that the balance of that note belonged to the assignor. This was held to be a good answer. It is true that the weight of authority in Indiana now is as held in the *STEWART CASE*. But the case of *Eaton v. Alger*, 57 Barb. 179, relied upon in the prevailing opinion in the *STEWART CASE*, has been overruled in 47 N. Y. 345.

It appears that it is generally held to be no defense in an action on commercial paper to show that the plaintiff holds it without consideration, or subject to equities between him and his assignor, or colorable. It is sufficient to make the plaintiff the real party in interest if he has the legal title either by transfer or delivery; but to be entitled to sue he must have the right of possession, and be ordinarily the legal owner. Such ownership may be as equitable trustee. It may be acquired without adequate consideration, but must be sufficient to protect the defendant, upon a recovery against him, from a subsequent action by the assignor.

Indorsers of a corporation note paid the same after protest, and it was delivered to them, and they assigned the same to the plaintiff, who

was authorized to collect the same against the maker of the note "(but not against us, indorsers thereof) for his sole use and benefit." In an action by the assignee against other stockholders it was held that the plaintiff was the real party in interest. *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611. In this case a note of \$40,000 was assigned for the consideration of \$500. The assignors testified that they "had no legal or absolute right to get anything [of the collection], but would be disappointed if they did not; or that they hoped to get something out of it, but that there was no understanding that they were to get anything." The court said: "The writing imports a consideration sufficient to sustain the assignment, and, as the defendants do not show that they have some equity or defense against plaintiff's assignors which they do not have against the plaintiff, or show that a judgment against them in favor of the plaintiff would not protect them, they are not concerned with what the plaintiff may do with the fruits of such judgment."

And an assignee of an open account was held to be the real party in interest. *Gomer v. Stockdale*, 5 Colo. App. 489, 39 Pac. 355. In this case there was annexed to the transfer the condition that when the sum was collected the whole or some part of it was to be paid to the assignor.

So, where a note was delivered to plaintiff upon his agreement to collect the same at his own expense, and to pay the indorser a certain amount on collection, it was held that the plaintiff was the real party in interest. *Eaton v. Alger*, 47 N. Y. 345, Overruling 57 Barb. 179. In this case the court said: "The note is transferred and delivered to the plaintiff under that contract; and in fulfillment of that contract he proceeds to its collection. The plaintiff is thus made the party in interest within the meaning of the Code, so as to enable him to maintain this action." The case, as reported in *Barbour*, is relied upon in the case of *STEWART V. PRICE*. In *Eaton v. Alger*, 57 Barb. 179, the court reversed the trial court, and granted a new trial because of the refusal to allow proof that the payee of the note delivered it to the plaintiff upon his undertaking to collect it at his own expense, and to pay the payee upon its collection the original amount of the note prior to its renewal. There was no appeal from this case to the court of appeals, as is erroneously stated in the citation tables, and in the footnote in

cause of action. Can the assignee of a verified itemized account, assigned in writing, where the assignment is regular and admitted, maintain an action thereon in his own name, when by a previous arrangement he had agreed to pay the proceeds collected to his assignor? Section 26 of the Civil Code (Gen. Stat. 901, § 4454) provides: "Every action must be prosecuted in the name of the real party in interest except as otherwise provided in § 28." It is not contended by either party that the case falls within any of the exceptions. It must therefore be considered solely with reference to the meaning of § 26. In examining this provision it will be observed that it does not say that it is the person in whose name the right of action stands, or the person who holds the

legal title thereof, that may prosecute the action, but that "every action must be prosecuted in the name of the real party in interest." If Price failed to recover from Stewart, he would not be liable to Mrs. Thompson. The loss would be wholly that of Mrs. Thompson. Is the real party in interest the person who is to be benefited or injured, or the person who holds the legal title to the thing in action? This section is plain and unambiguous, and seems incapable of misunderstanding. By its terms it excludes the idea that any person other than the one benefited or injured by the result of the litigation can be intended. To hold otherwise would appear to be doing violence to language. This question was before the supreme court of Indiana, as early

Eaton v. Alger, 2 Abb. App. Dec. 5. But after the third trial the case went up to the court of appeals (47 N. Y. 345), which held that this evidence established the fact that the plaintiff was the real party in interest.

An assignment of a claim for tort provided that the assignee was to retain \$50 for his advances, and all moneys used in the prosecution of the claim, and next to pay the attorneys' fees, and the balance to be paid to the assignor. It was held that the assignee was the real party in interest. *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9. In this case, on a motion to require the assignor to be made a party, he filed a paper disclaiming any interest in the prosecution, and stating that he had assigned the claim to the plaintiff.

This case followed and approved *Knadler v. Sharp*, 38 Iowa, 232, where an amount due on a breach of covenant of warranty was assigned, and the assignee paid nothing for the assignment, but agreed to pay the assignor the amount collected, less costs and expenses. It was held that the assignee was the real party in interest. The court said: "It is also provided by Revision, § 2757: 'Every action must be prosecuted in the name of the real party in interest, except as provided in the next section.' This language was first construed as found in the Code of 1851, § 1676, to mean the party having the legal title or interest. *Farwell v. Tyler*, 5 Iowa, 535. But, afterward, it was held to mean the party having the beneficial interest, as contradistinguished from the mere holder of the legal title. *Conyngham v. Smith*, 18 Iowa, 471. And subsequently it was held that the party holding the legal title of a note or instrument may sue on it though he be an agent or trustee, and liable to account to another for the proceeds of the recovery; but he is open in such cases to any defense which exists against the party beneficially interested; or the party beneficially interested, though he may not have the legal title, may sue in his own name. *Cottle v. Cole*, 20 Iowa, 481. The same doctrine was again affirmed in *Rice v. Savery*, 22 Iowa, 470. It follows, therefore, that the court did not err in holding that the plaintiff might recover upon all the claims as the proper party to the action."

So the plaintiff, as assignee of a note and account sued upon, was held to be the real party in interest, even though the consideration

of the assignment was to be a payment to be made after recovery in a suit by the assignee. *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383.

So, where a note was indorsed, and the consideration was not to be paid until the note should be collected, it was held that the indorsee was the real party in interest. *Cummings v. Morris*, 25 N. Y. 625. In this case the court said: "The consideration was ample, and it does not affect the transaction that it was not to be paid until the notes should be collected; and it may be its payment was conditional, depending upon that contingency."

But where the holder of a note payable to the payee or bearer, not wishing to sue the maker, delivered the same to another party, taking from the latter his note for the amount, on the understanding that, if he should not succeed in collecting the note transferred, he was not to pay the consideration, it was held that the holder of the note so transferred could not maintain an action against the maker, and that he was not the real party in interest. *Killmore v. Culver*, 24 Barb. 656. In this case the court said: "Is, then, this plaintiff the real party in interest? It seems to me from the evidence given by himself and Tanner, from which I have made the preceding statement, that he is not. He is not at all interested in the event of the suit, for, should he recover, the money must go to Tanner, and should he fail the loss would not be his, but would fall upon Tanner. The engagement of Tanner is not by way of guaranty that the plaintiff should recover the amount of the note; because then the recovery, if had, would be for the plaintiff's benefit, but the money was to be recovered or lost simply for, or by, Tanner. The evidence shows that the note was delivered to the plaintiff, and the suit was instituted by him, because, as Tanner declared to his counsel, he did not want to sue the note in his own name."

And where a set-off was pleaded by an assignee it was held that he was not the real party in interest where the assignment was colorable only, and the assignor was to refund the consideration in case the claim could not be collected by set-off. *Claflin v. Dawson*, 58 Ind. 408. The court said: "Under the evidence of Perry, the appellant could not have maintained an independent action on the account assigned to him. Perry was, and the appellant was not, 'the real party in interest' in said account. It would be a strange perversion, as

as 1858, in the case of *Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316, where it was ruled that the assignee of a promissory note, who was not entitled to the proceeds when collected, was not the real party in interest, and could not maintain an action thereon. Again, the same court, in *Bostwick v. Bryant*, 113 Ind. 448, 459, 16 N. E. 378, 383, where the answer pleaded that the note sued on was transferred and assigned to plaintiff by Anna S. Bloomer, the owner, without consideration, and solely for the purpose of suing on and collecting the same for the use and benefit of the real owner, said: "The answer shows clearly that Anna S. Bloomer is the owner of the note, and the real party in interest. The plain provisions of the statute cannot be avoided. The plea

must be held good." Without exception, this is the settled rule of interpretation of this provision of our Code in Indiana. The same rule has been followed in Nebraska in the case of *Mills v. Murry*, 1 Neb. 327, and reaffirmed in the case of *Hoagland v. Van Eiten*, 22 Neb. 681, 684, 35 N. W. 869, 870, in which case the chief justice said: "If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then § 29 has no meaning whatever. We do not care to enter into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The statute contains a plain pro-

it seems to us, of the equitable grounds in which the law of set-off had its origin, to give judicial sanction to the appellant's claim in this case to set off the Perry account against the appellee's cause of action. The appellant never 'held' the account assigned to him by Perry as the actual and unqualified owner thereof."

Where two cotenants had conveyed their interest in land by separate deeds, and subsequently one of them conveyed the same land to his cotenant for the purpose of bringing an action to set aside the first two deeds, it was held that the latter was not the proper party in interest, as the contract was against public policy, where the last deed provided for a reconveyance in case of recovery, and payment of damages recovered. *Gruber v. Baker*, 20 Nev. 453, 9 L. R. A. 802, 23 Pac. 858.

In Nebraska it seems there is a conflict of authority. In the early case of *McWilliams v. Bridges*, 7 Neb. 419, where a note was made payable to bearer, and the defense was that it was transferred to plaintiff merely to bring suit thereon for the benefit of another party, and it was claimed that the plaintiff was not the real party in interest, it was held that this was no defense to the note. The court said: "Holding, as we do, that these improvements, either alone, or together with the abandonment of the land to McWilliams, were a good and valid consideration for the promissory note, there only remains for consideration the single question of the right of the defendant in error to bring action upon it, on which some reliance seems to be placed by counsel as ground for reversal. But on this point we see no difficulty. That Bridges was the lawful bearer of the note from the payee named therein was not denied by the answer; it was merely alleged 'that he gave to said Bishop no value or consideration whatever for the assigning and delivery of said note to him, . . . and that he took the assignment and delivery for the express purpose of bringing suit upon the same in his own name, with the understanding and agreement . . . that, if he recovers upon said note, and collects the same, then in that case he is to pay something to said Bishop for said note; but if he does not recover, then he is to pay nothing to said Bishop for the same.' Had the principal defense, the want of a valid consideration for the note, been sustained, these facts would have become impor-

tant as showing that Bridges was not entitled to the protection which the law affords to an innocent holder for value of negotiable paper. But, that defense failing, they become wholly immaterial, for the reason that, under the facts of this case, the consideration for which Bishop saw fit to dispose of his interest in the note was a matter in which the makers could have no possible interest, and entirely within his own discretion." This case does not appear ever to have been cited, except in *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 Am. St. Rep. 747, 55 N. W. 218, to the effect that, there being no defense against the alleged real party in interest, it followed that the question of the good faith of the assignment to the plaintiff was not material.

II. Transfers for collection and suit.

In Colorado, North Dakota, Iowa, Missouri, Nevada, Ohio, Utah, and Washington, it seems that an agent or assignee for collection, holding the legal title to the claim sued upon, will be regarded as the real party in interest. This also seems to be the weight of authority in New York. In Indiana and Nebraska there seems to be some conflict with the weight of authority against the right of a collecting agent to sue. In Minnesota if the collecting agent holds the legal title it seems that he may maintain an action thereon. The effect of some of the decisions is that the legal-title holder may sue, and so may the beneficial holder,—the latter suing as the real party in interest, and the party holding the legal title suing as the trustee of an express trust, where the exception in the statute so provides. This appears to be the correct solution.

Where the payee of a draft sent it to the drawee, who had agreed that when he should receive the money he would remit the amount as directed, and the money was paid to him, and he was directed by the payee to transmit it to another bank, but he died before remitting the same, it was held that the payee was the party in interest to maintain an action for the amount collected, against the party who had taken charge of the assets of the drawee. *Firat Nat. Bank v. Hummel*, 14 Colo. 259, 8 L. R. A. 788, 20 Am. St. Rep. 257, 23 Pac. 986. In this case the drawer refused to sue.

And, where a business firm indorsed and deposited notes in a bank of another state for collection, which bank transferred the same to

vision, which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled, under § 29, to maintain an action as the real party in interest." This same case was again before the court on a motion for a rehearing, and upon reargument the court adhered to its former decision. 23 Neb. 462, 36 N. W. 755. Perhaps the fullest and most able presentation of this question, while not the law of that state, is found in *Eaton v. Alger*, 57 Barb. 179, 189. Defendant pleaded that the plaintiff was not the owner of the note, and not the real party in interest. The court said: "It would therefore seem very clear that a defend-

ant, on such an issue made by the pleadings, would have the right to show that the plaintiff was not the real party in interest, particularly if he had pleaded a defense in the action good as against such pretended real party. The plaintiffs, however, insist that, notwithstanding this provision of the Code [§ 111], the indorsee of a note, or the holder of a note payable to bearer or indorsed in blank, may maintain an action upon it, although not in fact the owner, nor, as between himself and the owner, entitled to the proceeds when collected. That such was the rule before the Code is conceded, and the argument is that it was abolished by the Code; that the codifiers and legislature so intended. In their report to the legislature the codifiers said: 'The rules respecting

a bank in Dakota, and the latter was so negligent in the collection as to cause a loss of the same, and the liability was fixed on the agent, by the North Dakota statutes, for negligence,—it was held that the indorsee for collection could maintain an action against its subagent in its own name. *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382, 79 N. W. 859.

The right to maintain the action was also controlled by N. D. Rev. Code, § 4133, providing that a mere agent of an agent has no responsibility, as such, to the principal of the latter. The case shows that the payee and owner "indorsed the notes in blank, and delivered them to the plaintiff for collection only," and the chief question was whether such a holder could maintain this action.

And an assignment of a judgment merely for the purpose of enabling the assignee to enforce its collection was held to constitute him the real party in interest. *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708.

So, a party holding a note indorsed to him for collection was held to be the proper party, and might maintain an action thereon. *Abell Note Brokerage & Bond Co. v. Hurd*, 85 Iowa, 559, 52 N. W. 488.

The court cited *Cottle v. Cole*, 20 Iowa, 485, holding that a party, having the legal title to a judgment, may sue on it, though another may be the beneficial owner.

And an assignee of a note for collection was held to be the party in interest, under Mo. act regulating "Practice in Courts of Justice," art. 3, § 1, providing that every civil action must be prosecuted in the name of the real party in interest, and § 2, providing that a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name, and § 3, providing that, in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to an off-set, and the bonds and notes act (Rev. Code 1845, p. 190), providing that all bonds and notes for money or property shall be assignable by indorsement on such bonds or notes, and the assignee may maintain an action thereon in his own name. *Webb v. Morgan*, 14 Mo. 428. In this case the court said: "Whenever the evidence shows the indorsement in assignment of the note or bill of exchange or bond to the plaintiff, that assignment makes such plaintiff the

party in legal interest, and authorizes the action in his name."

And where demands against a railroad company were assigned in order that suit might be brought thereon, and the assignee was to receive 25 per cent of the amount collected for his services, it was held that the assignee could sue in his own name on these accounts. *Peters v. St. Louis & I. M. R. Co.* 24 Mo. 586.

In *Young v. Hudson*, 99 Mo. 102, 12 S. W. 632, it was contended that the assignee of notes and an account, holding the same for the purpose of collection, was not the real party in interest; but it was held that an indorsement by the plaintiff as cashier of the bank (payee), and, in its name, to himself, individually, authorized him to maintain an action in his own name. The court said: "He certainly has ample power to indorse such paper for collection, and a holder for collection has sufficient title to maintain an action."

In *Buddington v. Mastbrook*, 17 Mo. App. 577, the court said: "Now, a person who holds a chattel belonging to another, upon an agreement made with that other to keep it, or to do something with it or to it for that other, is undoubtedly the trustee of an express trust within the meaning of this section. It is upon this ground that our supreme court has placed the right of one who holds a promissory note belonging to another for collection merely, to maintain an action thereon in his own name (*Beattie v. Lett*, 28 Mo. 596), though an earlier decision of the same court placed it upon the ground that he was 'the real party in interest' within the meaning of the preceding section;" citing *Webb v. Morgan*, 14 Mo. 428.

And where certain lands were granted to a party for the purpose of instituting an action to determine water rights, and the grantee made an oral agreement that, after the termination of the suit, he would reconvey, it was held that he was a proper party to maintain the action, under Nev. Comp. Laws, § 1067, requiring every action to be prosecuted in the name of the real party in interest. *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678. In this case it was held, under Nev. Comp. Laws, § 283, concerning conveyances, requiring a trust to be established by writing, that the plaintiff had the legal title.

A bank held a note, and assigned in writing, without consideration, to the cashier, all its right, title, and interest in the same. It

parties in the courts of law differ from those in the courts of equity. The blending of the jurisdiction makes it necessary to revise those rules to some extent. In doing so, we have had a threefold purpose in view: (1) To do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; (2) to require the presence of such parties as are necessary to make an end to the controversy; and (3) to allow otherwise great latitude in respect to the number of parties who may be brought in. . . . The true rule undoubtedly is that which prevails in the courts of equity,—that he who has the right is the person to pursue the remedy. We have adopted that rule.' This section (now 111) was adopted by the leg-

islature precisely as submitted by the codifiers, showing that they approved the reasons given by the codifiers for its adoption. It is therefore quite immaterial what was the rule previous to the Code, if thereby the legislature intended to and did change the rule by express enactment. That they did so we think clear, from the language of the statute and the reasons for its adoption. In their reasoning the codifiers alluded to the existing rules and the necessity for a revision; one purpose of the proposed change being to require the real person in interest to appear in court as such, followed by an act providing that 'every action must be prosecuted in the name of the real party in interest.' This reasoning and this enactment seem too plain for misconception. The

was held that he was the real party in interest. *White v. Stanley*, 29 Ohio St. 423. In this case the court said: "Here the payees, who were the absolute owners of the note, transferred to the plaintiff, by the indorsement and delivery, all their title and interest, legal and equitable. So that the property in the note was absolute in the indorsee, notwithstanding he might, in equity, be accountable to the bank for its proceeds when collected."

And where an assignment was made solely for the purpose of bringing an action for negligently killing stock, and by such assignment it was agreed that the assignee would turn over to the assignor all that was recovered in the action, after deducting his proportion of the expenses of the suit, it was held that the assignee was the real party in interest. *Wines v. Rio Grande Western R. Co.* 9 Utah, 228, 33 Pac. 1042.

It was also held to be immaterial whether or not any consideration was actually paid for the assignment, or whether or not the assignment was merely for the purpose of the suit, if it was in fact so made. *Ibid.*

The assignee of notes transferred to him for the purpose of suit was held to be the real party in interest, and could maintain an action thereon. In *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209. In this case the court said that "an assignment for the purpose of collection is an assignment for a valuable consideration."

In *Crouch v. Wagner*, 63 App. Div. 526, 71 N. Y. Supp. 607, a collecting agent induced his client to satisfy a judgment by taking notes for a less amount, and induced the creditor to give new notes to him for the face of the debt, which notes he indorsed, and the indorsee brought suit. The court held that there was no fraud on the debtor, and that the plaintiff could recover in his own right; and further held that, if the notes belonged to the creditor, the plaintiff could recover as trustee of an express trust. It was further held that the agent had a personal interest in the notes as they included his costs and commissions; and that he had transferred his interest to the plaintiff.

Where several parties had claims against an agent for conversion of claims intrusted to him, and they made an assignment of their claims to the plaintiff, of which assignment nothing was paid, and one of the assignors agreed with the plaintiff to take care of the case, and, if

plaintiff got beat, it would not trouble or cost him anything, it was held that the plaintiff was the real party in interest. *Allen v. Brown*, 44 N. Y. 228. In this case the court said: "In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim, and all of it, belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his."

An action was brought by an assignee of a claim. It was held that the plaintiff, under an absolute assignment in writing to him, was the legal holder of the claim and the real party in interest, although two of the assignors testified that they expected to receive the amount recovered in the action. *Meeker v. Claghorn*, 44 N. Y. 349.

And where an action was brought for work and labor, and, pending the action, the claim was assigned in writing, and the assignee was substituted as plaintiff, it was held that the assignee was the real party in interest whether the transfer was bona fide or not. *Sheridan v. New York*, 68 N. Y. 30. In this case the court said: "A plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor. In this case, from the undisputed facts, the defendant would be protected if it paid to the assignee, or if a recovery was had against it by him. No question was made, and none submitted to the jury, as to the execution or delivery of the assignment; and, conceding that the circumstances were such as to justify the jury in finding that it was colorable as between the parties, yet that would constitute no defense on the ground that the plaintiff was not the real party in interest."

A bank was the owner of a judgment, and assigned it to the cashier of the bank as a more convenient way to get the relief desired, and the cashier brought a suit on the judgment. It was held that he was the party in interest. *Brown v. Powers*, 53 App. Div. 251, 65 N. Y. Supp. 783. In this case the court said: "The

act is emphatic. It uses the Saxon word 'must' (a verb which has not yet been twisted by judicial construction, like the words 'may' and 'shall,' into meaning something else) to place beyond doubt or cavil what it intended."

We heartily coincide with the reasoning and in the conclusion reached in the foregoing cases. We believe this is the true meaning of this section, as applied to actions on assigned accounts, and that the language is so obviously plain as to admit of no other interpretation or construction. Therefore the decision of *Krapp v. Eldridge*, 33 Kan. 106, 5 Pac. 372, in so far as it expresses a doctrine contrary hereto, is overruled.

This cause is reversed and remanded, with

judgment which the bank held had, by an assignment in writing, been duly assigned to the plaintiff, and at the commencement of the action and at the time of the trial he had a valid transfer of it, and as such had the legal right to maintain the action upon it. He was the legal owner of it, and, therefore, was the real party in interest within the meaning of § 449 of the Code of Civil Procedure. A payment to, or recovery by, him of the judgment would protect the defendant against any claim which might be made against him by the bank or any other person by reason of the judgment. What the consideration may have been as between the plaintiff and the bank, as the cause or basis of the assignment, did not concern the defendant. The bank had the right, so far as the defendant was concerned, to give the judgment to the plaintiff,—to sell it to him for any consideration that it saw fit,—or to place him in a position where he could collect it for the bank. All that affected the defendant—and this was the extent of his right of inquiry—was that the legal title to the judgment was in the plaintiff, so that a payment to, or satisfaction by, him would be a full and complete satisfaction as to all others who theretofore had, or might thereafter claim, an interest in it."

In an action brought by an assignee on an account for work and labor, it was held that evidence showing there was no consideration for the assignment, offered for the purpose of proving that the plaintiff was not the real party in interest, was properly excluded. *Burnett v. Gwynne*, 2 Abb. Pr. 79. The court said: "We think that where the object is to prove that the alleged assignment to the plaintiff is a mere sham, and that, although an assignment in form has been executed, it was executed under an arrangement that recovery should be for the benefit of the alleged assignor, and that the form of an assignment was gone through with for the mere purpose of securing a recovery by means of the assignor's own testimony, while he was to receive and enjoy the fruits of the recovery, then proof that there was no consideration for the assignment may, in connection with other evidence tending to those conclusions, be competent; but the mere fact that there was no consideration does not, alone, amount to anything."

And where a note was indorsed specially and for the purpose of collecting and remitting the proceeds to the payee, it was held that the in-
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instructions to sustain the demurrer to the evidence of the plaintiff in proof of the second cause of action.

Smith and Ellis, JJ., concur.

Pollock, J., concurring:

In concurring with the majority in this case, I do so, not because of the belief that the decision is supported by the larger number of adjudicated cases, but for the reason that I believe it to be so commanded by the lawmaking power of the state, and in such clear and unmistakable language as to leave no escape therefrom, and to render the result reached inevitable. Other courts of high standing and authority, by the same process of reasoning employed by my dis-

dorse was the real party in interest, and could maintain an action on the same. *Freeman v. Falconer*, 12 Jones & S. 182. The court said: "He is, in such case, the real party in interest, under the Code, and can maintain the action, even though, as between the parties thereto, it appears that the transfer is merely colorable."

In *Hays v. Hathorn*, 74 N. Y. 486, where the answer denied that the note in suit was ever transferred to plaintiff, or that he was the legal owner or holder, and denied that he was the real party in interest, and alleged that the Saratoga County Bank was the real party in interest and the owner and holder of the note, and that the note was duly transferred to it instead of to the plaintiff, the court of appeals held that evidence to sustain the answer should have been allowed, and further said: "It is ordinarily no defense to the party sued upon commercial paper to show that the transfer under which the plaintiff holds it is without consideration, or subject to equities between him and his assignor, or colorable, and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority."

Some of the early New York cases went much further, and held that the holder for collection could not sue, although he held the legal title; but this does not seem to be the rule now in this state. In *Lewando v. Dunham*, 1 Hill 114, it was held that where an assignment was made of a claim for lost baggage, and the assignee was to have one half of the judgment, the assignee was not the real party in interest, and could not prosecute an action in his name.

And where an agent held commercial paper for collection only, it was held that he was not the real party in interest, and could not maintain an action thereon in his own name. *Iselin v. Rowlands*, 30 Hun, 488.

A foreign corporation sent a bill of exchange to its agents to institute a suit, and the agents brought an action in their own name thereon. It was held that they were not the real parties in interest. *Bell v. Tilden*, 16 Hun, 346. In this case the court said: "To enable an agent to maintain an action in his own name there must be something more than the mere powers of a naked agent. It was clearly shown in this case that the plaintiffs had nothing but such powers. To sustain the ruling in this case would be to hold that all foreign corporations

senting associates, have announced a different conclusion. The question, however, remains, Are such decisions correct in principle and sound in reason? For thousands of years had the courts of last resort been called upon to determine the form of the earth, it would have been solemnly decreed to be flat. The earth would have continued to be physically round, judicially flat. To my mind, the error arises in such decisions by reason of an attempt to construe a plain, positive provision of the Code, in its very nature, and by its express terms incapable of other construction than what it clearly says and plainly means, into the opposite of what it says and means. If I am correct in this view, one decision or a dozen decisions only result in what Jeremy Bentham

was pleased to call "judge-made law." I agree perfectly with my dissenting associates that before the adoption of the Code an action at law could not be maintained upon an assigned account in the name of the assignee; that an indorsed promissory note could be declared upon in the name of the indorsee; that a suit in equity looking to substance, and not to form, was brought and prosecuted in the name of the assignee of a chose in action; and that while the rules of equity practice required all persons in interest to be made parties to the suit, that the decree rendered might be a final and complete determination of the interest of all parties in the subject-matter, the assignor of a chose in action, having parted with his title and interest, was not a neces-

may maintain actions in this state in the name of mere naked agents, and thus evade the provisions of our statute requiring bonds for costs to be given by such foreign corporations; and, indeed, it would allow all actions upon negotiable contracts to be brought in the name of simple collecting agents."

And where a note was indorsed in blank for the accommodation of the maker, and was not to be used except in a contingency which never happened, it was held that the indorsees, having knowledge of this, could not maintain an action thereon. *Prall v. Hinchman*, 6 Duer, 351. In this case the court said: "The act of Young, Bonnell, and Sutphen, in placing the note in the hands of an attorney, to be sued in his name, when he had no title to the note, and had parted with no value therefor, and when they had no right of action thereon, did not prima facie, at least, make him the real party in interest."

In Alabama there seems to be some conflict of authority, the Federal court holding that the holder of a coupon of a bond transferable by delivery may maintain an action thereon, although the transfer was solely for the purpose of suit, while the state court holds that the payee of a note, who is only an agent for collection, cannot maintain an action thereon.

The holder of coupons, delivered to him for the purpose of enabling him to bring suit upon them, may maintain an action thereon. *Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56. The court said: "Doubtless it was competent for the defendant to show that the savings bank had the beneficial interest in the subject of the suit in order to let in any defense which it might have as against the bank; but it had no further interest in the matter."

But in *Moses v. Ingram*, 99 Ala. 483, 12 So. 374, it was held that the payee of non-negotiable rent notes, who was to collect and hold the same for the purchaser of the premises, and who brought suit on them as owner, had no such interest in the same as would entitle him to maintain an action thereon. The court said: "Not being the real owner, and the notes being, as the record shows, non-commercial, in their character, Ingram cannot maintain the action. It should have been brought in the name of Mrs. Cooper, the real owner."

In Indiana it is held to be a good defense to allege and show that the plaintiff is not the owner, and that he is attempting to collect the same for the use and benefit of his assignor. 64 L. R. A.

In an action on a note the answer was held to present a good defense where it avers that the note was transferred and assigned to the plaintiff herein, without consideration, and solely for the purpose of suing and collecting the same "for the benefit and use of said Anna S. Blommer, who is the real owner thereof." *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378.

In *Gillisle v. Ft. Wayne & S. R. Co.* 12 Ind. 398, the answer in an action on a note given for subscription of stock in a company alleged that the note had been delivered to one Jones, who was authorized to collect it and apply the proceeds upon a debt due from the company to him. This was held to be a good answer.

But in *Hardin v. Helton*, 50 Ind. 319, it was held, in an action to foreclose a mortgage, brought by the indorsee of a note, that an answer showing that the assignment was for the purpose, only, of enabling the plaintiff to collect the note, did not show that the plaintiff was not the real party in interest. In this case the court said: "It may be observed that the indorsement of the notes to the plaintiff transferred the title, though there was no consideration. An executed gift is valid. The title having vested in the indorsee, it is not material that the purpose was to enable her to collect the notes. No right remained in the indorser, either to the notes, or to the proceeds when collected. All that is alleged may be true and yet the plaintiff may be the real party in interest."

In *Bostwick v. Bryant*, 113 Ind. 448, 16 N. E. 378, it was said: "The answer here is different from that in the case of *Hardin v. Helton*, 50 Ind. 319. In that case it was not averred in the answer, as here, that the action was being prosecuted for the use and benefit of the payee, and that the payee was the owner of the note."

Under Neb. Code Civ. Proc. § 29, providing that every action must be prosecuted in the name of the real party in interest, it was held that an assignee of a lot of claims could not foreclose a mechanic's lien where he had no interest, and was to deliver to his assignor the proceeds of the action. *Hoagland v. Van Etten*, 22 Neb. 681, 35 N. W. 869, on Rehearing, 23 Neb. 462, 36 N. W. 755. On the first hearing the court said: "If a party having no interest in the subject-matter of the suit, who holds simply as assignee, and is to deliver to his assignor the proceeds of the action, may maintain an action on such an assignment, then § 29 has no meaning whatever. We do not care to enter

sary party. This, however, only serves to show the distinction between the rules governing matters of practice in actions at law and suits in equity before the adoption of the Code. The purpose of the adoption of the Code was to simplify, not to mistify, the practice. By the adoption of the Code the nice distinctions and subtle refinements in the matters of practice existing between common-law and equity practice were expressly abolished. With this end in view, § 26 of the Code (Gen. Stat. 1901, § 4454) was also adopted. This section reads as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in § 28." It is worthy of note, as mentioned in *Eaton v. Alger*, 57 Barb. 179, 189, that this section

contains the strong, well-defined, mandatory, Anglo-Saxon word "must," to characterize its imperative character. Evidently this was done with full knowledge of the tendency of the bench and the bar of the times, schooled in and imbued with the prior practice, to distort the meaning of this provision into harmony and compliance with their preconceived ideas of the proper practice, and with apprehension that a weaker word might not accomplish the purpose for which the Code was designed. The power to enact is not questioned. That the provision is emphatically mandatory in terms is acknowledged. That the purpose of the Code was to simplify the practice is admitted. Is not, then, the only possible remaining subject of inquiry in any given case not

into a discussion of the propriety or impropriety of requiring actions to be brought in the name of the real party in interest. The statute contains a plain provision which this court has no authority to disregard. We hold, therefore, that an assignee having no interest in the result of the suit, and not entitled to any portion of the proceeds thereof, is not entitled, under § 29, to maintain an action as the real party in interest."

In *Grimes v. Cannell*, 23 Neb. 187, 36 N. W. 479, the court said: "In *Hoagland v. Van Etten*, 22 Neb. 681, 35 N. W. 869, it was held that under § 29 of the Code an action must be brought in the name of the real party in interest, and that the naked assignment of a claim to a plaintiff upon an agreement that he was to pay to the assignor the proceeds of such claim would not authorize such plaintiff to maintain the action; and we adhere to that decision." It was held in the *Grimes* Case that evidence showing that the consideration of the assignment to plaintiff was to be paid only in case of succeeding in the suit should have been allowed.

In *Minnesota* it seems that an assignee for collection may maintain an action on a note if he owns the legal title. But if the assignment is special "for collection," he cannot maintain an action thereon in his own name, as he would hold neither the legal, nor the equitable, title.

So, where an indorsement on a note was: "Pay to A. B. or order for collection," signed by the payee,—it was held that the indorsee was merely an agent to collect the note, and was not vested with such title as to make him a proper party plaintiff. *Rock County Nat. Bank v. Hollister*, 21 Minn. 385. In this case the court said: "It was held, in some cases, that the beneficial owner of a negotiable bill or note, payable to bearer or indorsed in blank, might institute suit on it in the name of anyone who would allow his name to be used for that purpose; and that, unless the maker had a defense to the note, good against the real owner, he could not be permitted to show that the plaintiff was not the real party in interest. *Morton v. Rogers*, 14 Wend. 575; *Lovell v. Evertson*, 11 Johns. 52; *Conroy v. Warren*, 3 Johns. Cas. 259, 264, 2 Am. Dec. 156. Although this rule might be correct at common law, it certainly is not good under the statute of this state, which provides that 'every action shall be prosecuted in the name of the real party in interest.' Gen. Stat. chap. 66, § 26. To this 64 L. R. A.

there are exceptions made by § 28; but the case of this indorsement would not come within them. Although this form of indorsement is, and probably has long been, in very common use, we find no case which decides its effect upon the title to the note. There are several cases, in England, of indorsements such as, 'Pay to A. for the account of the indorser, or, 'Pay to A, or order, for my use,'—in which cases it seems to be held that the note, and the money when paid on it, are the property of the indorser (*Treuttel v. Barandon*, 8 Taunt. 99; *Sigourney v. Lloyd*, 5 Barn. & C. 622, 3 Moody & R. 58, 7 L. J. K. B. 73, 32 Revised Rep. 504, Affirmed in 5 Bing. 525, 3 Moore & P. 229, 3 Younge & J. 220, 30 Revised Rep. 728); and this, we think, is the case with the indorsement under consideration. It is apparent from the language used that it was not the intention of the indorser to make the indorsee the owner of the note, or of the money after collection, but simply to give him authority on the note to collect it. The relation of the indorser and indorsee is that of principal and agent; the agent cannot be the 'real party in interest' in a suit brought on the note."

In a similar case, *Third Nat. Bank v. Clark*, 23 Minn. 263, the court held that the indorsement for collection did not prevent a good defence against the payee, and said: "The plaintiff being thus compelled to stand upon the terms of the indorsement under which it claims, the case falls within the doctrine of *Rock County Nat. Bank v. Hollister*, 21 Minn. 385, in which it was held that an indorsee claiming under an indorsement like that in this instance was not the owner of the note indorsed, and, therefore, not the real party in interest; for which reason he could not maintain an action upon the note."

And where the assignor intended to give the assignee the right to collect notes, and there was some question whether the assignor retained a contingent interest, it was held that suit was properly brought in the name of the assignee. *Castner v. Austin*, 2 Minn. 44, Gil. 32.

In an action by the payee against the acceptor or of bills of exchange an answer that there was no consideration between the drawers and the payee, that the bills were given to the payee for collection only, and that the plaintiff was not the real party in interest, was held to con-

falling within the excepted class, whether such case is in its nature such as before the adoption of the Code would have been denominated "an action at law" or "a suit in equity," manifestly this: Who is the real party in interest in the subject-matter of the action? Or, in other words of exact meaning, who is the party to be benefited or injured by the judgment in the case? Mr. Black, in his *Law Dictionary*, p. 997, defines the real party in interest, within the meaning of this statute, as follows: "In statutes requiring suits to be brought in the name of the 'real party in interest,' this term means the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in it

or connection with it." The author of 15 *Enc. Pl. & Pr.* p. 710, says: "The real party in interest, within the meaning of this provision of the Code, is the person who will be entitled to the benefits of the action if successful,—one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in or connection with it." Mr. Bliss, in his work on *Code Pleading*, 3d ed., note to § 45, says: "This raises the question, Who is the 'real party in interest?' The 'real party in interest' is the party who is to be benefited or injured by the judgment in the case. It will be observed that the rule provides the action must be prosecuted in the name of the real party in interest, and, of course,

stitute no defense. *Vanstrum v. Liljengren*, 37 Minn. 191, 33 N. W. 555. In this case the court said: "By the drawing of the bills in favor of the plaintiff, and delivering the same to him, and by the acceptance of the drawee, the plaintiff acquired the legal title to the bills and acceptance. More than this, by his acceptances the defendant obligated himself directly to the plaintiff to make payment to him, and upon that obligation this action is brought. Therefore, the action is maintainable by the plaintiff notwithstanding the fact sought to be shown."

But where an agreement was made between the payee and the drawer of a draft, that it was to be taken for collection and the proceeds to be applied in payment of a debt of the drawer to the payee, it was held that the payee was the real party in interest in an action thereon against the acceptor. *Minnesota Thresher Mfg. Co. v. Helper*, 49 Minn. 395, 52 N. W. 33.

It seems that officials to whom paper is payable or assigned, naming them "president" or "cashier," may maintain an action thereon in their own name. This is on the ground that they hold the legal title. It is also held that the bank may sue thereon. It was held that the cashier, having the legal title, was the party in interest to sue on a certificate of deposit assigned to a "cashier." In the latter case the point made was that the assignor was the real party in interest, and that the assignment was for collection only. Where a party has divested himself of the legal title to deposits, it is held that he is not the real party in interest in actions in regard to such deposits.

The mere fact that the word "president" was placed at the end of plaintiff's name on a note was held not to be sufficient to show that he was not the real party in interest, and suit was properly brought in his name. *Ely v. Potter*, 58 Mo. 158. In this case, in the mortgage securing the note the payee was described as president of the bank, and it was insisted, in a suit on the note, that the action should have been in the name of the bank and that it was the real party in interest.

And where a certificate of deposit was issued to G., was indorsed by him to B., cashier, and by him indorsed to S., cashier, it was held that the latter could maintain an action against the bank in his own name. *Seybold v. Grand Forks Nat. Bank*, 5 N. D. 460, 67 N. W. 682. In this case it was claimed that the assignments were for collection, and that the first

assignor was the real party interested. The court said: "That one who has the naked legal title to a chose in action may maintain an action upon it, under a statute which provides that an action must be brought by the real party in interest, is a doctrine supported by the almost unanimous voice of authority."

Under this statute the assignee may sue in his own name, although he holds the legal title merely for the benefit of another. All that the debtor is interested in is protection against a second action on the same claim. If the beneficial owner has vested the legal title to the chose in action in a third person by assignment, the assignee can collect the claim, and the debtor will be protected; and, if the assignee sues upon the claim, a judgment in his favor will preclude a recovery on the same demand by the assignor."

But in *Smith v. Westcott*, 34 Fla. 430, 16 So. 332, a lot of duebills for work for a construction company in building a railroad were assigned to B., cashier of a partnership bank. It was held that the banking firm was the proper party to maintain an action as assignee of the original obligees of the claim sued on. In this case the cashier was a member of a banking firm doing business under the name of the Orange County Bank, and the action was brought in the firm name.

A deposit was made in a bank in the name of another party, to whom was given the bank and check books with authority to use them, and the holder of the bank book, disclaiming all interest, drew a check in favor of creditors of the depositor, who claimed the money as their own. It was held that the party giving such check could not maintain an action against the parties to whom he gave the check, and who received the money thereon. *Williams v. Whitlock*, 14 Mo. 552.

So, it was held that plaintiff was not the real party in interest where an action was brought by him to recover a sum alleged to have been deposited by him in defendant's bank, for his sole use and benefit; but the deposit was in the name of a third party, to be checked out by said third party. *Tripler v. Mt. Pleasant Commercial & Sav. Bank*, 21 Utah, 313, 61 Pac. 25. In this case the court said: "This is an action to recover a deposit of \$2,000, with interest, alleged to have been deposited in defendant's bank for the use and benefit of plaintiff. The evidence shows that no such deposit

if the defense can show that the plaintiff or plaintiffs are not the real parties in interest, the action must fail." The assignee of an account or chose in action is the real party in interest, and entitled to bring an action thereon, providing by such assignment the beneficial interest in or ownership of such chose in action is thereby transferred. But it is the interest or ownership, not the transfer, that gives the right of action. The owner would have the right of action without and independent of the formal assignment or transfer. Applying this rule to the case at bar, is defendant in error the real party in interest, and entitled to maintain an action on the Thompson account? Turning to the record, we find defendant in error did not purchase this ac-

count. It was not given to him. He did not become the owner thereof, nor was he entitled to demand and hold any beneficial interest therein. Mrs. Thompson did not sell this account, give it away, or part with any beneficial interest in it. She was the owner of it, and remained the owner. Loss of the account was her loss. Recovery upon the account was her recovery. All that was in fact done, as shown by the record, is this: A statement of the account, verified, was formally transferred to defendant in error, not for the purpose of vesting in him any ownership thereof, but for the purpose of enabling him to join it in an action on an account of his own. He did not intend to become the owner of the account, and did not. Mrs. Thompson did not intend to part

was ever made, and that the plaintiff is not the real party interested in the alleged deposit. A recovery by plaintiff would not bar an action by Chapman, the real party in interest."

See also *Rogge v. Cassidy*, 12 Ky. L. Rep. 54, 13 S. W. 716; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363; *Camden Bank v. Rodgers*, 4 How. Pr. 63; *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262, *infra*, III.; *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644, *infra*, VII.; *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78, *infra*, X. d; *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 409, *infra*, XXIII.; *Northwestern Loan & Bkg. Co. v. Muggil*, 7 S. D. 527, 64 N. W. 1122, 8 S. D. 160, 65 N. W. 442, *infra*, XXVII.; *Frye v. Bank of Illinois*, 10 Ill. 332, *infra*, XXXIII.

III. Equitable owner.

The general rule is that the equitable owner of the claim sued upon may sue as the real party in interest, under statutes requiring an action to be brought in the name of the real party in interest.

In suits upon notes assigned and transferred without indorsement it was held that the equitable owner could maintain an action thereon in his own name, and he was held to be the real party in interest. This was held in the following cases: *Taylor v. Perry*, 48 Ala. 240; *Cobb v. Bryant*, 86 Ala. 316, 5 So. 586; *Heartman v. Franks*, 36 Ark. 501; *Hancock v. Ritchie*, 11 Ind. 48; *Allison v. Barrett*, 16 Iowa, 278, 85 Am. Dec. 516; *Younker v. Martin*, 18 Iowa, 143; *Pearson v. Cummings*, 28 Iowa, 344; *Warnock v. Richardson*, 50 Iowa, 450; *Pease v. Rush*, 2 Minn. 107, Gil. 89; *Boeka v. Nuella*, 28 Mo. 180; *Bennett v. Pound*, 28 Mo. 598; *Willard v. Moles*, 30 Mo. 142; *Billings v. Jane*, 11 Barb. 620; *Allgoever v. Edmunds*, 66 Barb. 579; *Savage v. Bevier*, 12 How. Pr. 166; *Andrews v. McDaniel*, 68 N. C. 385; *Kiff v. Weaver*, 94 N. C. 274.

In *Weinlick v. Bender*, 33 Mo. 80, it was further held that an assignment to plaintiff after the institution of the suit did not affect his right.

So, where a daughter loaned money for her father, and took a note in her own name, and afterwards married, and after her death her husband transferred the note by indorsement to the father, it was held that the father was the real party in interest and could maintain 64 L. R. A.

an action thereon. *McDowell v. Bartlett*, 14 Iowa, 157.

A certificate of deposit was taken out in a husband's name for his wife's money, and he delivered the certificate to her. It was held that she was the party in interest, and could maintain an action thereon in her own name. *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 363.

So, a wife who brought suit upon a note payable to her husband, given as purchase money for her statutory estate, was held to be the proper party plaintiff in an action on the note. *Grantham v. Payne*, 77 Ala. 584. In this case the court said: "The action was properly brought in the name of the wife alone, as 'the party really interested.' She is shown to have been the beneficial owner of the note sued on, and it was a part of the corpus of her statutory separate estate under the laws of Alabama. Although payable on its face to the husband, he held the legal title in trust for the wife as beneficiary, and his possession was hers."

In *Hudson v. Weir*, 29 Ala. 294, it was held that a party may use as a set-off a promissory note of which he is the equitable owner. The court said that "a sale of two specified promissory notes at a specified price not exceeding \$200 may be so made as to invest the purchaser with the equitable title and ownership of them without writing, without delivery at the time of the sale, and without the payment of any part of the price at that time."

And under Ala. Code, § 3603, providing that all actions brought before justices of the peace, founded on any contract, express or implied, must be brought in the name of the party really interested, whether he have the legal title or not, it was held that an action for the purchase money of lands on a written covenant should be brought by the party owning the same under an oral assignment. *Ryall v. Prince*, 82 Ala. 264, 2 So. 319. In this case the court said: "This section is manifestly broader in its scope than the analogous one applicable to actions brought in the circuit court, which provided that contracts 'for the payment of money' only shall be prosecuted in the name of the party really interested." This action was properly brought under either section, as it was an action for the payment of money.

And where a bank brought an action on a draft payable to its cashier, and the complaint

with her interest in and ownership of the account, and did not. At all times she remained the owner and party in interest. She at all times was and remained the real party in interest, and the only party entitled to bring and maintain an action for its recovery, without doing violence to the provision of the Code now under consideration. An extended review of the authorities pro and con upon this proposition (and they are many) would, to my mind, tend to the confusion of that which is and ever must remain plain, and would evince a lack of confidence in a proposition that is and must ever remain self-evident.

Doster, Ch. J., concurring:

I concur in the majority opinion, and ap-

prove the reasoning of Mr. Justice Pollock. It is legally impossible for one to transfer to another the mere right to bring a lawsuit,—that and nothing more,—and that was all that was attempted in this case.

Greene, J., dissenting:

I cannot agree with the opinion of the court. The conclusion reached is against the great weight of adjudicated cases and the opinions of Code writers, as well as a former decision of this court, and, in my judgment, it is based upon a misconception of the Code and the purpose intended to be accomplished by its adoption. If the majority opinion is correct, the Code has not only changed the equity rule of pleading in actions on contracts and other choses in

alleged that it was delivered to him for the bank, it was held that the action was well brought. *Camden Bank v. Rodgers*, 4 How. Pr. 63. In this case the court said: "The assignee of a demand, whether negotiable or not, must be the plaintiff in the action. How, then, does the case stand? The draft is payable to the order of the plaintiff's cashier. It was delivered to him for the bank. The bank is the holder and the owner of the draft. These are the averments of the complaint, and taking them to be true, as we do upon demurrer, who but the plaintiff has such an interest in the draft, as would entitle him to maintain an action? The payee of the draft, instead of being 'the real party in interest,' has no interest at all in the draft."

A bank was the assignee of another bank of certain notes. The obligor renewed the notes by executing a note payable to the assignors, and delivered the same to the assignee, who held his paper, and who was the owner thereof. It was held that such assignee could maintain an action upon the renewal note, although not made payable to it. *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262.

And in a suit on a note payable to a bank, providing, "We hereby direct the proceeds of this note, when discounted, to be placed to the credit of ———,"—the plaintiff claimed that the bank refused to discount the same, but that plaintiff, for the price agreed upon, discounted the same. The note was not indorsed by the bank. It was held that plaintiff was the real party in interest. *Rogge v. Cassidy*, 12 Ky. L. Rep. 54, 13 S. W. 716. The court said: "The rule that, where the payee transfers a note by delivery merely, and not by indorsement, the legal title therefore remains in him, requiring him to be a party to an action upon it, does not apply in a case of this character. A rule of law is not to be applied when there is no ground or reason for its application."

An assignee of a note, the actual beneficiary and equitable holder thereof, was held to be a necessary party plaintiff in an action on the note by the payee. *Carpenter v. Miles*, 17 B. Mon. 598. The court said that the payee was a proper party.

The assignee of a bond assigned by parol was held to be a proper party plaintiff to maintain an action in his own name, in *Conyngnam v. Smith*, 16 Iowa, 471. In this case it was said 44 L. R. A.

that the real party in interest in a law forum was uniformly understood to mean legal interest, on the theory that the Code abrogated none of the rules of common law. "This construction of the Code and Constitution, announced in *Claussen v. Lafrenz*, 4 G. Greene, 224, *Cooper v. Armstrong*, 3 G. Greene, 120; and followed in *Roberts v. Tallafarro*, 7 Iowa, 110,—was adopted as indisputable, so far as relates to the question now before us; and, upon this assumption, and deductions regarded as necessarily resulting, it was held that only those having the legal interest in the cause of action could be heard at law. In other words, real interest was held to mean, at law, a legal interest, and hence, as in *Farwell v. Tyler*, 5 Iowa, 536, it was decided that the holder of a note not negotiable by delivery, nor assigned in writing, could not sue upon it in his own name. The construction above adverted to was, however, certainly much innovated upon, if not entirely overthrown, in the subsequent case of *Shepard v. Ford*, 10 Iowa, 502, decided by two members of the court as then constituted." And the court concludes that the party in interest is the same, now, in law and in equity.

A party to whom a coupon, payable to bearer, has passed by delivery was held entitled to maintain an action on the same, although the coupon contained words destroying its commercial character. *Kansas City, M. & B. R. Co. v. Cobb*, 100 Ala. 228, 13 So. 938. The court said: "If the coupons passed by delivery, plaintiff became the owner of the legal title without an indorsement, and, conceding the contention of appellant for the argument, that there was a condition in the face of the coupons that destroyed their character as commercial paper, then, under § 2594 of the Code, the party really interested, or the beneficial owner, must sue, whether he has the legal title or not."

An assignment of a debt in writing, not accepted in writing, was held to be, not a bill of exchange, but an equitable assignment; and the assignee was held to be the real party in interest, and the party who should maintain an action thereon. *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522.

And an assignment of notes without indorsement was held to constitute the assignee the real party in interest, and the assignor could not maintain an action thereon in his own name. *Wilson v. Clark*, 11 Ind. 385.

actions, but has also changed the law of commercial paper, for the reasoning applies with equal force to actions on negotiable promissory notes. At common law, promissory notes and other negotiable instruments were assignable, and the holder and indorsee thereof could prosecute an action thereon in his own name, not because of any rule of pleading, but because of the law of commercial paper; and in such actions the makers, acceptors, or indorsers could not question his title in any manner short of impeaching its good faith. Not so with personal contracts and other choses in action. These were not assignable so as to give the assignee a right of action at law in his own name. He was required to sue in the name of the assignor, or, if he were

dead, in the name of his personal representative. This rule was based upon the doctrine that there was no mutuality or reciprocity of contract between the original promisor and the assignee. At all times, however, the person holding the legal title to a chose in action might prosecute the action in equity in his own name without joining with him the original obligee, or any of the persons to whom such original obligee had assigned the contract. What the Code intended to do by the provision in question was to abolish the common-law rule of pleading in actions on contracts and other choses in action, and adopt the equity rule as to parties. This rule is clearly stated by Mr. Pomeroy in his work on Code Remedies, 3d ed. § 249: "The fundamental

So, a verbal assignment of a note and mortgage was held sufficient to authorize an assignee to maintain an action of foreclosure. *Barthol v. Blakin*, 34 Iowa, 452.

A verbal assignment of a note and guaranty was held to transfer to plaintiff the property in the chose in action in which the instruments were the evidence; and the plaintiff thus became the real party in interest, and could maintain a suit in his own name to recover upon the guaranty. *Green v. Marble*, 37 Iowa, 95.

And where a note was made payable to an agent as trustee, it was held that the principal, being the real party in interest, could maintain a suit in her own name, although the note was not indorsed by the payee. *Little v. Bradley*, 43 Fla. 402, 31 So. 342.

In *Caldwell v. Meshew*, 44 Ark. 564, it was said that an agent, to whom notes and mortgages were transferred without indorsement, being the holder under such a transfer, might maintain an action thereon.

In *St. Louis, I. M. & S. R. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. 704, it was said that a verbal assignment of certificates of indebtedness, if they were issued by a party authorized so to do, would authorize the assignee to sue thereon in his own name.

In *Dixon v. Buell*, 21 Ill. 203, the court said: "Equity treats the assignee of a contract, not assignable at law, as the party in interest, and affords him relief in a proceeding instituted by him in his own name; whilst courts of law require the proceeding to be in the name of the owner of the legal interest, unless it be in cases where the legal title vests in the purchaser by delivery."

The purchaser of certain lands directed the same to be conveyed to another as security for a debt. The land pointed out, and insured to be the tract conveyed, was not the same land that it was represented to be. It was held that the purchaser was the real party in interest, and that he could maintain an action for fraud and damages. *Phillips v. Bush*, 15 Iowa, 64. In this case the court said: "If it is true, as stated by the petitioner, that the title was taken in the name of E. E. Phillips, as security for a debt, then the plaintiff was the party to the contract. He is the one injured by the fraudulent representations of the vendor, as the land would revert to him after the debt secured thereby was paid. Again, if the land is valueless, the security is unavailing to the debt-
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or. The defendant, by his demurrer, admits the allegations of the petition. If it is conceded that the land was deeded to E. E. Phillips at the request of plaintiff, and only for a special purpose, and it is admitted that the sale was to plaintiff, we are unable to see why he is not the proper party to the suit."

Parties to a subscription contract for the construction of a railroad agreed to pay any railroad company that "our agent may contract with," and provided for a delivery of the contract to the company. A delivery of the contract to the railroad company by the agent was held sufficient to authorize the company to sue thereon in its own name. *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa, 115. In this case the court said: "It is urged that no assignment of the contract of the defendant and others is shown by the petition. None was necessary. By the express terms of the instrument, the agents were authorized to transfer it by delivery, and it was thus to become the property of the party receiving it."

A transferee by delivery of a bill of lading without indorsement was held to be the proper party to bring an action thereon in his own name against the carrier. *Merchants' Bank v. Union R. & Transp. Co.* 69 N. Y. 373.

And an equitable owner of a judgment was held to be the real party in interest. *Kelley v. Love*, 35 Ind. 106; *J. I. Case Threshing Mach. Co. v. Pederson*, 6 S. D. 140, 60 N. W. 747; *Thomas v. Irwin*, 90 Ind. 557.

But where the complaint stated that the payee indorsed the note sued upon and duly delivered it, but the manner of the indorsement was not stated, nor was it stated to whom it was delivered, it was held that the demurrer to the complaint was not frivolous. *Parker v. Totten*, 10 How. Pr. 283. In this case the court said: "Mere delivery is an immaterial ceremony, unless made by some person having power or authority to confer title. Delivery is often essential to perfect title. But in such cases it accompanies a sale, gift, or other disposition of property. It is the accessory, not the principal. And for what purpose was the note delivered to the plaintiffs? It is just as easy to infer that it was delivered to and received by them as agents or attorneys for collection, as owners. It is not even alleged that it was indorsed to the plaintiffs. And, even if it had been, such indorsement might have been, in legal effect, a mere direction, or ap-

principle may be stated as follows: The plaintiff who institutes an equitable action must bring before the court all those persons who have such relations to the subject-matter of the controversy that, in order to prevent further litigation by them, they must be included in and bound by the present decree,—in other words, all those persons who are so related to the controversy and its subject-matter that, unless thus concluded by the decree, they might set up some future claim and commence some future litigation, growing out of or connected with the same subject-matter, against the defendant who is prosecuted in the present suit, and from whom the relief therein is actually obtained." In *Walker v. Mauro*, 18 Mo. 564, Mr. Chief Justice Gamble says:

pointment to pay the money due upon the note to the plaintiffs, for the use and benefit of the real party in interest. An indorsement for such a purpose is an ordinary business transaction. It takes place whenever a note is deposited with a bank for collection. And in such a case, if the note is not paid by the maker, no one, as the law now is, but the owner, or real party in interest, can prosecute an action upon it."

See *Gillispie v. Ft. Wayne & S. R. Co.* 12 Ind. 398, *supra*, II.; *Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154, and *Sanford v. Sanford*, 45 N. Y. 723, *infra*, VIII.

IV. On contracts for benefit of third parties.

It seems to have been a rule of law in the United States prior to the Code provision authorizing an action to be brought in the name of the real party in interest, that where a promise is made to one directly for the benefit of a third party, the latter can maintain an action thereon. This seems to be the weight of authority. In addition to the Code provision requiring an action to be brought in the name of the real party in interest, it is usually provided that, where a contract is made with one party for the benefit of another, the former may maintain an action thereon. This class of cases is an exception to the rule that every action must be prosecuted by the real party in interest, and is not intended to be included in this note. In some of the cases it was contended that this exception clause, authorizing the contracting party to sue, precluded the beneficiary from suing; but it is generally held that, notwithstanding the provision allowing the contracting parties to sue, the beneficiary may maintain an action thereon in his own name as the real party in interest. The note is intended only to include such cases as hold that such party is within the statute requiring an action to be brought by the real party in interest. Notwithstanding this provision, some cases hold and decide the case under the common-law rule, and reach the same conclusion.

So, where a contract was made between two persons for the benefit of a third person, it was held that the latter, though not one of the contracting parties, was a proper party to maintain an action for a breach of the contract. *Plano Mfg. Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809.

And a party who paid the consideration on a contract was held to be the party beneficially 64 L. R. A.

"The effect of our new Code of Practice in abolishing the distinction between law and equity is to allow the assignee of a chose in action to bring suit in his own name in cases where by the common law no assignment would be recognized. In this respect the rules of equity are to prevail, and the assignee may sue in his own name."

In view of this rule, as stated by Mr. Pomeroy, and its purpose as stated by Chief Justice Gamble, it is difficult to understand why one holding by written assignment a verified, itemized account, may not sue in his own name. Does not such person represent all persons who are related to the controversy and its subject-matter? Would not a decree settle all future controversies growing out of, or connected with, the same

interested, although the contract was taken in the name of another party. *Tracy v. Gunn*, 29 Kan. 508.

The Dorr Cattle Company owned a team of horses. John Dorr, its manager, sold the same, the value to be subsequently ascertained and to be credited on a note of said Dorr held by the purchaser. The note of Dorr was afterwards otherwise satisfied. It was held that the Dorr Cattle Company could maintain an action against the purchaser for the value of the team, under Iowa Code, § 3459, providing that every action shall be brought in the name of the real party in interest. *Dorr Cattle Co. v. Jewett*, 116 Iowa, 93, 89 N. W. 109. In this case the court said "that, under this provision, it has been held that the party for whose benefit a contract has been made may sue for breach thereof. There is no statutory provision which deprives the person to whom, on a consideration proceeding from himself, a promise is made to pay or deliver property to a third person, presumably for the ultimate benefit or advantage also of the party furnishing the consideration, of a right to maintain an action in his own name for damage resulting to him for a breach of the contract by the other party."

And under Iowa Rev. § 2757, providing that every action must be prosecuted in the name of the real party in interest, and § 2758, providing that a person in whose name a contract is made for the benefit of another may sue in his own name, where a contract is made with an agent for the benefit of another who was the real party in interest, it was held that the latter could sue thereon in his own name. *Rice v. Savery*, 22 Iowa, 470. In this case the court said: "It is no longer absolutely necessary (§§ 2757, 2758) that the party to whom a promise is made shall be the plaintiff on the record, in an action to enforce it. That is to say, if the promise is made for the benefit of another who is the real party in interest, the latter may sue though the contract or promise be made to an agent or trustee."

A party to whom an indebtedness was due was held to be a proper party to maintain an action to foreclose a trust deed wherein another party was named trustee to secure this debt, in *Hutchinson v. Myers*, 52 Kan. 290, 34 Pac. 742. The court said that § 28, Kan. Code, authorizing a trustee to sue, did not prevent the maintenance of an action in the name of the real party in interest.

subject-matter? If these questions are answered in the affirmative, it will have to be conceded that the plaintiff is within the rule stated, and may therefore maintain this action. Could the assignor in this instance, after having appeared in court and assisting the assignee in the litigation, by testifying that the assignment was regular, and the defendant therein did not owe her anything, be heard to set up this claim as a cause of action against the defendant after the entry and satisfaction of a judgment? This provision intended to adopt the equity rule which permits the assignee holding the legal title to a chose in action to bring suit in his own name, instead of that of the original promisee or his personal representative, and without joining with him such

original promisee. It cannot be said that this provision was adopted for the purpose of preventing persons who had no interest in a litigation from instituting suits. In the first place, no general complaint of that kind has been made; and, second, lawsuits carry with them sufficient penalties for such a practice ever to become obnoxious. The certainty of defeat is a sufficient preventative of any continued wrongs of this kind. 2 Dan. Neg. Inst. § 1181a, says: "Any holder of a bill or note who can trace a clear legal title to it is entitled to sue upon it in his own name, whether he possesses the beneficial interest in its contents or not." Mr. Pomeroy, after treating of the right of an assignee of a promissory note to maintain an action thereon, says: "Analogous to the

And where a bill was brought to enforce a trust deed, and was filed by the real beneficiary, who had loaned the money to the grantor, it was held that the plaintiff was the real party in interest. *Castleman v. Berry*, 86 Va. 604, 10 S. E. 884. The court said: "In equity the real party in interest must be the complainant, and all parties in interest must be before the court, either as plaintiffs or defendants; and it is immaterial that the interests of the defendants are in conflict with each other, or that some of their claims are identical with the claims of the plaintiffs. Equity deals with the real parties in interest."

And where two mining companies entered into a contract which, among other things, provided for the building of a furnace by one party, and was signed individually by the representatives of the different companies, the builder and two sureties, it was held that the builder, as the payee of the compensation to which he was entitled under the covenant for building the furnace, was the only party interested in the recovery. *Craig v. Fry*, 68 Cal. 363, 9 Pac. 550.

A subscription contract set out that, whereas it was the desire of the undersigned to have a railroad built between two points, and a development company proposed to construct a railroad when the right of way was secured and \$20,000 put in bank to be paid to it on the completion of the road, in consideration whereof, "we, the undersigned, hereby agree to contribute and pay for carrying out the foregoing enterprise." It was held that the development company was the proper party plaintiff to maintain an action against a subscriber on his subscription. *Western Development Co. v. Emery*, 61 Cal. 611. The court said: "The contract sued on in this case was made for the benefit of plaintiff, and plaintiff was the real party in interest, as the money, when recovered, will belong to the company."

And in an action on an indemnifying bond taken by a railroad company from its lessee to protect against suits and damages, it was held that a beneficiary under such indemnity clause was a party for whose benefit a contract was made, and who thereby became the real party in interest, and could sue upon the contract; and that it made no difference that the contract was under seal. *Hughes v. Oregon R. & Nav. Co.* 11 Or. 437, 5 Pac. 206.

On a parol promise by one to pay the debt
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of another, it was held that an action may be maintained by the beneficiary of such promise. *Mason v. Hall*, 30 Ala. 599. The court said: "It is no objection to the maintenance of the suit by him for whose benefit the promise is made, that an action might also be brought by him to whom the promise was made."

So, where a debtor agreed with his creditor to pay the latter's debt to a third party, such third party was held to be the proper party plaintiff, and could maintain an action therefor in his own name, as such agreement made by all the parties was held to constitute him an equitable owner, and he was the real party in interest. *Wiggins v. McDonald*, 18 Cal. 126. In this case the court said: "We have but one form of action for the enforcement of private rights, and, with certain exceptions, the statute requires that every action shall be prosecuted in the name of the real party in interest. Cases of assignment are not included in these exceptions, and in the form of the remedy no distinction exists between legal and equitable rights. In this respect the two classes of rights are placed precisely upon the same footing, and must undergo the same remedial process for their enforcement."

And where a father of an illegitimate child promised several persons that, if they would provide for and educate her, he would make a provision for the same in his will; and the child, after becoming of age, relying on such promises, agreed to pay the expenditures so incurred,—it was held that she could maintain an action against the estate upon the promise made by her father. *Todd v. Weber*, 95 N. Y. 181. 47 Am. Rep. 20. In this case the court said: "As she had the sole beneficial interest in the contract, it was, we think, properly brought in her name."

In *Millani v. Tognini*, 19 Nev. 133, 7 Pac. 279, which held that a party benefited by a contract to which he was not a party could maintain an action thereon, the court said: "Besides the statute which provides that 'every action shall be prosecuted in the name of the real party in interest,' this court has held in three different cases that the beneficiary named in such a contract may maintain an action thereon in his own name. *Ruhling v. Hackett*, 1 Nev. 370; *Alcalda v. Morales*, 3 Nev. 137; *Bishop v. Stewart*, 13 Nev. 35." Although these cases hold as cited, they do not refer to the Code provisions.

subject discussed in the preceding paragraph is the question whether an assignee, to whom a thing in action has been transferred by an assignment which is absolute in its terms, so as to vest in him the entire legal title, but which by means of a contemporaneous and collateral agreement is in fact rendered conditional or partial, is the real party in interest. It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that by virtue thereof the entire apparent legal title vests in the assignee, any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds, 'and is to account to the

assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional,' does not render him any the less the real party in interest. He is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the parties—either the assignor or other—to whom the assignee is bound to account. This is the settled doctrine in most of the states." Code Rem. § 132. This rule, as stated by the most sci-

And where a widow for a valuable consideration made an agreement with her father-in-law that on the final distribution of the latter's estate his grandchildren and her family were to share equally with others, it was held that the grandchildren could maintain an action on this contract after the death of their grand father. *Smith v. Smith*, 5 Bush, 625. The court said that Ky. Code Proc. § 33, authorizing a person in whose name a contract is made for the benefit of another to bring suit without joining the beneficiary, would not interfere.

A citizen and taxpayer and injured party was held to be a proper party plaintiff in an action against a water-supply company for failure to comply with its contract with a city in keeping water pressure on, causing loss by fire to plaintiff's premises. *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249; *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35, 12 S. W. 557. In the *Paducah Case* the court said: "It is not, however, important whether this case either comes within what is elsewhere laid down as a general rule, or is an allowable exception to it, for this court has held the doctrine well settled, a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him (*Smith v. Lewis*, 3 B. Mon. 229; *Allen v. Thomas*, 3 Met. [Ky.] 198, 77 Am. Dec. 169); which practice is not only in accordance with the rule found in *Chitty on Pleading*, but seems to be required by § 18, Civil Code, that in express terms provides, every action must be prosecuted in the name of the real party in interest."

In *Filnt v. Cadenasso*, 64 Cal. 83, 28 Pac. 62, it was held, where a grantor conveyed land in consideration of a grantee's contract to pay the grantor's note to a third person, which was secured by a mortgage on the land, that the grantor, having paid the note, could maintain an action against a subgrantee, who also made the same promise in consideration of his conveyance. In this case the Code was not cited, but it was held that their agreement was for plaintiff's benefit, and, upon their failure to perform, he had a right of action against them. It was contended that the plaintiff could not maintain the action under Cal. Code Civ. Proc. § 367, providing that every action must be brought by the real party in interest.

In *Wormouth v. Hatch*, 33 Cal. 121, it was 64 L. R. A.

said that, if a subsequent grantee promised his grantor, as part of the consideration, to pay a third party, such third party could maintain an action upon such promise as the party beneficially interested.

But third parties who were not referred to in a contract, and were expressly excluded from all claims or benefits, were held not to be the proper parties to maintain an action thereon as the real parties in interest. *Reynolds v. Louisville, N. A. & C. R. Co.* 143 Ind. 579, 40 N. E. 410. In this case the court said: "It is not denied that a third person, for whose declared benefit a contract was made, may sue to enforce the same. But it is only those whom the contract expressly declares are the beneficiaries and real parties in interest, as when the obligation runs to and is for the benefit of a designated third person or a class. In such cases the promisee is taken to be the mere agent or trustee of the designated actual beneficiary. This doctrine is without any sort of application to the facts of this case; for here the third parties (appellants) are not only not referred to in the remotest degree by any contract executed by appellee, but the construction contract and debt are expressly excluded from all claims or any benefits whatever. It is strictly a promise to pay to a trustee, conditioned upon the 'mutual and dependent obligations' of the immediate parties thereto. It is not contemplated by the immediate parties to the contract in suit that anything shall be paid except upon the performance of future obligations. That appellants may, therefore, have a right of action because they may anticipate some benefit from a contingent promise made to their promisor by another, has no support under the cases cited by appellants."

See *Pleasants v. Erskine*, 82 Ala. 386, 2 So. 122, *infra*, VIII.

As to rights of a third party to sue upon a contract made for his benefit, see *Jefferson v. Asch*, 25 L. R. A. 257, and *note*, 53 Minn. 446, 39 Am. St. Rep. 618, 55 N. W. 604.

V. On claims and accounts for work and labor, and goods sold.

Assignees of book accounts, of claims for work and labor, and for goods sold, have been held to be the real parties in interest. So have assignees of claims due on contracts. But where an assignor had transferred his interest by sale or otherwise, it was held that he could not

entific Code writer America has produced, is well understood by courts, and, with two exceptions, has been followed. The case of *City Bank v. Perkins*, 29 N. Y. 554, 568, 86 Am. Dec. 332, was an action on two bills of exchange, for \$10,000 each, indorsed by the defendant, and two other bills of exchange, for \$5,000 each, accepted by him. The defendant denied the indebtedness, and also denied that the plaintiffs were the legal holders and owners of said bills, and alleged that said bills belonged to the bank of Akron, Ohio. It appeared upon the trial that the defendant owed the amount of the bills in suit. The only question was whether the plaintiffs were the legitimate holders. The court said: "But as I understand the rule, nothing short of actual mala fides,

or notice thereof, will enable a maker or indorser of such paper to defeat an action brought upon it by one who is apparently a regular indorser or holder,—especially where there is no defense as to the indebtedness. This rule is founded in the most obvious dictates of reason and sound policy, and should be inflexibly maintained. As to anything beyond the bona fides of the holder, the defendant, who owes the debt, has no interest." The case of *Eaton v. Alger*, 47 N. Y. 345, 349, cited in the majority opinion, was before the court of appeals on appeal from that decision, and was overruled. In the opinion the court said: "The evidence substantially established that the payee of the note [Clark] delivered it to the plaintiff upon his undertaking to collect it

maintain an action for services, and could not maintain an action for goods sold.

An assignment of a claim due for goods sold was held to constitute the assignee the proper party to institute an action thereon, and he was the real party in interest. *Garrison v. Clark*, 11 Ind. 369. In this case the failure to deny the assignment was held to vest the right of action in the assignee without joining the assignor.

And an assignee of book accounts was held to be the real party in interest, and a proper party to sue thereon. *Brumback v. Oldham*, 1 Idaho, 709.

An assignment of a rent account by an order drawn on a tenant was held to constitute the assignee the party in interest, and to allow him to sue in his own name. *Walker v. Mauro*, 18 Mo. 584.

And where a party advanced money for the defendant upon his written request, and assigned his claim for the debt, it was held that the assignee was the real party in interest. *Loug v. Heinrich*, 46 Mo. 603.

And where claims were assigned to plaintiff, who brought suit upon the same, it was held to be immaterial whether third parties had furnished the funds to purchase the claim sued on. *Jacobs v. Mitchell*, 2 Colo. App. 456, 31 Pac. 235. The court said: "Conceding that Mr. Mackey furnished the money for the purpose of purchasing the claims, it does not follow that the plaintiff was not the bona fide purchaser, the legal assignee of the claims declared upon, and real party in interest."

An order on a cashier of a railroad company was held to be an assignment, and his assignee was the real party in interest, and was entitled to sue in his own name. *Jackson v. Hamm*, 14 Colo. 58, 23 Pac. 88.

And where a contractor engaged in constructing a pier was to be paid in instalments, and before completion he assigned all the payments due and to become due under the contract, authorizing the assignee to receipt for the same in his own name, and the assignee served notice of the assignment on the contracting party, it was held that the assignee was the real party in interest, and the proper party to maintain an action for an instalment. *Sharp v. Edgar*, 3 Sandf. 379.

So, a certificate stating that it was for money due, issued by a railroad company's chief engineer having authority, was held to be a con-

tract for the payment of money, and an assignee of such certificate was held to be within the meaning of Ala. Code, § 2129, requiring an action on a contract for the payment of money to be brought in the name of the party really interested. *Alabama & M. Rivers R. Co. v. Sanford*, 36 Ala. 703.

A substituted contractor under a contract to build a house, acknowledged by the employer "as if he was the original contractor," was held to be a proper party to maintain an action thereon. *Pensacola R. Co. v. Schaffer*, 76 Ala. 233. The court said: "He was not only the transferee of the contract, which was one for the payment of money, but he possessed the exclusive right to collect and receipt for the money; so that payment to no other person would be valid without his order or assent."

A contractor with a city for public works obtained a judgment against another party requiring him to pay all claims arising out of the work. Subsequently the contractor obtained an assignment from the claimants for work done, and brought an action against such other party to compel the payment. The plaintiff was held to be the real party in interest. *Root v. Moriarty*, 39 Ind. 85. In this case the court held that, as the assignees, having been made parties defendant, did not controvert the assignment, there was no reason shown why the alleged debtor could be allowed to do so.

And where a physician, employed by a coroner to discover whether poison was the cause of death, agreed, in consideration of money received by an insurance company, to assign such a judgment as he might recover to such company, it was held that, as he had divested himself of all beneficial interest in the claim, and vested it in the company, the latter was the only proper plaintiff in an action against the county, and that the assignor was not the proper party plaintiff. *Bartholomew County v. Jameson*, 86 Ind. 154.

And where an action was brought by the vendor for railroad ties sold and delivered to defendant, and the defense was that the vendor had given a bill of sale for the ties in controversy, and authorized his vendee to collect what might be found due on said ties, it was held that this would be a complete defense, and the plaintiff would not be a proper party in interest. *Buffington v. South Missouri Land Co.* 25 Mo. App. 492.

at his own expense, and to pay to Clark upon its collection \$600, which was the original amount of the note prior to its renewal. . . . The note is transferred and delivered to the plaintiff under that contract, and in fulfillment of that contract he proceeds to its collection. The plaintiff is thus made the party in interest, within the meaning of the Code, so as to enable him to maintain this action." In the case of *Hays v. Hathorn*, 74 N. Y. 486, the court reviewed all the decisions of the courts of New York upon this question, and summarized its conclusions as follows: "To entitle a party to maintain an action upon a promissory note, he must be the legal owner and have the right of possession of the instrument. Such ownership must be sufficient to protect

the defendant, upon a recovery against him, from a subsequent action thereon." In *Cottle v. Cole*, 20 Iowa, 481, 485, the defendants pleaded that plaintiff was not the real party in interest, and that they were not indebted to plaintiff in any manner, in the sum of \$100 or any other sum. The court, on demurrer, held this answer sufficient. On appeal Judge Dillon said: "The course of decision in this state establishes this rule, *viz.*, that the party holding the legal title of a note or instrument may sue on it, though he be an agent, or trustee, and liable to account to another for the proceeds of the recovery; but he is open in such case to any defense which exists against the party beneficially interested. . . . Holding, as the plaintiff did, the legal title to the

See *Smith v. Westcott*, 34 Fla. 430, 16 So. 332, *supra*, II.

VI. On claims not arising on contracts for payment of money.

The weight of authority seems to be that an assignee of a claim not arising on a contract for the payment of money will be held to be the real party in interest if the claim is assignable. There are several cases in Alabama holding the other way, but the statutory provision in that state in regard to the real party in interest is limited to actions on contracts for the payment of money, except in courts of justices of the peace.

An assignee of a written contract for the delivery of property was held to be the real party in interest, under 2 Ind. Rev. Stat. p. 37, § 3, requiring the action to be brought by the real party in interest. But it was held that the assignor was also a proper party plaintiff under § 6, providing that where the contract is not assigned by indorsement in writing the assignor shall be made a party. *Mewherter v. Price*, 11 Ind. 199.

And where a note payable in work had been sold and delivered to a third party, it was held that he could maintain an action thereon in his own name. *Schnier v. Fay*, 12 Kan. 184.

And where a note was payable in oats, to a named payee or bearer, and transferred to the plaintiffs after due, and the payee agreed to put the note in judgment, or, in default thereof, to pay the plaintiffs \$15, it was held that the plaintiffs were the parties in interest, and the action did not have to be brought by the payee. *Combs v. Bateman*, 10 Barb. 573.

The assignee of a claim for killing cattle was held to be the real party in interest. *Butler v. New York & E. R. Co.* 22 Barb. 110.

See *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9, *supra*, I.; *Wines v. Rio Grande Western R. Co.* 9 Utah, 228, 33 Pac. 1042, and *Lewando v. Dunham*, 1 Hill. 114, *supra*, II.

But under a contract to sell and deliver ore at smelting works, by a firm, to be paid for on assay, it was held that the smelting firm could not assign its interest so as to allow its assignee to maintain an action. *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308. In this case the court held that the contract was of such a personal nature as would prevent an

assignee from maintaining an action thereon. The court said: "If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name."

In *Auerbach v. Pritchett*, 58 Ala. 451, it was held that a promise to pay in cotton was not a contract provided for under Ala. Code, § 2890, providing that actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not. It was held that on the death of the obligee the action should be in the name of the administratrix.

So, a written promise to return or account for a certain note to A., indorsed in blank, was held not to be within the terms of Ala. Code, § 2129, where suit was brought by B., the holder of the same, who received the writing by delivery, as it was not a "promissory note, or other contract, express or implied, for the payment of money." *Henley v. Bush*, 33 Ala. 636.

So, an action for breach of warranty of the soundness of a slave is not upon "a promissory note, bond, or other contract, express or implied, for the payment of money," under Ala. Code, § 2129. *Newson v. Huey*, 36 Ala. 37. In this case the defendant pleaded that the plaintiff was not the real party in interest. The court held that the statute did not apply to this class of actions.

VII. Bills, notes, and bonds.

At common law, where a payee assigned a note, an action thereon was required to be brought by the assignor for the benefit of the assignee. This rule of law was changed by the commercial law authorizing the party who is the legal holder of commercial paper to maintain an action thereon in his own name. In most of the states the statutes require an action to be brought by the real party in interest. The statutes also generally provide that a trustee of an express trust may maintain an action in his own name. This latter statute is an exception to the provision requiring an action to be brought by the real party in interest. In attempting to establish rules of pleading, a great many cases simply followed the commercial law, without reference to the statute requiring an action to be brought by the real party

judgment by assignment, he could sue upon it; and his right to recover could not be defeated by simply showing that Cluff was the party beneficially interested in the action. This alone would not constitute a defense." The case of *Cassidy v. Woodward*, 77 Iowa, 357, 42 N. W. 319, 320, was an action involving the title and ownership of 80 acres of land. The objection was that the plaintiff was not the real party in interest. In passing upon this question the court said: "It has uniformly been held by this court that under this provision of the Code the party holding the legal title to a cause of action, though he be a mere agent or trustee, with no beneficial interest therein, may sue thereon in his own name." *Cottle v. Cole*, 20 Iowa, 481; *Rice v. Savery*, 22 Iowa,

470; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 514, 17 N. W. 31, 21 N. W. 9. In *Minnesota Thresher Mfg. Co. v. Heipier*, 49 Minn. 395, 396, 52 N. W. 33 it is said: "By the terms of the order or draft sued on, the drawer directed the defendant to pay the plaintiff a certain sum. The defendant accepted the draft, expressly agreeing to pay the plaintiff the sum named. Clearly, the plaintiff held the legal title to the demand, and was the real party in interest. It did not concern the defendant that there was an agreement between the drawer and the plaintiff that the latter took the order only for collection; the proceeds, when collected, to be applied on the indebtedness of the former to the latter. No exceptions were taken on the trial of the cause which

in interest. These cases are not included in the note. When the point was made that the Code controlled, there was quite a struggle in the courts to adhere to the commercial law and at the same time follow the statute. This appears in subdivision II., *Transfers for collection and suit*, and is also apparent in subdivision III., *Equitable owner*. And so, in the former class, *Transfers for collection and suit*, some states have gone one way and some the other, although the weight of authority now is that the legal holder for collection may maintain an action thereon; and in regard to equitable owners, under the Code a party who holds paper without indorsement, being the owner thereof, is entitled to maintain an action thereon. The negotiable instrument law, providing that "the holder of a negotiable instrument may sue thereon in his own name, is an adoption of the commercial law. As to whether or not new difficulties will arise in the application of this statute which has been adopted in many states, remains to be seen. The assignees and owners of warrants, bonds, notes, checks, and the like are generally held to be the real parties in interest. This was held in regard to notes, whether negotiable or not, and where they were transferred after maturity, and where they were transferred by a separate instrument. After transfer of title the payee cannot maintain an action on a note; and some cases have held that, in an action by an assignee or indorsee on a note, it is a good defense that the plaintiff has improperly obtained possession of the same, and is not the owner or legal holder.

In an action on a county warrant issued to B. or order, and by him assigned to S. or bearer, it was held that the holder thereof could maintain an action in his own name, and was the real party in interest. *McCormick v. Grundy Co.* 24 Iowa, 382.

In an action on a note by the indorsee, an answer denying that plaintiff had any interest in the note was held to constitute no defense, where no reason was given why, if the note was indorsed, the plaintiff did not own it; nor why she was not the party in interest. *Hereth v. Smith*, 33 Ind. 514.

Where the plaintiff sued as indorsee of a note, and proved his title as such, it was held that he was the real party in interest. *James v. Chalmers*, 5 Sandf. 52.

The assignment of a note after maturity was held to vest the legal title in the assignee, 64 L. R. A.

and he was held to be the real party in interest. *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473; *James v. Chalmers*, 6 N. Y. 209.

And where an action was brought upon a note, by a party holding the same under a blank indorsement, and the answer denied that the note was transferred to the plaintiff, or that he was the legal holder or owner, or that he was the real party in interest, and alleged that a bank was the real party in interest and the owner and holder thereof, it was held that evidence to sustain the allegations of the answer was properly rejected on the ground that the blank indorsement constituted a written assignment of the security, and made the plaintiff the real party in interest. *Hays v. Southgate*, 10 Hun, 511. The court said: "The cases cited by the defendants—*Metropolitan Bank v. Lord*, 1 Abb. Pr. 185; *Flood v. Reynolds*, 13 How. Pr. 112; *Duncan v. Lawrence*, 6 Abb. Pr. 304; *Tamiser v. Cassard*, 17 Abb. Pr. 187—arise on the sufficiency of answers denying plaintiff's ownership of the notes sued upon, and setting up another owner. These were held to be issuable facts, and to compel the plaintiff to prove his title. But they do not reach this case, where a sufficient title has been proved on the trial. *Sheldon v. Parker*, 3 Hun, 498, was decided on the question of bona fides. *Killmore v. Culver*, 24 Barb. 656, must be considered as overruled by the cases cited. In *Sanford v. Sanford*, 45 N. Y. 723, the defendant, as executor, claimed to be the owner and holder of the note, and entitled to the proceeds equally with the plaintiff, who was executor under the same will."

The holder and owner of a note indorsed in blank was held entitled to maintain an action thereon, notwithstanding subsequent indorsements. *Vanaradule v. Hax*, 47 C. C. A. 31, 107 Fed. 878. The court said that a holder of a note indorsed in blank by the payee may, at the trial, strike out all subsequent indorsements, and recover on the instrument.

And where a note was indorsed in blank, and an action brought thereon by a party other than the payee, it was held that the introduction of the note in evidence established a prima facie case that the action was brought by the real party in interest. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

In *Riebig v. Teabout*, 73 Iowa, 419, 35 N. W. 499, it was held that the holder of a note could maintain an action thereon whether it

raised any other question." *Abell Note Brokerage & Bond Co. v. Hurd*, 85 Iowa, 559, 52 N. W. 488, was an action upon a promissory note assigned to plaintiff for collection merely. The only question submitted was whether the plaintiff was the real party in interest. The court said "that the party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery; but he is open in such case to any defense which exists against the party beneficially interested." In *First Nat. Bank v. Hummel*, 14 Colo. 275, 8 L. R. A. 788, 20 Am. St. Rep. 257, 23 Pac. 991, an action on a chose in action, the court said: "The meaning of the language of the 1st section [Code, § 3]

cited has been frequently construed by the courts. The 'real party in interest' is held to mean the person in whom the legal title to the claim in suit is vested." The case of *Young v. Hudson*, 99 Mo. 102, 106, 12 S. W. 632, 633, was an action upon three promissory notes and an account for merchandise, all alleged to have been regularly transferred to plaintiff. The defense was that the assignment of the account to plaintiff was without consideration, and was a mere pretense and sham, and the assignors, being the owners and entitled to whatever sum might be collected on it, were the real parties in interest. Speaking on this question, the court said: "The assignment was regular and formal. There was evidence of defendant's admission of the original in-

was negotiable or not. The court does not discuss the question of the party in interest.

In *Helper v. Alden*, 3 Minn. 332, 611. 232, it was said that in this state an indorsee is a proper party to maintain a suit in his own name against any or all of the parties on a non-negotiable instrument under seal.

Where an assignment of a note was made upon separate paper, it was held that the assignee could maintain an action on the note in his own name as the real party in interest. *Thornton v. Crowther*, 24 Mo. 164.

And where the payee of a lost note indemnified the obligor and brought suit upon the note, to which it was pleaded that the plaintiff was not the real party in interest, the court said: "The objection that the plaintiff is not the real party in interest is without foundation; the note was made payable to him, and he is prima facie the owner; his right to maintain this action cannot be questioned, except the defendant pleads payment or offset against *Cleero Price*, whom he alleges is the true owner of the note." *Price v. Dunlap*, 5 Cal. 483.

After a bond under seal had been lost, the owner transferred the same to the plaintiff by a writing under seal. It was held that he could maintain an action on the bond. *Glassell v. Mason*, 32 Ala. 719. The court said: "A debt created by bond, which bond has been lost, is still a debt or contract for the payment of money, and is embraced by the section of the Code above copied."

Assignees of a promissory note, to whom it had been transferred by a separate writing by the payee, but not by indorsement or delivery, were held to be proper parties to maintain an action in their own name on the same. *Morris v. Poillon*, 50 Ala. 403.

And where a non-negotiable note had been assigned by a separate instrument, and not by indorsement, such assignee was held entitled to maintain an action in his own name, in assumption, against persons wrongfully collecting and appropriating the same. *Planters' & M. Ins. Co. v. Tunstall*, 72 Ala. 142. The court said: "Under the statute a suit must have been prosecuted in the name of the assignee having the equitable or beneficial interest."

So, where a non-negotiable note was transferred by a separate indorsement the assignee was held to be the proper party to maintain an action in his own name. *Stephens v. Adams*, 83 Ala. 117, 9 So. 529.
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And where a memorandum was indorsed on the back of a note after its execution, that "this note shall not be transferred to any person other than S.," but it was transferred to J., it was held that he could maintain an action on the note. *Johnson v. Washburn*, 98 Ala. 258, 13 So. 48. The plea did not negative the fact that it might have been transferred to A. and by him to J.; and it was also held that a contemporaneous parol agreement could not affect the original terms of the writing.

Where the complaint alleged that the defendant made his note, and that the indorsee obtained a judgment against the maker, and, after "no property found," obtained a judgment against the indorser, who transferred to plaintiff "said claim against defendant,"—it was held, under Ala. Code, § 2129, providing that an action on notes, bonds, or contracts for the payment of money must be prosecuted in the name of the person really interested, that the plaintiff was not the real party in interest in the judgment; but the complaint was treated as one on the note, the right to which had reverted in the indorser on his payment of the judgment rendered on his indorsement, and therefore the action was brought by the real party in interest. *Smith v. Harrison*, 33 Ala. 706. In this case the court said: "The recovery of the several judgments, and the payment of the latter, were but links in the chain of facts which supported the plaintiff's action,—necessary to be averred and proved, but the cause of action stated in the complaint is the note of Smith, not the judgment which Maull, for the use of Givhan, recovered upon it."

In a suit by an assignee and purchaser upon a time check, it was held that the action should have been in the name of the purchaser and assignee because he was the owner and real party in interest. *Rio Grande Extension Co. v. Coby*, 7 Colo. 299, 8 Pac. 481.

In an action on a note payable to a party as trustee for others, it was held that the trustee could maintain an action in his own name. *Rice v. Rice*, 106 Ala. 636, 17 So. 628. In this action the plaintiff amended his complaint to sue as "trustee of Jennie, Lena, and Belle Rice," and the case was tried as upon the complaint of Rice in his individual capacity. In most of the states the Code provision authorizes a party in whose name a contract is made for the benefit of another, or a trustee for another, to maintain an action. This seems to be wanting

debtedness it exhibited. But no consideration for its transfer to plaintiff appeared. The account was evidently assigned to him to collect for the use of the assignors. That did not preclude a recovery. An assignee of a chose in action arising out of contract may sue upon it in his own name, though the title was passed to him only for the purpose of collection." In *McPherson v. Weston*, 64 Cal. 275, 281, 30 Pac. 842, 845, the defense was that the plaintiff was not the owner of the note, and therefore not the real party in interest. It was ruled: "It makes no difference that the plaintiff paid nothing for the note. Forbes had the right to indorse it to him whenever the note became his property. He held it with the same right as any other owner had." In the

syllabus the court says: "The transfer to plaintiff was without consideration, and merely for the purpose of collection. Held, that the transfer to plaintiff was valid, and that he was entitled to judgment against Robinson as an indorser." In *McCallum v. Driggs*, 35 Fla. 277, 278, 17 So. 407, 408, it was held: "If a note be indorsed in blank, the courts never inquire into the right of the plaintiff, whether he sues in his own right or as trustee, nor into the right of possession, unless a plea be made of mala fides in the plaintiff's possession." In *Caldwell v. Laurence*, 84 Ill. 161, 162, one defense was that the plaintiff was not the owner of the note, and therefore not the real party in interest. The court says: "The legal title to the note was still in

in the Alabama Code, but the same result is reached in the decision. The court said: "Notwithstanding the provision of the statute, that 'actions on promissory notes . . . must be prosecuted in the name of the party really interested' (Code, § 2594), when the promise is made to one person for the benefit of another, either may sue (*Mason v. Hall*, 30 Ala. 599; *Shotwell v. Gilkey*, 31 Ala. 724); and where the party having the legal title—the payee named in a promissory note—is also the party entitled to receive the money and discharge the debtor, 'although, when collected, he holds the money, not for his own use, but for the use of some other person, and to whose use he is to apply it, or to whom he is bound to pay it,—in all such cases the action must be in the name of the party having the legal title.' Per Peck, Ch. J., in *Yerby v. Sexton*, 48 Ala. 311, 325. And to like effect it is said by Manning, J.: 'This § 2524 [now 2594] has caused much perplexity in practice. But whenever a party has the legal title, if he is a party to whom payment can be legally made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use.' *Hirschfelder v. Mitchell*, 54 Ala. 419. See also *Tilley v. Harrison*, 91 Ala. 295, 8 So. 802. In this case the plaintiff had the legal title; payment could be efficaciously made to him, and he could discharge the debtor. The suit, therefore, proceeded properly in his name, though had there been a recovery, he would have held the money for Jennie, Lena, and Belle Rice."

A party who had the legal title, to whom payment could be made, and who could legally discharge the debtor, was held to be a proper party to maintain an action in his own name on a note, although the money, when collected, was not for his use. *Hirschfelder v. Mitchell*, 54 Ala. 419. In this case the plaintiff was the owner of one-half interest in the note, had it in his possession, and could give an acquittance to the debtor.

After a transfer by the payees of notes, and while the same were owned by the transferee, it was held that the payees could not maintain an action in attachment for the debt evidenced by such notes, as they were not the real parties in interest. *Landauer v. Espenhain*, 95 Wis. 169, 70 N. W. 287.

A county superintendent who was the legal holder of a note turned over to him by town- 64 L. R. A.

ship trustees, and which note was given for money loaned by the trustee, was held to be the proper party plaintiff within the meaning of Ala. Code, requiring an action to be brought by the real party in interest, and Ala. act August 5, 1865, providing for the appointment of a superintendent of education in each county, and that all money or other property shall be turned over to the county superintendent. *Yerby v. Sexton*, 48 Ala. 311. In this case the court said: "Said trustees had, not only the legal title to said note, but were, within the meaning of said section, the parties really interested. What the words, 'the party really interested,' as used in this section, mean, I readily admit I do not very well understand; no rule, so far as I know, has been laid down by which their meaning as applicable to particular cases, or to cases generally, can be certainly ascertained. In ordinary cases, there is little difficulty. Where the dry legal title is in one, and a clear equitable title is in another, whether by transfer, delivery, or otherwise, to whom alone the money belongs, and who only is entitled to receive it, and authorized to discharge the debtor,—in such cases there is no trouble; the action must be brought in the name of the equitable owner. He is, in the language of said section, the party really interested. But where the party having the legal title is also the only party entitled to receive the money and discharge the debtor, although when collected he holds the money, not for his own use, but for the use of some other person or persons, and to whose use he is to apply it, or to whom he is bound to pay it,—in all such cases the action must be in the name of the party having the legal title."

An officer of a lodge may maintain an action upon a note payable to himself as such officer. *Bryan v. Willson*, 27 Ala. 208. The court said that where the note is made payable to the plaintiff it is an admission that he is entitled to receive the amount thereof. It further said that it is a general rule that an agent cannot sue in his own name on a note made to him in behalf of his principal; but there are exceptions. "One of this class of cases is where the promise is made in writing, and made to the agent by description of office."

Where the payee of a note, payable to him individually, brought an action on the same, and the answer set up that the note was the property of the township and was given for money

plaintiff, and the facts averred simply showed the payee was equitably entitled to the proceeds; but that is a question with which defendant need not concern himself. It is not alleged he had any defense to the note as against the payee, and in whom were the equities is a matter of no consequence. Had the plea set forth facts which constituted a defense to the note, either in whole or in part, a very different question would have been presented. The legal title of the note remaining in plaintiff, the fact that the payee may have been the equitable owner constitutes no sort of defense to the action. The suit was rightfully brought in the name of the party in whom was the legal title to the indebtedness, and it can make no difference to defendant who may

have been the equitable owner of the note if he had no defense on the merits." In *Brown v. Chenoworth*, 51 Tex. 470, the defendant pleaded that plaintiff after the execution of the note was adjudged a bankrupt, and that the note was transferred to his assignee in bankruptcy for the benefit of his creditors; that after his discharge in bankruptcy the note belonged to the creditors, who had not been paid. The court said that plaintiff, "the apparent owner of the note, might sue in his own name, and the mere fact that he was not the real owner would constitute no defense, either in bar or in abatement." In *Epting v. Jones*, 47 Ga. 622, it was held that "it is no good plea to a suit upon a promissory note that the suit is brought by the true owner in a ficti-

loaned from the township funds; that the payee had accounted for the same; that he should have delivered it to his successor in office, and that the plaintiff was not the real party in interest.—It was held that this constituted no defense. *Robbins v. Cheek*, 32 Ind. 328, 2 Am. Rep. 848.

But in an action brought upon a note indorsed by the payee, where plaintiff claimed to be the owner and holder, an answer alleging that the payee had never delivered the note to the plaintiff, and that the payee was the owner and holder of the note, was held to be a good answer. *Mendenhall v. Bayles*, 47 Ind. 575.

So, where a party brought an action on a note, and introduced the note in evidence, and it was indorsed by the payee, and the answer put in issue the ownership and want of interest in plaintiff, it was held that it was error to exclude evidence tending to prove that the note was not the property of plaintiff, that the same was never transferred to him, that he was not the real party in interest, and that the note was the property of a savings bank, which was the real party in interest. *Hays v. Hathorn*, 74 N. Y. 486.

And where a note indorsed by the payee was given to a bank to be used for thirty days, and such note was not so used, but was retained by the bank, and, after maturity, was transferred to a bona fide purchaser without notice, who brought an action thereon and to foreclose a mortgage securing the same; and the defense was that the plaintiff was not the real party in interest,—it was held that the payee of the note was the real party in interest, and plaintiff could not recover. *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644.

Where a note had been transferred by an indorsement of the payee, and an action was thereafter brought by him on the note, it was held that the plaintiff could not maintain such action as he was not the real party in interest. *Clawson v. Cone*, 2 Handy (Ohio) 67.

And where an assignment of a note was made, and the assignee sued one of the three makers of the note and did not sue the sureties, and subsequently the assignor brought suit against all the parties, it was held that he could not maintain an action on the note without a re-assignment of the same to him, as the assignees were the real parties in interest, and entitled to 64 L. R. A.

sue. *Anderson v. Yosemite Min. Co.* 9 Utah, 420, 35 Pac. 502.

See *Prall v. Hinchman*, 6 Duer, 351, *supra*, II.; *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383, *supra*, I.; *McCormick v. Williams*, 54 Iowa, 50, 6 N. W. 138, and *McMinn v. Freeman*, 68 N. C. 341, *infra*, XX. See also *supra*, II., *infra*, VIII., XIX., and XXIII.

VIII. Joint obligees and partial assignments.

The assignment by one obligee of his interest to another obligee, or to a third party, is held to constitute the remaining obligee and the assignee the real parties in interest. If an obligee has only a partial interest in the recovery of the debt, he cannot maintain an action on the same. A surviving obligee is the party in interest; but, if both obligees are dead, it is held that the representatives of both should sue.

A note was payable to two payees, and one of them assigned his half interest in the note to a third party. It was held that the remaining payee and the assignee could maintain an action thereon, such parties being the real parties in interest. *Groves v. Ruby*, 24 Ind. 418.

And where an action was brought to recover money paid by the plaintiff and another party, who had assigned his claim to the plaintiff, it was held that an instruction that the plaintiff was not the real party in interest was properly refused, as it was not competent for the defendant to question the sufficiency of the consideration therefor. *Stone v. Frost*, 61 N. Y. 614.

Subscribers to a contract to build a church, who paid their subscription, and who incurred obligations on the faith of the contract, were held to be the real parties in interest, and entitled to maintain an action on such subscription against a defaulting subscriber. *Hodges v. Nalty*, 104 Wis. 434, 80 N. W. 726.

In an equity action to establish the rights of parties advancing money against other parties liable by the express terms of the contract to contribute equally to such advances and share such liabilities, it was claimed that the plaintiffs were not the real parties in interest, because the enterprise was for the purpose of purchasing land for the benefit of two railroads, and five of the plaintiffs were officers in one company and three others in the other company; but it was held that there was no trust,

tious name, it not appearing by the plea that the defendant has any defense to the note."

The question involved in this case has been before this court, and for fifteen years it has been the settled law of this state that one holding the legal title to a chose in action may maintain an action thereon in his name, and, in my judgment, this should have been left at rest. In *Krapp v. Eldridge*, 33 Kan. 106, 109, 5 Pac. 372, 373, Mr. Chief Justice Horton, speaking for the court, said: "Finally, it is urged that the trial court committed error in not compelling Eldridge to answer upon cross-examination 'what he paid for the account.' The amount he paid was immaterial. The account was transferred and assigned in writ-

ing to him, and to this writing Carroll had attached his signature. Where an account is assigned absolutely, so that the assignee becomes in fact the owner thereof, he is the real party in interest. As Carroll had transferred in writing this account to Eldridge it was immaterial to Krapp whether he had given it to him or sold it to him. After such transfer and assignment, Eldridge was the only person entitled to maintain an action therefor. Of course, Eldridge, as assignee, had no rights which his assignor did not possess. Krapp was entitled to make all defenses against the account in Eldridge's hands which he might have made if the action had been brought in the name of Carroll." An able and thoroughly sound opinion involving the principles of this case

and that the plaintiffs acted in their individual capacity, and that they could maintain the action. *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332.

Notes were taken in settlement of a claim due plaintiff, payable to her attorneys, and plaintiff agreed that they should have the amount of the smaller note for fees, and all of the notes were indorsed by the attorneys. It was held that plaintiff was the real party in interest, and could maintain an action thereon. *Miller v. Wolbert*, 71 Iowa, 539, 29 N. W. 620, 32 N. W. 402. The court said: "While it is true they were to have the amount of the smaller note, it does not appear to have been understood that they were to have the note itself as their property. That was indorsed as well as the larger one, and both were treated in the same way. It may be that Grass & Storey had the right to hold the smaller note until they should be paid their fees. But we see nothing more. The plaintiff then, we think, is the real party in interest, so far as both notes are concerned, and we see no evidence tending to show otherwise."

Surviving obligees on a joint contract were held to be the real parties in interest, and could maintain an action on such contract without joining the heirs or representatives of the obligee. *Indiana, B. & W. R. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5. The court said: "If they do possess the entire right, then they are the real parties in interest, since it is inconceivable that, if they do possess the entire right, any other person can be a real party in interest. The principle of the common law vesting the whole right in the survivors is not changed by the Code, and, so long as the principle remains unchanged, the persons possessing this entire right must be regarded as the real parties in interest."

But where a chose in action as a penal bond had been assigned to two, both of whom were dead, it was held that, in treating a bond as an obligation to pay money, the real interest was not in the representatives of the survivor alone, but in the representatives of both the assignees; and an action by them for the recovery of purchase money and interest, on the failure of title to land, was properly brought in the name of the two representatives of the assignees jointly. *Skinner v. Bedell*, 32 Ala. 44. The difference between this case and the one preceding is probably on the ground that, the survivor having died, there was no one in whom

the legal title could vest, and, therefore, the representatives of both assignees were the real parties in interest.

Where a party to a contract transferred by an equitable assignment one half thereof to another party, it was held that both were proper parties plaintiff in an action thereon. *Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154.

Where a note as made payable to a husband and wife, and, after the husband's death, the wife brought an action thereon, it was held that the court erred in excluding evidence which tended to show that a legacy to the wife was intended to take the place of the note, and that she had turned the note over as assets of the decedent, and that it was competent to show that she was not the real party in interest. *Sanford v. Sanford*, 45 N. Y. 723.

And where a subscription was made promising to pay two persons for building an opera house, and one of the payees assigned all his interest in the same to the other payee and a third party, it was held that the assignor had no interest in an action on such subscription, and that the suit was improperly brought in the name of the original payees, and that it should have been brought by the remaining payee and the assignee of the interest of the other payee. *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51.

Where bonds were transferred on a settlement, and the transferee agreed to pay a portion of the proceeds to a third party, it was held that such third party could not maintain an action on the bonds. *Pleasants v. Erskine*, 82 Ala. 386, 2 So. 122. In this case the court said: "The contract, by which James J. Pleasants turned the bonds over to Robert did not, and does not, clothe Sam, plaintiff's intestate, with the real interest. It confers on him only a partial interest,—one-fourth interest in the net collections. Where a contract is one and single for the payment of a gross sum of money, it cannot, without the consent of the promisor, be so altered as to make it several, for the payment of parts of it to different persons separately."

See *Hirschfelder v. Mitchell*, 54 Ala. 419, *supra*, VII.; *Holderman v. Tedford*, 7 Kan. App. 657, 53 Pac. 887, *infra*, XI.; *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711, *infra*, XV.; *Filley v. Walker*, 28 Neb. 506, 44 N. W. 737, *infra*, XIX.; *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Silliman v. Tuttle*, 45 Barb. 171; *Tustin Fruit Asso. v. Earl Fruit Co.* (Cal.) 53 Pac.

was written by Judge Garver in *Linney v. Thompson*, 3 Kan. App. 718, 45 Pac. 456.

If Stewart had paid Price the amount of this account after the assignment, and before the suit, does any one doubt that this would have been a complete satisfaction? Price had been authorized to receive the money, and the account had been assigned to him and placed in his hands. A receipt from him would have been sufficient to protect Stewart, and could have been successfully pleaded in payment to any action thereafter prosecuted by Mrs. Thompson on that account. Holding the legal title, as he did, with authority to collect and receipt in full, why may he not maintain an action in his own name? The Code did not intend to adopt a rule that changes the law of com-

mercial paper, nor one that abolishes the equity rules as to parties to actions on contracts; but it intended to abrogate the common-law rule, and adopt and apply the equity rule of pleadings, so far, at least, as concerns the plaintiffs in actions on contracts and other choses in action. The principle running through and controlling in all of the foregoing decisions is that the person in possession and holding the legal title to the evidence of indebtedness sued on is the real party in interest, within the meaning of the Code, notwithstanding the entire beneficial interest is in another.

Johnston and Cunningham, JJ., concur with **Greene, J.**

693; and *Toney v. Snyder*, 50 Iowa, 73,—*infra*, XX.

IX. Fictitious payees.

An action was brought upon an instrument in writing given to Quan On Wing in payment for goods, and was assigned to plaintiff, who brought an action thereon. It was objected, in the supreme court, that the payee's name was fictitious, not showing the persons interested as partners, and that the payee could not maintain an action, and, therefore, the assignee could not. It was held that there was nothing in that point, and that, the assignment being established, the action was properly brought in the name of the real party in interest. *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783. This objection not having been made in the pleadings, and no objection having been made to the evidence, it was too late to raise the question on appeal in the supreme court.

In *Farwell v. Tyler*, 5 Iowa, 535, an action was brought in the name of D. C. F. on a note payable to him. The defense was that defendant had been a partner with one M. C. F., and the note was given to him on a settlement, but was made payable to D. C. F., a fictitious person, in order to prevent creditors of M. C. F. from seizing the same; that the note had never been delivered to plaintiff and that M. C. F. was still the owner and the real party in interest. It was held that M. C. F. could not sue upon the note in his own name, it not having been assigned. The court said that, if he owned it, the suit was properly brought; but held that any defense against M. C. F. could be made against the note if he was the party beneficially interested in the debt, although the suit was brought in the name of the person having the legal interest.

X. Bonds given in judicial and other proceedings.

a. On appeal.

If an assignment of a judgment is made the assignee is held to be the party in interest to maintain an action on the appeal bond. Under a statute giving a city the fees and costs received by an officer, the city is held to be the party in interest, in an action on an appeal

bond, for costs given in an action against city officers.

An action was assigned, but prosecuted in the name of the original plaintiff, and after the assignment the bond was given on appeal in the name of the original plaintiff. It was held that the assignee was the real party in interest, and could maintain an action for a breach of the bond in his own name. *Bennett v. McGrade*, 15 Minn. 132, Gil. 99.

So, where an appeal was taken in replevin, and the obligee in the appeal bond had caused an assignment of the judgment to be filed, it was held that the assignor could not maintain an action on such appeal bond. *Crum v. Stanley*, 55 Neb. 351, 75 N. W. 851.

A plaintiff recovered a judgment, and assigned his cause of action. The action was continued in the name of the plaintiff, and judgment for costs in his favor was obtained in the court of appeals, which judgment was also assigned to the same party. An action was thereafter brought in the name of the original plaintiff on the appeal bond to recover the costs. It was held that this could not be maintained for the reason that the attorney, being the equitable owner of the costs, should have brought the action in his own name. *Klapp v. Rapp*, 7 N. Y. Civ. Proc. Rep. 385.

Where an appeal was taken in an action against the officers of the city of New York, and the judgment in favor of the officers was affirmed, it was held that the city of New York was the real party in interest in an action on the appeal bond for costs, under N. Y. Laws 1882, chap. 410, § 56, providing that all fees and costs received by any officer shall be the property of the city, and Code Civ. Proc. § 449, providing that all actions must be brought in the name of the real party in interest. *New York v. Bannan*, 42 App. Div. 191, 58 N. Y. Supp. 1031.

b. In attachment.

Where a bond to pay any judgment which may be recovered was given to release an attachment, and was assigned to a third party in trust for another who paid the consideration of the assignment, and after the death of the equitable owner it was assigned to the trustee, widow of the deceased, it was held that such widow held the bond in trust for the estate, and, having the legal title, was the real

party in interest in the undertaking sued on, and was entitled to maintain an action as the "real party in interest." *Grant v. Heverin*, 77 Cal. 263, 19 Pac. 493, 18 Pac. 647.

In *Taafe v. Rosenthal*, 7 Cal. 515, it was stated that in an attachment bond given by the plaintiff to the state the defendant, being the real party in interest, could, no doubt, sue upon the undertaking in his own name.

But in an attachment action judgment was rendered against the plaintiffs for costs. An action was afterwards brought upon the attachment bond for costs, including witness fees, but the complaint did not show that such fees had been paid, or that the witnesses had assigned their claim to the plaintiff. It was held that the plaintiff could not recover. *Munzelheimer v. Byrne*, 56 Ark. 116, 19 S. W. 320.

c. In replevin.

A plaintiff succeeding in attachment was held to be the real party in interest and a proper party plaintiff in an action on the bond given in a replevin action against the sheriff, where that action failed, although the bond in replevin was given to the sheriff personally. It was held that the statute providing that a trustee of an express trust may bring an action in his own name did not prevent the beneficiary in the bond from maintaining this action. *Lomme v. Sweeney*, 1 Mont. 584.

On a redelivery bond in a replevin suit, given to the sheriff and payable to the plaintiff, the party for whose benefit the undertaking was taken was held to be the real party in interest. *Kimball v. Bleck*, 24 Or. 59, 32 Pac. 766; *McBeth v. Van Sickle*, 6 Nev. 134.

A replevin bond in attachment, if made payable to the officer, was held not to be within Ala. Code, § 2890, providing that actions on contracts for the payment of money must be brought by the real party in interest; and the plaintiff could not sue upon such bond as the real party in interest, as that section was confined to actions on contracts, express or implied, for the payment of money. *Agnew v. Leath*, 63 Ala. 345.

Property attached by a sheriff was replevied, and the sheriff, who was successful in the replevin suit, brought an action against the officer who served the replevin writ for taking an insufficient bond whereby the debt was lost. It was held that the sheriff was the real party in interest, and could maintain the action. *Shull v. Barton*, 58 Neb. 741, 79 N. W. 732, *Overruling* 56 Neb. 716, 71 Am. St. Rep. 698, 77 N. W. 132.

A bank obtained a judgment, execution, and levy. The defendant gave a replevin bond to the sheriff, and judgment was rendered in replevin in his favor. Subsequently an order was made substituting the bank as defendant in the replevin action, and it brought a suit on the replevin bond. It was held that Neb. Code Civ. Proc. § 50, authorizing the substitution of the plaintiff in execution to be made party defendant in a replevin action, did not mean after judgment, and that the real party in interest in the execution was the sheriff, and not the bank. *Hicklin v. Nebraska City Nat. Bank*, 8 Neb. 463, 1 N. W. 135. The court said: "It is true, also, that, if the defendant in error were the real party in interest in the execution under which the sheriff held the goods when they were replevied, it would have an interest—not a legal, but an equitable interest—which the 64 L. R. A.

law would protect in a proper action. . . . Looking, however, to the petition, we fail to see that the defendant in error has any interest whatever in the subject of the action, but, on the contrary, we do discover that said Farber, as sheriff, the person to whom it was given, was, and for aught that is pleaded is still, the real party in interest."

d. Other bonds.

It is generally held that a party for whose benefit a bond is given is the party in interest to maintain an action thereon, although the payee of the bond may be an officer of the state.

It was held that the owner of tobacco was the real party in interest, and could maintain an action on a warehouse bond executed for his benefit, running to the commonwealth, although the bond was informal as to statutory requirements. *Lane v. Kasey*, 1 Met. (Ky.) 410. The court said: "Under the former system of pleading, the action must have been brought in the name of the commonwealth, for the use and benefit of the plaintiff. But the Code of Practice has changed this rule of pleading by requiring every action to be prosecuted in the name of the real party in interest. The plaintiff was the person injured and the real party in interest, and, therefore, had a right to bring the action on the bond in his own name."

And where an action was brought upon an injunction bond to recover counsel fees for obtaining the dissolution of the injunction, and the obligees named were designated as "mayor of the city of Washington" and "marshal of the city of Washington," it was held that the city of Washington was the real party in interest. *Hyatt v. Washington*, 20 Ind. App. 148, 50 N. E. 402.

And under N. Y. act 1871, chap. 103, § 19, making it the duty of the board of education to commence suit against the city treasurer to recover for funds diverted, it was held that the board of education was the real party in interest, and was entitled to sue upon the treasurer's and tax receiver's bond, although the bond on its face was payable to the city. *Board of Education v. Quick*, 99 N. Y. 138, 1 N. E. 533.

Where a statute in regard to an election contest required a bond, but failed to provide for an obligee, and the bond was taken, in which the contestee was named as obligee, it was held that the election inspectors were the real parties in interest, and should have a right to maintain the action precisely as if no obligee had been named or the obligation had run to the state. *Moede v. Haines*, 66 Minn. 419, 69 N. W. 216. In this case it was said that, "although it was error to name the contestee as obligee, the obligors, who presumably are responsible for the error, should not be allowed to escape responsibility on this ground alone."

A master commissioner collected rents under an order of the court. It was held that the owner of such rents, being the real party in interest, could bring an action for the same against the surety on the master's bond, although the bond was executed to the commonwealth. *Tyler v. Exchange Bank*, 9 Ky. L. Rep. 195.

A bond was given by the defendant in an action to prevent the appointment of a receiver, and ran to the state. A judgment was obtained in that action, and suit was brought on the bond by the plaintiff. It was held that he

could maintain the action, as he was the real party in interest. *Baker v. Bartol*, 7 Cal. 551.

An assignee of a delivery bond given for property seized under an execution, which bond was not in accordance with the statute, but good as a common-law bond, was held to be a proper party plaintiff in an action thereon. *Waterman v. Frank*, 21 Mo. 108.

And the assignee of a penal bond conditioned to make the title to land when the purchase money was paid, was held to be the real party in interest, in an action on such bond. *Utey v. Foy*, 70 N. C. 303.

An action on a detinue bond in a justice's court was held to be properly brought in the name of the beneficiary, under Ala. Rev. Code, § 3204, providing that all actions founded on any contract, express or implied, brought before justices of the peace, must be brought in the name of the party really interested therein, whether he has the legal title or not. *Levystein v. Marks*, 56 Ala. 564. In this case the court said there was a substantial difference in the language of the two sections applying to the circuit court and to the justice's court. "While one limits the rule to contracts for the payment of money, the other embraces all actions founded on contract. The present suit is founded on a contract,—the bond of defendants, given when they sued out their writ in detinue. It results that the complaint first filed in the city court was right as to parties, and that court erred in sustaining the demurrer to it." The form of the bond was not given, but the court evidently held that the action need not be brought in the name of the obligee if he was not the party beneficially interested.

Where a bond was taken by a county treasurer from a bank payable to him as county treasurer to indemnify him for deposits, it was held that he was the real party in interest. *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. 78. In this case the court said: "There having been no question of the solvency of the treasurer and his sureties, no default, and the treasurer being liable over for the funds deposited with defendants, and the bond having been taken by the treasurer as one of indemnity, the fact that the money was that of the county, and upon its recovery by the treasurer must have been paid over to the county, did not change the status of the parties, invest the county with the title to the bond, nor divest the treasurer."

In an action in which the county was interested by reason of being the beneficiary in a bond, it has been held that the action should be brought in the name of the county.

A bond was given to a territory to prevent a sale of personal property for taxes, and the obligation was to pay to the tax collectors of G. county "when the same shall be payable as prescribed by law." It was held that the county was the proper party to prosecute an action on the same. *Curry v. Gila County* (Ariz.) 53 Pac. 4. The court said: "The complaint, and bond, which is a part of the complaint, clearly show that the bond was given for the benefit and use of the county in the exercise of its function of collecting taxes for 1895."

An official bond was given by a county treasurer, running to the territory by mistake. In an action thereon to recover for defalcation it was held that the county was the real and only party in interest, and was the proper party to

institute the action. *Jefferson County v. Lineberger*, 3 Mont. 281, 35 Am. Rep. 462.

Where an action was brought in the name of the state, for the use and on relation of Hickory county, on a bond of a collector of state and county revenue, for defalcation of county-revenue funds in his hands, it was held that the state was a mere nominal party, and that the county sued in its own right and was the real party in interest and a proper and necessary party to recover the lost revenue funds belonging to the county, for which the bond was given as security, as well as to secure the state revenue. *Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3.

And where a recognizance was taken in the name of the state it was held that an action could be properly brought thereon in the name of the county. *Shelby County v. Simmonds*, 33 Iowa, 345. In this case the court said: "The bond in this case was executed to the state, but the money forfeited thereon is to be paid into the county treasury, as a trust fund, for the benefit of the schools of the state. It clearly appears from the foregoing considerations that the county is the only party entitled to receive the money. There exists no party for whose benefit the money is held by the county, that may prosecute an action. Neither the people nor the different school organizations can prosecute the suit in their names. The county, therefore, is a proper party in whose name the action may be prosecuted."

An action was held to have been properly brought by the county on a bond for the hire of a convict made in the name of the county. *Pike County v. Hanchey*, 119 Ala. 36, 24 So. 751. In this case the court said: "The action was properly brought in the name of Pike county, not only because Pike county was the party really interested, and therefore the proper party plaintiff, under § 2594 of the Code of 1886, in the counts seeking a recovery for the payment of money, but by the terms of the contract Pike county is made the obligee or payee, and, therefore, entitled to maintain the action to recover damages for a breach of the agreement."

But in an action upon a county treasurer's bond, payable to the state of Ohio, to recover for a delinquency and for not paying over taxes collected for county, township, and school purposes, and money arising from the sale of school lands, it was held that the commissioners of the county could not maintain an action in their own names, as they were not the parties in interest. *Hunter v. Mercer County*, 10 Ohio St. 515.

It was further held that, under an act of Ohio, establishing a board of county commissioners, § 7, providing that a board of county commissioners shall be capable of suing in certain enumerated cases, but not providing for this kind of a case, no authority was conferred by this section to sue in this case. *Ibid*.

Where a surrogate made an order assigning bonds of an administratrix to a claimant having a decree against the administratrix, it was held that the claimant was the real and only party in interest to prosecute an action on the bond. *Baggott v. Boulger*, 2 Duer, 160. In this case the court said: "It is a useless proceeding to bring it in the name of 'the People on the relation of Edward Baggott.' . . . The common-law rule that an action on a bond must

be brought in the name of the obligee, whoever may be the owner, is abrogated by the Code."

An action for a breach of a sheriff's bond payable to the county was held to be properly brought in the name of the individual damaged for a breach of official duty, and the county was not a necessary party plaintiff. *Hollister v. Hubbard*, 11 S. D. 461, 78 N. W. 949; *Guernsey v. Tuthill*, 12 S. D. 584, 82 N. W. 190.

See *Hughes v. Oregon R. & Nav. Co.* 11 Or. 437, 5 Pac. 206, *supra*, IV.; *Skinner v. Bedell*, 32 Ala. 44, *supra*, VIII.; *People v. Slocum*, 1 Idaho, 62, *infra*, XXXII.

XI. Judgments.

The general rule is that an assignee of a judgment is the real party in interest in actions based upon such judgments. This is not the rule in Alabama, as the Code section in regard to real party in interest is held not to apply to judgments.

So, where a decree in foreclosure for a deficiency was assigned by the complainant, it was held that the assignees might maintain an action in their own name on such decree to set aside fraudulent conveyances, and to enforce the same. *Robinson v. Springfield Co.* 21 Fla. 203.

And where the complaint alleged that a judgment had been obtained by the plaintiffs in an action, against the defendant, and that the plaintiffs in such action equitably sold and assigned in writing said judgment to this plaintiff, who now owned the same, and the judgment plaintiffs were made defendants in this case to set up what interest they had, it was held that the action was properly brought in the name of the real party in interest. *Anthony v. Masters*, 28 Ind. App. 239, 62 N. E. 505.

In *Moore v. Nowell*, 94 N. C. 285, it was held that judgments arise out of contracts, and that an assignee could maintain an action on them in his own name, under N. C. Code, § 177, providing that every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

Under Mont. Stat., requiring all suits to be brought in the name of the real party in interest, it was held that a scire facias to revive a judgment should be sued out in the name of the assignees of the judgment. *Haupt v. Burton*. 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110.

A right of action against a garnishee, under Ohio Code Civ. Proc. § 218, giving such an action, was held to pass by an assignment of the judgment that was obtained in attachment, and the assignee was a proper party to maintain an action in his own name. *Whitman v. Keith*, 18 Ohio St. 134.

And where a claim was assigned after suit was brought, and a judgment was recovered thereon, it was held that a creditor's bill based upon that judgment must be brought in the name of the assignee. *Wilson v. Kiesel*, 9 Utah, 397, 35 Pac. 488.

Parties covenanted to indemnify the defendants in an action in New York, and to pay any judgment rendered. A judgment was rendered and taken to the Supreme Court of the United States, and, while pending there, a judgment was recovered in Wisconsin upon the New York judgment, and was paid by the indemnitors. 64 L. R. A.

The Supreme Court of the United States reversed the judgment of New York, and it was held that the covenantors were the real parties in interest in an application to vacate the Wisconsin judgment. *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107.

It was also held in *Mann v. Ætna Ins. Co.* 38 Wis. 114, that the real defendant who paid such a judgment against a nominal defendant, which judgment was afterwards vacated, could recover in his own name the money so paid. The court said: "Though the plaintiffs were not named parties to the record, still they were the parties in interest who were really affected by the judgment, and stood in such relation to it that they were entitled to move to have it set aside."

In *Cottle v. Cole*, 20 Iowa, 481, which held that an assignee of a judgment might sue thereon, the court said: "The course of decisions in this state establishes this rule, *viz.*, that the party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery; but he is open, in such case, to any defense which exists against the party beneficially interested. *Farwell v. Tyler*, 5 Iowa, 535; *Fear v. Jones*, 6 Iowa, 169; *Sheldon v. Middleton*, 10 Iowa, 17. Or, under the Revision, the party beneficially interested, though he may not have the legal title, may sue in his own name. *Conyngham v. Smith*, 16 Iowa, 471, construing Rev. § 2757. . . . Holding, as the plaintiff did, the legal title to the judgment by assignment, he could sue upon it; and his right to recover could not be defeated by simply showing that Cluff was the party beneficially interested in the action. This, alone, would not constitute a defense."

Farwell v. Tyler, 5 Iowa, 535, *supra*, cited by the court, held that the equitable owner of a note could not sue thereon; but this was overruled by many Iowa cases. See *Conyngham v. Smith*, 16 Iowa, 471, and *Knadler v. Sharp*, 36 Iowa, 232, *supra*, I.

But after an action had begun on promissory notes the plaintiff assigned the claim and all interest in the judgment to another party, and authorized the assignee to prosecute the suit in the plaintiff's name to final judgment, and to receipt for the same. The notes were not assigned. It was held that it was improper to substitute the assignee as a party, and that the action should be prosecuted by the original plaintiff. *Allen v. Newbery*, 8 Iowa, 65. In this case the court said: "Civil actions are to be prosecuted in the name of the real party in interest. . . . After an action has been commenced, however, the plaintiff may sell and dispose of the judgment he may recover, without investing the person purchasing it with the legal interest to the thing in action. Under such an assignment, it would be improper to substitute the holder of it as plaintiff, with the power to prosecute in his own name. And taking the writing, made in this case, in all its parts, we are inclined to either give it this latter character, or to conclude that it was not the intention to invest Nichols with the legal title to the notes."

Where a promise was made on a valuable consideration to release a deficiency judgment benefiting several judgment creditors, it was held that one of them could maintain an action upon it. *Holderman v. Tedford*, 7 Kan. App. 657, 53 Pac. 887. The court does not cite the Code.

An assignee of a judgment holding, also, the power to collect the same was held not entitled to maintain an action to redeem from foreclosure sale, although he was not a party to the foreclosure proceedings. *McKee v. Murphy*, 2 Jones & S. 261. In this case the court said: "The defendants in this case defended upon the express ground, among others, that the plaintiff was not the real party in interest, and to be able, therefore, to maintain the action, it was necessary for the plaintiff either to prove himself to be the bona fide legal owner of the equity of redemption, or to bring himself within one of the exceptions authorized by the Code. He failed to do either."

An action on a judgment that had been assigned was held to be properly brought in the name of the original plaintiff, as a judgment was not a "contract, express or implied, for the payment of money," under Ala. Code, § 2890, providing that "actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested," etc. *Wolfe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Maaterson v. Gibson*, 56 Ala. 56; *Johnson v. Martin*, 54 Ala. 271.

Where, on appeal, a motion was made to substitute as party plaintiff an assignee of the judgment, and his counsel admitted that he had paid the judgment in fact for one of the defendants, the court said: "The latter, if anyone, should be made a party to the action as the 'party in interest.' Code, § 177. This, however, would present the singular spectacle of the same person being plaintiff and one of the defendants. The motion is denied." *Field v. Wheeler*, 120 N. C. 264, 26 S. E. 812.

See *Cottle v. Cole*, 20 Iowa, 485; *Brown v. Powers*, 53 App. Div. 251, 65 N. Y. Supp. 733; *Searing v. Berry*, 58 Iowa, 20, 11 N. W. 708, — *supra*, II.; *Kelley v. Love*, 35 Ind. 106; *Thomas v. Irwin*, 90 Ind. 557; *J. I. Case Threshing Mach. Co. v. Pederson*, 6 S. D. 140, 60 N. W. 747, — *supra*, III.; *Bartholomew County v. Jameson*, 86 Ind. 154; *Root v. Morlarty*, 39 Ind. 85, *supra*, V.; *Smith v. Harrison*, 33 Ala. 706, *supra*, VII.; *Ashby v. Ashby*, 39 La. Ann. 105, 1 So. 282, *infra*, XVI.; *Daby v. Ericsson*, 45 N. Y. 786, *infra*, XIX.; *Greene v. Niagara F. Ins. Co.* 6 Hun, 128, *infra*, XXI.

XII. Corporations, stockholders, and associations.

A corporation locating a railroad on acquired land upon compliance with the act of Congress making the grant was held to be the real party in interest in an action to restrain other parties from obtaining title, and it was no defense that the other parties had a beneficial interest in the subject-matter of the suit. *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.* 23 Minn. 359. The court said that stockholders might have a beneficial interest, but that they would not be proper parties to an action brought to enforce the strictly legal right, or to redress a wrong committed against the corporation.

And where the court found that the plaintiff had never held the notes sued on, excepting as treasurer and as mere custodian for an association, and that he was never authorized to sue upon said notes in his own name, but prosecuted a suit without the knowledge or direction of the association and without any right so to do, it was held that he was not the real party in interest, nor was he a trustee of an express

trust. *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224. In this case the facts disclosed that the plaintiff was a mere agent for the custody of the paper, not named in the paper as trustee, and acting in the suit with neither authority nor consent of the association; and that he was only connected with the transaction without any intention to make him trustee. This was an action to foreclose a note and mortgage. The notes had been indorsed in blank, and the mortgage had been assigned to the complainant.

But, where a stockholder in a building association brought suit to restrain the officers from closing out a series of shares before maturity and releasing securities in violation of its by-laws, it was held that he was the real party in interest notwithstanding the stock in the association was pledged as collateral for a loan. *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1006. In this case the court said: "Plaintiff has still such rights, as owner of the equity of redemption in the stock, as will authorize in equity his interposition to prevent its destruction or impairment by the wrongful acts of the company's board of directors."

Where a legacy was to be paid to a person who should act as treasurer of the American Protestant Society, and such society with two others was dissolved, and the members associated themselves under the name of the American Foreign Christian Union, it was held that the proper person to prosecute for this legacy was the treasurer of the American Protestant Society, or his successor (if there were such), the treasurer of the American Foreign Christian Union. *DeWitt v. Chandler*, 11 Abb. Pr. 459. The court said: "The suit shall be brought by the real party in interest, or by the party who occupied the position of a trustee of an express trust." In this case the action for the legacy was brought in the name of the president, instead of by the treasurer.

See *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611, *supra*, I.; *Bell v. Tilden*, 16 Hun, 346; *Gillispie v. Ft. Wayne & S. R. Co.* 12 Ind. 398; — *supra*, II.; *Chin Kem You v. Ah Joan*, 75 Cal. 127, 16 Pac. 705, *infra*, XX.; *State ex rel. Gilbert v. Union Ins. Co.* 7 S. D. 51, 63 N. W. 232, *infra*, XXXII.

XIII. Receivers.

In an action on a note by a receiver in chancery, it was held that he was the party really interested, where both parties to a note were enjoined from collecting, and the maker was enjoined from paying, and the receiver had been ordered to collect the same. *Leonard v. Storrs*, 31 Ala. 488.

In an action on an account, where the plaintiff's title was an assignment by receivers of a corporation, it was held that, if no consideration had been paid by the assignee, the defendant would be protected by making payment to him, and could not object to his title; that it constituted the plaintiff the real party in interest if he had a valid transfer as against the assignor, and held the legal title to the demand. *Toplitz v. King Bridge Co.* 20 Misc. 576, 46 N. Y. Supp. 418.

In *Merchants' Loan & T. Co. v. Clair*, 36 Hun, 362, where a receiver of a New Jersey corporation brought an action in New York in the name of the corporation under N. J. Stat. 1877, p. 187, authorizing such an action, it was held that such statute had no extraterritorial force, and that it should have been brought by the re-

celver, who alone would be recognized as the real party in interest.

XIV. Assignments for creditors.

After an assignment for creditors a discharge in bankruptcy was had, and it was held that the assignee for creditors could not maintain an action to foreclose a mortgage belonging to the assignor, as the discharge in bankruptcy caused the trusteeship of the assignee to cease, and the property remaining in the hands of the assignee belonged to the bankrupt. *Seymour v. Street*, 5 Neb. 85.

An action on a note was brought by an assignee for creditors, and the defense was that the marshal had levied upon the note, treating the assignment as void. This defense was held valid. *Rohrer v. Turrill*, 4 Minn. 407, Gil. 309.

XV. Husband and wife.

A husband and wife were lessees of real estate, but the buildings placed on it were the property of the wife, and she brought an action on a contract made between herself and husband and the city wherein the city obtained permission to excavate for a sewer on the property, and agreed to pay all damages. It was held that the wife was a proper party plaintiff, and the fact that the husband joined with her in executing the contract did not make him a necessary party, for he was not the real party in interest. *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711. The court said: "The party who owns the property injured by the negligence of another is the one who should bring the action. It is true that the complaint avers that her husband had an interest in the property as the manager for their joint benefit, but, taking all the allegations of the complaint together, it must be held that the husband was simply the agent, and the wife the owner of the property injured."

And where plaintiff brought an action against an agent for fraud in buying land for plaintiff, on which land the agent had a secret option and converted the difference, it was held that plaintiff was the real party in interest notwithstanding that a letter from him to defendant indicated that the purchase was to be on account of his wife, but that the title should be in his name. The contract was made in the name of the plaintiff, and there was nothing else, except this letter, to indicate that he was not the real party in interest. *Hewitt v. Young*, 82 Iowa, 224, 47 N. E. 1084.

And where a widow continued her husband's business, and signed his name in her business transactions, and brought a suit in his name upon one of them, it was held that she was the real party in interest, but that she was as well known by the name in which the suit was brought as by that of her proper name, and could maintain the action in that name. *Deets v. Smith*, 6 Kan. App. 601, 51 Pac. 581.

But in *Carpenter v. Tatro*, 38 Wis. 297, a divorced woman married again, and her second husband furnished necessities to a child of her former husband, and assigned to her the claim. She brought an action thereon. It was held that a married woman having no separate estate could not acquire the claim from her husband, and, therefore, was not the party in interest, and could not maintain the action.

On notes payable to a husband or wife, it appears that the equitable owners thereof are

the real parties in interest. See *Grantham v. Payne*, 77 Ala. 584; *McDowell v. Bartlett*, 14 Iowa, 157; *Cassidy v. First Nat. Bank*, 30 Minn. 86, 14 N. W. 863,—*supra*, II.; *Sanford v. Sanford*, 45 N. Y. 723, *supra*, VII.

See, further, *Denver, St. P. & P. R. Co. v. Frame*, 6 Colo. 382, *infra*, XXII.; *Ray v. Honeycutt*, 119 N. C. 510, 26 S. E. 127, *infra*, XXXIII.

XVI. Infants; parent and child.

A contract of employment of a minor was entered into by the employer, the step-father, and the minor, and provided that a part of the services was to be performed by the step-father, but the contract was ambiguous as to whom the wages should be paid. The step-father brought suit for breach of contract in not allowing him to perform the services, and he alleged that the previous payments had all been made to him. It was held that he was the proper party to maintain an action on such contract. *Tilley v. Harrison*, 91 Ala. 295, 8 So. 802. This was on the ground that the minor was not entitled to receive the money, and could give no acquittance therefor.

Under Minn. Gen. Stat. chap. 66, § 26, providing that every action must be prosecuted in the name of the real party in interest, and § 30, providing that, when an infant is plaintiff, he shall appear by his guardian, it was held that an action upon an insurance policy payable "to their children for their use, or to their guardian if under age," was properly brought in the name of the infants "by their guardian *ad litem*." *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 497, 10 Am. Rep. 166, Gil. 473. The court said: "The children are the real parties in interest, and, therefore, the action is, under the statute (Gen. Stat. chap. 66, §§ 26, 30), well brought by them in their own names, they appearing by a guardian *ad litem*. Even if the general guardian be regarded as a trustee of an express trust, the statute authorizing such trustees to bring actions in their own names is not imperative, but permissive in its terms. Gen. Stat. chap. 60, § 28."

In an action by an assignee of a debt, an answer alleging that the assignor was a minor and could not assign, that the suit was solely for her benefit, and that she was made a defendant to give the court jurisdiction as to venue and with the intention of enabling her to testify, was held to show that the plaintiff was not the real party in interest. *Lawrence v. Long*, 18 Ind. 301.

But where a judgment was in favor of children, and they had all attained their majority, it was held that their mother, who had at one time been their tutrix, could not individually prosecute a suit on that judgment to have fraudulent conveyances of the debtor set aside. *Ashby v. Ashby*, 39 La. Ann. 105, 1 So. 282.

Where an action was brought for damages for killing plaintiff's cow it was held that plaintiff was the real party in interest, although the cow had been given to plaintiff for his son, Boss, the donor stating: "Take that blue calf as your own, and when Boss . . . comes twenty-one years old give him a cow as good as that one will make." *Wood v. St. Louis, I. M. & S. R. Co.* 20 Mo. App. 601. The court said: "Plainly it was a gift of the calf to the plaintiff, coupled with the request that the plaintiff would give to Boss, not the particular cow

which this calf would make, but as good a cow, —that is, another cow."

See *Todd v. Weber*, 95 N. Y. 181 47 Am. Rep. 20, *supra*, IV.

XVII. Executors and administrators; wills.

An executor or administrator is the real party in interest in actions on choses in action belonging to the estate, or on contracts made by him for the benefit of the estate. It is held that he may sue individually on contracts for which he is personally responsible to the estate. But an administrator cannot maintain an action where the subject-matter involved relates to real estate belonging to the heirs.

An executrix sold on credit the property of the estate, and sued to recover the debt. It was held that she, as an individual, was the real party in interest in an action on the contract. *Thompson v. Whitmarsh*, 100 N. Y. 35, 2 N. E. 273. This was on the ground that the contract was made with her, and the promise to pay ran to her, and she was personally accountable for the assets which she had sold.

In an action by an executrix in her individual name to recover on a note payable to testator or bearer, where the defense was that the plaintiff was not the real party in interest, but that the action should have been brought by her as executrix, judgment was rendered for plaintiff without opinion. *Curtis v. Dean*, 77 App. Div. 632, 79 N. Y. Supp. 1130. In this case the possession of a note payable to bearer evidently was *prima facie* evidence of ownership, and, in addition to that, the plaintiff claimed in her evidence that she was entitled to the note as distributee.

And where an administrator assigned all claims for an infringement of a patent, it was held that the assignee could maintain an action thereon in the Federal court. *May v. Logan County*, 30 Fed. 250.

In *Niederhaus v. Heldt*, 27 Ind. 480, an action was brought by a citizen and taxpayer to set aside a probate of a joint will, on the ground that neither the testator nor the testatrix had any heirs within the jurisdiction of the United States. This action was brought under Ind. act May 31, 1852 (2 Gavin & Hord, § 39, p. 559), providing that any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been filed for probate. It was held that the Code provision, requiring every action to be prosecuted in the name of the real party in interest, applied also, and that, as plaintiff had no interest, he could not maintain the action. But an adverse suit to determine the right to mining profits was held to have been improperly brought by the administrator on the ground that the heirs, being the real parties in interest, could, alone, maintain such action. *Keeler v. Trueman*, 15 Colo. 143, 25 Pac. 311.

And where notes were taken by a sheriff individually under an order of sale, and he died, it was held that his administrator was not the real party in interest, and could not maintain an action on the notes. *Pratt v. Carr*, 46 Ind. 67.

Legatees have been held to be the real parties in interest in actions against the executor for conversion; and where there were neither debts nor an administrator, it was held that the legatees could maintain an action for waste; and 64 L. R. A.

a distributee receiving a note was held to be the proper party to sue thereon.

A wife, who was the sole legatee of her husband's will, was held to be the only party in interest, and she alone could complain of an unlawful conversion by the executor of the personality, and an heir could not maintain such action. *State ex rel. Ruhlman v. Ruhlman*, 111 Ind. 17, 11 N. E. 793.

So, a sole legatee and devisee was held to be a proper party to bring a suit for waste where there were no administrator and no debts, and the property was held by the testatrix, a wife, as her statutory separate estate. *DeBardelaben v. Stoudenmire*, 82 Ala. 574, 2 So. 488. This was on the ground that the complainant was the equitable owner.

In *Carter v. Owens*, 41 Ala. 217, it was held that distributee could maintain an action on a note payable to a testator, where it was shown that there were no debts due by the estate, and there was no administrator, and the note was given to the distributee as his share. This was under Ala. Code, § 2129, providing that actions on contracts for money should be brought by the real party in interest. The court said that, "under this section, the plaintiff may sue, although holding only an equitable title."

Executors of an assignee of a note and mortgage brought an action thereon, and it was claimed that the testator had given the same to his daughter, and that, therefore, the executors could not sue. It was held that the defendant had the statutory right to have the cause of action against him prosecuted by the real person in interest. But the rule was laid down that "where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest;" and it was held that, by satisfying the present judgment, the defendant would be discharged from all liability to the alleged conflicting claimants, and that was all that he could ask. *Giselman v. Starr*, 106 Cal. 651, 40 Pac. 8.

But a sole legatee, who was executor also, but had not qualified, was held not to be a proper party to institute an action on a note payable to his testator, in the absence of a showing that there were no debts, or that the debts had all been paid. *Wood v. Cosby*, 76 Ala. 557.

See *Kelley v. Love*, 35 Ind. 106, *supra*, III.; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Smith v. Smith*, 5 Bush, 625,—*supra*, IV.; *Sanford v. Sanford*, 45 N. Y. 723, *supra*, VIII.

XVIII. Landlord and tenant.

A lessee has been held to be the real party in interest in an action for damages to leasehold, where he was an assignee of the lessor, and where his leasehold interest was injured. In contracts by an agent of the lessor in the name of the agent either may sue, and an assignee of the lessor owning the claim may sue for rent.

A lessee, having also an assignment from the lessor of damages for obstruction of a street in front of the premises, was held to be a proper

party to maintain an action therefor. *Hall v. Cincinnati, H. & D. R. Co.* 1 Disney (Ohio) 58.

Under N. C. Code, § 1754, providing that crops shall be deemed and held to be vested in possession of the lessor, it was held that this was only for the lessor's protection; and, as against anyone except him, the tenant was entitled to the possession of the land while it was being cultivated, and could maintain an action in his own name for any injury thereto; and for this purpose he was the "real party in interest" within the spirit and meaning of the North Carolina Code. *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692.

And a lessee of a hotel, having the right to a free and uninterrupted use of the easements, was held to be the party in interest in an action of trespass for a nuisance for obstruction of a right of way. *Avery v. New York C. & H. R. R. Co.* 26 N. Y. S. R. 279, 7 N. Y. Supp. 341.

In *Kansas City, Ft. S. & M. R. Co. v. King*, 63 Ark. 251, 38 S. W. 13, it was held that the owner of land was not a proper party plaintiff to bring an action for damages to land in the possession of his tenant, where a railroad company had constructed a temporary fence cutting the tenant off from water. The court said that the right of action, "if there was any, was in the tenant, who, as we understand, was in possession when the wrong was done of which the appellee complains, and held continuous possession until after the institution of this suit." The court does not discuss the statutory requirement as to who must bring an action, but the case evidently was decided with the statute in view.

And in *Tarpey v. Deseret Salt Co.* 5 Utah, 205, 14 Pac. 338, which was an action for possession, brought by the lessee, it was held that the court improperly excluded a lease which established the plaintiff's right of possession, although such lease recited that actions for possession should be in the name of the lessor. In this case the court said: "It is nowhere otherwise provided that an action of this character could be instituted in the name of anyone not having the title to the possession. That title was not in the railroad company. It was alone in the appellant. The recital in the lease did not pertain to the issue as to the possession, but was a collateral matter, affecting only the appellant and the railroad company. It did not affect the respondent."

Where a lease not under seal was made, by which the lessor rented a farm "now owned by Catherine Whitney," and there was nothing to show that the lessor was principal or agent, it was held that the action was properly brought by the lessor, and that he was the real party in interest; as in such a case the action could be maintained either by the principal or agent, in either of their individual names. *Manette v. Simpson*, 39 N. Y. S. R. 617, 15 N. Y. Supp. 448.

The assignee of a claim for rent was held to be the proper party, and entitled to bring an action for its recovery, in his own name. *Mills v. Murry*, 1 Neb. 327.

See *Walker v. Mauro*, 18 Mo. 564, *supra*, V.; *Schaefer v. Henkel*, 75 N. Y. 378, *infra*, XX.; *Weise v. Gerner*, 42 Mo. 527, *infra*, XXIX.

XIX. Partnership.

A partner obtaining the interest of his copartner is held to be the real party in interest; and so is an assignee of a surviving partner. But it has been held that the assignment by one 64 L. R. A.

partner of his interest in a special partnership to a third party, without the knowledge of his copartner, would not prevent an action by the firm.

A partner who obtained from his copartner an assignment of an open account due the firm was held to be the real party in interest to sue on the same. *Swails v. Coverdill*, 17 Ind. 337.

So, where one partner assigned a firm claim to his copartner, it was held that the latter must sue thereon in his own name. *Stuckey v. Fritsche*, 77 Wis. 329, 46 N. W. 59. The court said: "We are not aware of any rule of law which prevents one partner from assigning to his copartner his interest in any particular debt due such partners; and, under our Code of Procedure, when such claim is so assigned the individual partner may, and in fact must, sue upon it in his own name."

And after the dissolution of a partnership and a purchase by one of the partnership property, the one who has become the exclusive owner of an account sued on was held to be the only party really interested in collecting the balance due. *Walker v. Steel*, 9 Colo. 388, 12 Pac. 423.

Where a judgment was owned by a partnership firm, and two of the members died, and the surviving partner assigned the judgment, which was a copartnership demand of the firm, it was held that the survivor had the right to assign. *Daly v. Ericsson*, 45 N. Y. 786. The court said: "The survivor of a firm is the real party in interest to a demand owned by or due to the firm. The debtor cannot, when sued by the survivor, object that the representatives of the deceased partner are not made parties with the survivor. . . . It is not material upon the question of the capacity of the surviving partner to maintain an action for the partnership demand, that the beneficial interest in the claim was by the arrangement between the copartners and the deceased, or that upon an accounting his representatives would be entitled to the proceeds."

In *Christ v. Schell*, 31 Fed. 550, it was held that causes of action accruing to one firm may be recovered upon by another firm which has succeeded to its rights.

An indorsee of a bill of exchange indorsed by one of the partners in his individual name was held to be the proper party plaintiff; but, as the first count in the complaint was upon an indorsement, and did not contain an allegation appropriate to recover upon the equitable title, it was held insufficient. *Alabama Coal Min. Co. v. Brainard*, 25 Ala. 476.

But where a partnership of two brought an action for damages for failure of the vendee to comply with the contract of sale, the fact that one of the firm, without the knowledge of his copartner, sold his interest in firm cattle to another party, was held not to make such third person a party in interest, or prevent a recovery in the name of the original firm. *Filley v. Walker*, 28 Neb. 506, 44 N. W. 737.

See *Smith v. Westcott*, 34 Fla. 430, 16 So. 332, *supra*, II.

XX. Principal and agent, and parties claiming title therefrom.

The principal has been held to be the real party in interest in actions brought by him against the agent. The same has been held in actions on contracts made by an agent, even when the principal was not disclosed, and in

actions for real estate belonging to the principal, and where the contract was in the principal's name, and where the agent had no interest. An agent has been held to be the real party in interest on contracts made by him in his own name under seal, and where he had an interest or special property in the matter in controversy; and it has been held that he could sue in his own name where he contracted as principal.

A debtor placing notes in the hands of another on a special contract to collect the same and to pay certain creditors was held to be a proper party to maintain an action of assumpsit against the estate of his agent for failure to carry out the contract. *Shotwell v. Gilkey*, 31 Ala. 724.

A principal who sued in his own name upon a simple contract made in writing with his agent, of which the principal was the sole owner, was held to be the real party in interest. *Erickson v. Compton*, 6 How. Pr. 471.

And where a contract was made by an agent for the benefit of his principal, it was held that the principal could sue on the contract, even though the agent might also have the right to sue; and this was so held where the contract was made in the name of the agent, and the principal's name was not disclosed. *St. Louis, K. C. & N. R. Co. v. Thatcher*, 13 Kan. 564.

In an action on a written contract for trading in sewing machines, naming Bartran, "agent," as the obligee, it was held that the principal was the real party in interest to maintain an action on such contract. *Weed Sewing Mach. Co. v. Wicks*, 3 Dill. 261, Fed. Cas. No. 17,348. This conclusion was reached by applying the Missouri Code provision in regard to real parties in interest to suits in the Federal court.

In *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618, it was held that principals may sue in their own name on a contract in writing made and signed by their agent without disclosing the principals. In this case the court said: "Although the cases cited are conflicting, the best authority and soundest reasoning, I think, are in favor of the position that, in such cases, the principal may bring the action. But, in order to maintain it, he must show the agency, and the power of the agent to bind him, at the time of making the contract, else there would be no mutuality, and consequently no contract."

Where an agent assumed the ownership of property bought by him for two persons, and one of them assigned all of his interest to a third party, who brought suit to enforce the trust, it was held that he was the real party in interest. *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 266. The court said: "It is sufficient, under the Code, if he holds the legal title to the demand." But the court held that the other principals should have been made parties to the action.

And where the title to property was in the name of one person for the benefit of several owners, and he sold the property in his individual name, it was held that all the joint owners could sue upon the bill of sale, as it was for their joint benefit, and they were the real parties in interest. *Silliman v. Tuttle*, 45 Barb. 171.

Five persons contributed \$5 each for a bet, and one of them deposited the whole amount with the stakeholder. It was held that the de-

positor could not maintain an action for any of the fund contributed by the others. *Toney v. Snyder*, 50 Iowa. 73. The court said: "This seems to have been the ruling in New York, in the absence of any statute requiring the action to be brought in the name of the real party in interest. *Ruckman v. Pitcher*, 20 N. Y. 9."

The action in New York was brought before the Code of Procedure, requiring actions to be brought in the name of the real party in interest, was adopted, and, although the case ran from 1844 to 1850, the court did not refer to the New York Code.

An agent appointed under parol authority to take care of real property was held to have no such interest as would authorize him to maintain an action in his own name to recover possession from the holder under a tax title. *McHenry v. Painter*, 58 Iowa, 365, 12 N. W. 338. In this case the court said that he could not recover as trustee, because, under the Code, § 1934, a trust must be executed the same as deeds or conveyances.

Where a Chinese pawnbroker claimed to have loaned money for the Hong Fook Tong Society, and the contract in Chinese was a memorandum showing that Ah Joan borrowed \$500 from the Hong Fook Tong Society, it was held that the agent was not the real party in interest, and was not authorized to bring a suit in his own name, and that the cause of action, if any existed, was in favor of the Hong Fook Tong Society. *Chin Kem You v. Ah Joan*, 75 Cal. 124, 16 Pac. 705. In this case there was no showing made that the plaintiff had any personal interest in the money, or was a member of the Hong Fook Tong Society. It was further held that there was no showing made that plaintiff made the loan as trustee of an express trust.

In *Sutton v. Mansfield*, 47 Conn. 388, which was a bill in equity to set aside an award, it was held that an agent having no real interest in the controversy could not maintain the bill to set aside the award.

And, where an agent claimed that he was authorized in writing to procure insurance, and brought an action for a premium paid by him, it was held that, if the action was for premiums, the insurance company was the party in interest; and, if it was for money paid out by plaintiff personally, it was held that the payment was a voluntary one, and, as it had not been made until after the action was commenced, he could not recover in either event. *Ross v. Rubin*, 25 Misc. 479, 54 N. Y. Supp. 1036.

So where a party who sold goods for a merchant was to sell only for cash, and verbally agreed that on failure so to do he would be personally responsible, and a sale was made on credit and charged on the employer's books, it was held that the employer was the only person authorized to sue. *Smock v. Brush*, 62 Ind. 156, 176. In this case the court said (p. 159): "We think it was most clearly shown by the evidence that Owen, Pixley, & Co. were the parties, and only parties, entitled to sue in this action, and that, in legal contemplation, Brush, the plaintiff, had no interest whatever in the subject-matter in controversy. A merely verbal understanding that the plaintiff was to be personally responsible for the debt, if it could not be collected, was within the statute of frauds, and not binding on him, and did not, in any event, confer any ownership of the debt upon him."

A real-estate broker making a contract for the conveyance of property to him or his assignees was held not to be the real party in interest in an action for specific performance, where his sole interest was a commission of 5 per cent, and he demanded a deed conveying the property to the purchaser. *Lawyer v. Post*, 47 C. C. A. 491, 109 Fed. 512. In this case the court said: "Conceding Lawyer to be the party in interest, he does not appear to have made any demand on the defendants for the conveyance of any of the property to him. If he be not the real party in interest he cannot maintain the action."

And where a contract was made by an agent, who had no personal interest in the contract, it was held that the only parties in interest were the principals, and the action should have been prosecuted in their names. *Rawlings v. Fuller*, 31 Ind. 255.

But where an agent having parol authority to make a lease executed a lease under his own seal as party of the first part, and signed his own name as agent, it was held that the owners could not maintain an action thereon in their own name for rent, in the absence of proof showing that the lessees had knowledge of the owners' rights. *Schaefer v. Henkel*, 75 N. Y. 378. The court said: "One great object of this provision was, to enable an assignee of a chose in action to sue in his own name; and it would be placing a construction upon this provision which is, I think, unwarranted, to hold that a sealed instrument executed by parties belongs to another, without any transfer whatever by a party named therein. The parties whose signatures and seals are affixed to such an instrument, and who alone are named therein, are the real parties in interest, for they only are bound thereby. No right, therefore, exists in a stranger, as against one of them, until there is an assignment of the interest of such party."

In *Fear v. Jones*, 6 Iowa, 169, a bill of sale was executed by an agent for a threshing machine, and a note was given for the same. By mistake a machine of higher value was taken. The agent brought suit in his own name to recover the difference in the value, and it was held that, as the contract was made in his name, and the promise made to him, he was the party having the legal interest, and the proper plaintiff.

And where an agent sold an engine, furnished working material to set it up, and gave his personal guaranty for one year, it was held that he was the real party in interest in an action for the price, although the contract provided that the engine was to remain the property of the gas-engine company until paid for in full. *Welsh v. Rheinhardt & Co.* 21 Misc. 22, 46 N. Y. Supp. 866, *Affirmed* 20 Misc. 407, 45 N. Y. Supp. 1026. In this case the court said: "The real party in interest is the party having the sole right to enforce the contract, and the plaintiff is that party, the contract being, not simply for the sale of the engine for which plaintiff might have been regarded as acting merely as agent, but for labor and materials for which he contracted as principal, and for a collateral warranty upon which he alone is liable."

And where a factor brought an action against a wrongdoer for taking from the possession of a bailee property stored by the factor, it was held that the plaintiff was the real party in interest. *Gorum v. Carey*, 1 Abb. Pr. 64 L. R. A.

285. This was on the ground that he was to be accountable for the loss pursuant to an agreement, or on the ground that he was a party having a special property in the goods, and entitled to the possession.

So, a bailee holding goods for the purpose of sale was held to have such an interest in them that he could maintain an action for any injury or loss to the property resulting from the negligence of the defendant. *Allen v. Barrett*, 100 Iowa, 16, 69 N. W. 272.

In a suit on a contract by which defendant agreed to sell plaintiff's fruit, it was objected that plaintiff was not the real party in interest on the ground that the complaint showed that plaintiff was not the owner of the fruit under that contract, and that stockholders of plaintiff in their individual capacity owned the various crops with which plaintiff dealt, and that plaintiff was merely an agent. It was held that, notwithstanding this, plaintiff was the proper party. *Tustin Fruit Asso. v. Earl Fruit Co.* (Cal.) 53 Pac. 693. In this case the court said: "The defendant contracted directly with plaintiff as a principal, and in such a case the law allows the agent treated as a principal to sue in his own name on the contract, whether the fact of agency was or was not known to the other contracting party."

Parties wrongfully obtaining from an agent title to choses in action cannot maintain an action thereon.

So, where an obligee in a bond gave it to her son to deliver to a lawyer for collection, and the plaintiff bought it of her son and held it without indorsement, it was held that he could not maintain an action thereon. *McMinn v. Freeman*, 68 N. C. 341. In this case the court said: "The Code, however, requires the 'real party in interest to sue.' And, if the plaintiff could show that he had any interest in the bond, he could maintain the action without an indorsement of the bond to him."

And a purchaser of a note under an execution in garnishment against an agent, which note belonged to his principal and was converted by the agent to his own use, was held to have acquired no property in the note, and the purchaser was not the real party in interest in an action against the maker. *McCormick v. Williams*, 54 Iowa, 50, 6 N. W. 138. The court said: "As the plaintiff acquired no property in the note, he cannot maintain an action thereon; it can only be prosecuted by the real party in interest."

A telegram was sent by plaintiff's sister, whom he had left in charge of his house, the cost being prepaid out of his funds, and was directed to his father, at whose house he was on a visit. The telegram requested the father to tell the plaintiff to come home, that his daughter was ill. It was held that the plaintiff could maintain the action on the ground that his sister was his agent in sending the telegram, and also because he was a beneficial party on the face of the telegram, and was the party alone who would be injured. *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527, 14 S. E. 94.

Where a sender of a telegram discloses to the company that he is an agent, and that it is sent for his principal, the latter may bring an action in his own name for failure to deliver. *Daugherty v. American Union Teleg. Co.* 75 Ala. 168, 51 Am. Rep. 435. In this case it was contended that the plaintiff could not maintain an action. The court said: "The first

three grounds of demurrer raise the same question, and deny the right of the plaintiff to maintain the action in his own name. We think this ground of demurrer was also improperly sustained. The point of this objection to the complaint is, that Renfro Brothers are shown to have made the contract with the telegraph company in their own name; and the contract not being for the payment of money, the suit should have been brought in their name. This point is certainly well taken, if the proper construction of the complaint is that which is contended for. Code 1876, § 2890; *Johnson v. Martin*, 54 Ala. 271; *Masterson v. Gibson*, 56 Ala. 56; *Agnew v. Leath*, 63 Ala. 345. It is certainly true that the message proposed to be sent, as copied in the complaint, is signed Renfro Brothers. But the message is not the contract declared on. The complaint avers, in substance, that the plaintiff made the contract through his agents, Renfro Brothers. The contract declared on we suppose was oral. It is not averred that it is in writing. If, in delivering and paying for the message to be forwarded, the Renfro Brothers disclosed the name of their principal, for whom they were acting, that constituted it plaintiff's contract, upon which he can, and should, sue in his own name. Such proof is admissible under the complaint as framed, and, if made, will sustain the averment. This ground of demurrer was not well taken." The effect of this decision is that, under Ala. Code, § 2890, providing that actions on contracts for the payment of money must be brought by the real party in interest, the contracting party must sue for the failure to send telegrams.

See *Moses v. Ingram*, 99 Ala. 483, 12 So. 374, *supra*, II.; *Caldwell v. Meahew*, 44 Ark. 564; *Little v. Bradley*, 43 Fla. 402, 31 So. 342; *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa, 115,—*supra*, III.; *Rice v. Savery*, 22 Iowa, 470, *supra*, IV.; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224, *supra*, XII.; *Hewitt v. Young*, 82 Iowa, 224, 47 N. W. 1084, *supra*, XV.; *Lane v. Columbus Ins. Co.* 2 Code Rep. 66, *infra*, XXI.; *Hall v. Plaine*, 14 Ohio St. 417, *infra*, XXIX.

XXI. Insurance.

In actions upon insurance policies only a small proportion of the cases discuss the question as to who is the real party in interest, but treat the question, By whom must an action be brought? under the rule at common law. In the following cases the statutory provision was applied.

An insurance company has been held to be the real party in interest in actions for damages against the party causing the fire, where there was no one who could make any other claim against the defendant for causing such loss. But in such a case, where an interest remains in the assured, or other insurance companies have similar claims, the company paying the loss will not be held to be the party in interest.

An insurance company paid to the owner less than the value of his loss, and obtained an assignment of all his right to recover on account of said loss against the railroad company that caused the fire, reserving all rights in excess of the face of the policy. It was held that the insurance company could not maintain an action against the railroad company that caused the fire. *Ætna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96. In 64 L. R. A.

this case the court said: "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act is single and indivisible, and gives rise to but one liability.

So where a loss by fire exceeded the whole amount of the insurance paid, it was held that an insurance company could not maintain an action against a third party for negligence in causing the fire, but that such action must be brought by the assured. *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984. In this case the court said: "When the insurer pays the assured the full value of the property destroyed, the insurer may maintain an action in his own name against one responsible for its loss, because, by operation of law, the whole beneficial right to indemnity from the wrongdoer has been vested in the insurer. He is, therefore, the real and only party in interest, and, under the Code, the proper party to bring the suit. But, when the value of the property destroyed exceeds the insurance money paid, the beneficial right to indemnity from the wrongdoer remains in the assured, for the whole value of the property,—for the unpaid balance due to himself, as well as for the amount paid by the insurer, as to which last sum he is chargeable as a trustee."

But where an insurance company had paid the insured the full value of the property destroyed by fire, the insurance company was held to be the real party in interest to maintain an action against the railroad company for causing such fire. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643.

And where an insured accepted payment from a railroad company that caused the fire, and gave it a release, reserving a claim for insurance, and the insurance company afterwards brought an action against the railroad company on the policy which it had paid, it was held that the action was properly brought in the name of the plaintiff, and that no other person had any right or interest in the claim. *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171.

So an insurance company which had indemnified the owner in part for loss by fire from the railroad was held to be the proper party to maintain an action against the railroad company for the same where the railroad company had paid the remainder of the loss, and obtained a release from the owner. *Hartford F. Ins. Co. v. Wabash R. Co.* 74 Mo. App. 106. In this case the court said: "But it has been held, as contended by defendant, even in states providing that the action must be brought in the name of real party in interest, that, if the insurance placed on the property is less than its value, the suit must be in the name of the owner. *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 986; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96, and cases cited. In the latter case it was said: 'The property destroyed exceeded in value the amount insured, and the rule of law has been long settled that the insurance company, on the payment of the loss, cannot sue the wrongdoer who occasioned it in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gives rise to but one liability. If one in-

surer may sue, then, if there are a dozen, each may sue, and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance." We are, however, of the opinion, after full reflection on the point made, that it cannot apply to this case from the fact that here Burruss, the owner, released all his interest in the loss by his settlement with the defendant railroad company."

The beneficiary of a policy and his assignee are usually held to be the real parties in interest in an action against the insurance company.

The beneficiary of a policy of insurance running to nominal parties for the benefit of "whom it may concern" was held to be the party really interested, in *Insurance Co. v. Forchelmer*, 86 Ala. 541, 5 So. 870.

And where a fire-insurance policy was issued to one N., "loss, if any, payable to W. C. L. Co., as their interest may appear," it was held that the latter, being the beneficiary, was the proper party to maintain an action on the policy after loss. *West Coast Lumber Co. v. State Invest. & Ins. Co.* 98 Cal. 502, 83 Pac. 258. In this case the court said: "A receipt from Newkirk was not necessary to the security or discharge of defendant. A party entitled to maintain an action may, upon payment being made to him, give a valid discharge from the cause of action. Under our law an action may be maintained by the party in interest. The courts, with some exceptions, hold that the party to whom the loss is payable may sue. *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619; *Chamberlain v. New Hampshire F. Ins. Co.* 55 N. H. 249. It is sufficient to say, under this head, that decisions to like effect are to be found emanating from the courts of Missouri, New Jersey, Illinois, and many other states. Where the proceeds of the policy are to go in part to the assured and in part to others, the authorities are not uniform as to the proper plaintiff; the better opinion, however, is believed to be that all the beneficiaries may unite as plaintiffs in the action."

An order on an insurance company, given by the insured to a creditor after the loss, directing the company to pay such creditor the whole amount due under the policy, was held to constitute the person receiving such order an assignee, and entitled him to sue on the policy for the loss in his own name. *Spratley v. Hartford Ins. Co.* 1 Dill. 392, Fed. Cas. No. 13,256; *Perry v. Merchants' Ins. Co.* 25 Ala. 355.

A mortgagee entitled to the whole of the policy is held to be the real party in interest.

So, where an insurance policy on a vessel was made payable to a chattel mortgagee, it was held that he was the real party in interest, and the proper person to maintain an action on the policy after the loss. *Roussel v. St. Nicholas Ins. Co.* 9 Jones & S. 279.

But a mortgagee in fire insurance policies was held not entitled to maintain an action thereon, where the policies were taken out by the mortgagor in his own name, "the loss, if any, payable to J. F. (the mortgagee) to the extent of his mortgage interest." *Fire Ins. Cos. v. Feirath*, 77 Ala. 194, 54 Am. Rep. 58. In this case the policies did not provide that the entire sum was payable to the mortgagee, nor were they assigned to him. The court said: "They did not confer on Feirath a right to sue

for a part, and on Clark the right to sue for the residue. That would have been to split one contract into two causes of action, which can only be done by agreement of debtor and creditor, having that object in view."

In Tennessee and Mississippi it seems that an action by the assured for the use of a creditor complies with the statute requiring an action to be brought by the real party in interest; but in an action on a judgment in such a case the courts of New York refuse to follow that view.

Under Tenn. Code, § 2795, providing that in all suits prosecuted in the name of one person for the benefit of another the person for whose benefit the suit is brought would be held to be the real plaintiff of record, it was held that the real party in interest was in court, where the debtor, in whose name the fire insurance policy was taken, brought an action for the use of his creditor on a policy payable to the creditor "as his interest may appear." *Queen Ins. Co. v. Union Bank. & T. Co.* 49 C. C. A. 555, 111 Fed. 697. In this case the court said: "The Tennessee Code provides (§ 2795): 'In all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought will be held the real party of record.' Under this statute the real party in interest was in court, and, if appellant's contention be correct, was entitled to the sole recovery in the case. It is effectually barred from any further recovery on the cause of action sued upon, and, assuming that it might have brought the action alone, the plaintiff in error has not been prejudiced, and a judgment otherwise correct should not be disturbed for this reason."

And where an action was brought in Mississippi on an insurance policy, by a firm "for the use of E. A. Greene," and a judgment was obtained by the plaintiff in that action, no question was made in Mississippi as to the party plaintiff. In a subsequent suit in New York by E. A. Greene on that judgment, it was held that he was not the real party in interest under the Code. *Greene v. Niagara F. Ins. Co.* 6 Hun, 128. In this case the court said: "The Code requires suits to be commenced and prosecuted in the name of the real party in interest; and that has been held to be the person having the title to the instrument on which the action is brought, even though the proceeds, when recovered by him, are to be principally paid over to another person ultimately entitled to receive them from him. *Williams v. Brown*, 2 Keyes, 486, 488; *Allen v. Brown*, 44 N. Y. 228, 231; *Fulton v. Fulton*, 48 Barb. 581. As these cases now appear, the action should have been brought in the name of the members of the firm of William R. Greene & Co. The plaintiff cannot maintain them without some further proof of title than that given upon the trials already had."

Notwithstanding a restriction in a policy making it payable to an agent only, it was held that the principal may recover thereon. A broker, not being authorized by the assured to act, procuring policies that are not accepted by the assured, cannot maintain an action against the insured for the premiums.

A policy of insurance was effected by an agent, and the policy was made out in the name of the agent as principal, and contained a clause, "the loss, if any, to be paid to the agent (naming him) only." It was held that

the principal could maintain an action thereon, and that he was the real party in interest. *Lane v. Columbus Ins. Co.* 2 Code Rep. 65. In this case the court said: "This brings us to the second point: Whether, by the insertion of the word 'only,' the real party in interest is precluded from his action. It is alleged that the word was inserted for the protection of the broker or agent and to secure some claims he had. If that really was the object, it was an unnecessary precaution, for the broker would, without the insertion of that word, have had a right to hold the policy to secure any lien he might have thereon; but a third party having a lien was never understood to prevent the party in interest suing in his own name, and neither the agent, nor the insurer, had a right to make out a policy in a form which would prevent the party in interest from maintaining his action; and of this opinion is Mr. Duer in his work on insurance."

Where the insured repudiated a policy, and a broker brought an action to recover for insurance premiums paid by him, where he was not requested by the insured to pay such premiums, and the insurance company had not assigned the claim to him, it was held that the broker was not the party in interest, and could not maintain the action. *DeGroot v. Clark*, 51 App. Div. 606, 64 N. Y. Supp. 282.

See *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 497, 10 Am. Rep. 166, 6 Ill. 473, *supra*, XVI.

XXII. Against carriers of goods.

Notwithstanding the statutory provision requiring actions to be brought by the real party in interest, nearly all the cases in regard to carriers seem to be determined upon common-law principles. The rules in such cases are varied, and have many exceptions, which this note is not intended to include; but reference is made to Ray, *Negligence of Imposed Duties, Freight Carriers*, § 147, for a discussion of the question, Who may sue for loss? In the following cases reference is made to the statutory provision.

A consignor of goods belonging to him and his wife was held to be the proper party to sue for the loss of the same. *Denver, S. P. & P. R. Co. v. Frame*, 6 Colo. 382. The court said: "The appellee had a special property in the goods, and a beneficial interest in the recovery therefore, which gave him a right to sue in his own name the same as in actions of replevin for the possession, or in trover upon a conversion."

Where a railroad company agreed to furnish transportation at several places for the grain to be delivered to it, in pursuance of a contract made by the plaintiffs for the purchase of the same, to be paid for on delivery, and the grain was tendered to the railroad company but it failed and refused to receive it, it was held that plaintiffs were the real parties in interest, and could maintain an action for breach of a contract to receive, transport, and deliver grain. *Cobb v. Illinois C. R. Co.* 38 Iowa, 601. The court said: "It seems to us that it can hardly be questioned that the sixth count presents a cause of action entitling plaintiffs to recover. It alleges an undertaking on the part of defendant to transport property for, and on account of, plaintiffs, and for their benefit. It cannot be doubted that the duty of defendant to transport the oats was owing to plaintiffs, and the obligation so to do was to them. And it is 64 L. R. A.

very plain that any loss sustained by plaintiffs from defendant's failure to discharge this duty and obligation would constitute a cause of action in plaintiffs' favor."

But where an action was brought by an assignee of a shipper on a claim for conversion against a common carrier, it was held that an answer which put in issue the assignment, and pleaded that they were not the real parties in interest, gave the defendant the right to introduce evidence to that effect, the exclusion of which was held to be error. *Nanson v. Jacob*, 98 Mo. 331, 8 Am. St. Rep. 531, 6 S. W. 246. In this case the consignee received notice from the railroad company that the goods had arrived, and on his order a transfer company delivered the goods to him without notice that there was a draft attached to the bill of lading, which was unpaid.

The consignors of soap who sued the carrier for damages caused to the goods, having also sued the consignees for the price, were held to have no interest in a cause of action against the carrier, under La. Code Prac. art. 15, providing that an action can only be brought by one having a real and actual interest which he pursues; but as soon as that interest arises he may bring his action. *Leberman v. New Orleans, F. & H. S. S. Co.* 28 La. Ann. 412. This was on the ground that, if the consignees were liable to the consignors for the value of the goods, the consignees alone were entitled to a recovery against the carrier.

And where consignees of a car load of wheat screenings paid a draft drawn on them, and received a bill of lading to which the draft was attached, and subsequently purchased the grain consigned to them from the owner, it was held that they thus became the real parties in interest, and the fact that the screenings were destroyed prior to the absolute sale to plaintiffs did not affect this; and the consignees could maintain an action against the carrier where the wheat was destroyed before reaching the point of destination. *Kirkpatrick v. Kansas City, St. J. & C. B. R. Co.* 86 Mo. 341. The court said: "The property of Slaughter in the screenings still continued, and was the subject of transfer to plaintiffs, and they could maintain this action on the ground of the transfer, if upon no other."

See *Merchants' Bank v. Union R. & Transp. Co.* 69 N. Y. 373, *supra*, III.

XXIII. On collateral and pledge.

The general rule is that the pledgee cannot maintain an action on the collateral while the condition is not performed, and the pledgee of a collateral, where the condition has not been performed, is held to be the party in interest to maintain an action thereon. It is held that this rule applies, although the collateral was not indorsed to the pledgee. But it was held that the pledgee holding the legal title could maintain an action on the collateral with the consent of the pledgee.

An action upon a note by parties holding the same as collateral security was held to be properly brought in their name. *Bibb v. Hall*, 101 Ala. 79, 14 So. 98.

So where a note was indorsed and delivered to a trustee as collateral security for the payment of certain money, it was held that the payee of such note was not a proper party plaintiff to recover thereon, as he was not the party beneficially interested. *Alabama Terminal &*

Improv. Co. v. Knox, 115 Ala. 587, 21 So. 495. In this case the court said: "Upon these facts it seems hardly debatable that the plaintiff had no right to maintain the action. It was neither the legal, nor beneficial, owner of the note, entitled to receive payment thereof at the time this suit was instituted."

A note was transferred to secure a pre-existing indebtedness, and the holder before maturity, in the usual course of business, had it discounted. It was held that the party discounting it was the proper party to maintain an action thereon. *Marine Bank v. Vall*, 6 Bosw. 421. In this case the court said: "In determining the question of the plaintiff's right to recover, so far as that right depends upon the character of the indorsement alone, it must be borne in mind that there is no obstacle to a recovery under the Code created by the fact that a bill or note is not indorsed at all. An action since the Code must be brought in the name of the actual party in interest, even though the instrument sued on be not negotiable; yet, if it has been transferred and delivered to a party, either absolutely upon the sale of it, or as security, such party may sue upon it in his own name. Code, § 111."

Pledges of a mortgage were held to be the real parties in interest, and entitled to bring an action on the same in their own name, and recover the entire amount, in *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275, 72 N. W. 872.

A party holding an unindorsed note as collateral security was held to be the proper party to maintain an action thereon, in *White v. Phelps*, 14 Minn. 27, 100 Am. Dec. 190, Gil. 21, and *Williams v. Norton*, 3 Kan. 295.

In *Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790, 18 S. W. 234, where the plaintiff brought an action upon a note, it was allowed to amend and set up that it held the same as collateral, making the administrator of the payee a coplaintiff.

Where the plaintiff, a bank, had delivered a note and mortgage, without indorsement, to a savings bank as a pledge, and afterwards, with the consent of the savings bank, presented its claim on said note and mortgage to administrators, and the same was allowed, and the pledgee afterwards commenced an action in its own name, with the consent of the pledgee, it was held that the delivery without indorsement did not constitute such a transfer as would deprive the pledgee of the right to sue on the note and mortgage in its own name. *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469. The court said: "The rule is that where the plaintiff holds the legal title to the demand he is the real party in interest."

Where the assignee of notes assigned the same as collateral security to his assignor, it was held that, where the act for which he assigned them as security had not been performed, and where they were still held by the other party as collateral, the assignee was not the real party in interest to maintain an action against his assignor on the prior assignment. *Felton v. Smith*, 84 Ind. 485; *Smith v. Felton*, 85 Ind. 223.

So, an assignor was held to have no right of action upon contracts that had been assigned as collateral security to another. *Reynolds v. Louisville, N. A. & C. R. Co.* 143 Ind. 579, 40 N. E. 410.

In an action by an assignee of a note, an

answer alleging that the payee assigned the note to the plaintiff as collateral for a debt, that such debt had been paid, and that plaintiff had no other interest in the same, was held to be a good defense, and to show that plaintiff was not the real party in interest. *Swift v. Ellsworth*, 10 Ind. 205, 71 Am. Dec. 316.

See *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096, *supra*, XII.; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542, *supra*, XXV.

XXIV. Chattel mortgages.

An assignee of a note secured by chattel mortgage was held to be the real party in interest, and could maintain an action of replevin thereon in his own name. *Kingsland & F. Mfg. Co. v. Chrisman*, 28 Mo. App. 308. The court said: "Certainly, where a court of equity would compel the depositary of the naked legal title to assign the instrument to the assignee, under our Code, he must be the real party in interest. And it does seem to me that the spirit and object of the statute will be best expressed and executed in allowing this plaintiff to proceed in his own name, immediately, to enforce his possessory right under the mortgage, rather than to compel him either to resort to the circumlocution of a bill in equity to compel an assignment of the legal title, or to bring replevin in the name of the mortgagee."

So, where a note was made payable to G., to secure which a chattel mortgage was executed, and the consideration consisted wholly of sums due from the mortgagor to a third party, and the note was taken at his instance, to whom it was indorsed by the payee without recourse, the assignee as the real party in interest was held to be the proper party to maintain an action in replevin as against the sheriff who had levied on the property. *Coughran v. Sundback*, 9 S. D. 483, 70 N. W. 644.

In *Wyle v. Ohio River & C. R. Co.* 48 S. C. 405, 26 S. E. 676, where a chattel mortgagee brought an action for the negligent killing of a cow, and the defense was that the plaintiffs were not the real parties in interest, it was held that upon a breach of the condition of a chattel mortgage the mortgagee became the legal owner of the property, and could bring an action for damages for injury thereto.

See *Buddington v. Mastbrook*, 17 Mo. App. 577, *supra*, 11.; *Roussel v. St. Nicholas Ins. Co.* 9 Jones & S. 279, *supra*, XXI.

XXV. Foreclosure.

In an action to foreclose a mortgage, an assignee of the note and mortgage was held to be the real party in interest, and the proper party to bring the action. *Lamson v. Falls*, 6 Ind. 309.

And the same was held notwithstanding a subsequent assignment by the assignor recited that these notes were held by the first assignee and the bank as collateral security. *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542. The court said that a recital in a subsequent assignment could not bind a previous assignee.

And where a decree of foreclosure was a nullity, it was held that on a second foreclosure the assignee and the holder of a sheriff's certificate of sale under the prior foreclosure was the real party in interest, and that she alone could maintain the second suit. *Curtis v. Gooding*, 99 Ind. 45.

And where an assignee of a note secured by mortgage had subsequently made a deed conveying to a stranger all the plaintiff's estate and interest in the real estate, but the assignee did not transfer the notes, it was held that this did not prevent him from maintaining an action to foreclose the mortgage. *Swan v. Yaple*, 35 Iowa, 248. In this case the court said: "The plaintiff, being the owner and holder of the notes, would, in case he had assigned the mortgage, remain the real party in interest, and his assignee would be a mere trustee, and an action to foreclose would be maintainable by him." "Him" apparently referred to the plaintiff.

See *Hardin v. Helton*, 50 Ind. 319, *supra*, II.; *Caldwell v. Meshew*, 44 Ark. 564, and *Barthol v. Biakin*, 34 Iowa, 452, *supra*, III.; *Castleman v. Berry*, 86 Va. 604, 10 S. E. 884, and *Clutchison v. Myers*, 52 Kan. 290, 34 Pac. 742, *supra*, IV.; *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644, *supra*, VII.; *Riblinson v. Springfield Co.* 21 Fla. 203, *supra*, XI.; *Mitchell v. St. Mary*, 148 Ind. 111, 47 N. E. 224, *supra*, XII.; *Fire Ins. Cos. v. Feirath*, 77 Ala. 194, 54 Am. Rep. 58, and *Farmers' & M. Ins. Co. v. Moore*, 48 Neb. 713, 67 N. W. 764, *supra*, XXI.; *Morgan v. South Milwaukee Lake View Co.* 97 Wis. 275, 72 N. W. 872, and *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 44 Pac. 469, *supra*, XXIII.

XXVI. Relating to counties.

An action to recover money alleged to have been wrongfully taken from the treasury of the county was held to be properly brought in the name of the county, under Iowa Code, § 2343, providing that an action must be prosecuted in the name of the real party in interest, and § 2544, providing that a party with whom a contract is made for the benefit of another and a trustee may sue in their own name. *Polk County v. Sherman*, 99 Iowa, 60, 68 N. W. 562. The court said: "This is not an action for the collection of taxes, but to recover money alleged to have been taken from the treasury of the county wrongfully. In collecting it the county, a body corporate, acted by its agent, the treasurer. When collected the money belonged to the county; or, if a part of it was from levies made for municipal corporations and other beneficiaries, that part was held in trust by the county for their benefit and use. It did not belong to the treasurer, and, if it was wrongfully paid out by him, the county may properly recover it."

Where a county appealed from a judgment against it setting aside certain taxes, part of which was for indebtedness of a town; and the county board authorized the town to employ an attorney,—it was held that the county was the real party in interest, and was liable to reimburse the town for expenditures. *Eagle River v. Oneida County*, 86 Wis. 266, 56 N. W. 644. The court said: "The first contention of the learned counsel for the appellant is that the county had no interest in the suits, but the town was the real party in interest. The town may have been incidentally interested in those two items of the taxes. All the taxes were sustained except those two items, and the plaintiffs in the action appealed also. It follows that the county had the main interest in the suits. But the county is the party to be sued in such a case, as the real party in interest, and the town could not be made a party." 44 L. R. A.

The duty of defending the action was on the county alone, and the county is liable for the costs in case of defeat."

And where township trustees and clerks, as a local board, paid a physician for smallpox services out of taxes collected, it was held that they could not maintain an action against the county to recover the money, as they were not the real parties in interest. *Sanderson v. Cerro Gordo County*, 80 Iowa, 89, 45 N. W. 560. The court said: "We know of no law giving the plaintiff the right to receive and hold the funds in question conceding the liability of the county for its payment."

See *Bartholomew County v. Jameson*, 86 Ind. 154, *supra*, V.; *Yerby v. Sexton*, 48 Ala. 311, *supra*, VII. See also *X., d. supra*.

XXVII. Taxes and taxpayers.

A taxpayer is held not to be the real party in interest in an action to restrain payment of claims; so, a bank is not the party to maintain an action to restrain the collection of a tax on stockholders. But a taxpayer was held to be the real party in interest in an action of damages for failure of a water company to comply with its contract with a city, whereby the plaintiff was specially damaged; and under local statutes a holder of a certificate for special assessment, or his assignees, are held to be the parties in interest.

A taxpayer was held not to be the real party in interest, and was not authorized to bring an action against supervisors for allowance and payment of illegal claims, in *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133. In this case the court said: "No reasons are set forth in the complaint why this action is prosecuted by and in the name of plaintiff, a taxpayer, instead of by the district attorney, in the name of and in behalf of the county. It is not alleged, even, that any demand was made by plaintiff, either for the money, or for the institution of an action for its recovery. The county is the real party in interest, and the district attorney is the proper person to prosecute actions in the name of the county."

And a bank was held not to be the proper party to maintain an action to restrain the collection of a tax assessed against the individual owners of stock, in *Northwestern Loan & Bkg. Co. v. Muggill*, 7 S. D. 527, 64 N. W. 1122, 8 S. D. 160, 65 N. W. 442.

Under Mo. act January 16, 1860, providing that a contractor for paving could proceed to collect the same by ordinary process of law in the name of the city to his use, it was held that an assignee of a certified tax bill was a proper party to maintain an action thereon as the assignment vested in him the whole equitable interest in the demand. *St. Louis v. Rudolph*, 36 Mo. 465. The court said: "He thus became the real party in interest, and we think he may maintain an action in the name of the city to his own use under the special act."

An assignee of a contractor to whom tax bills were issued was held to be the real party in interest, and he could prosecute an action under the city charter, providing that all state tax bills shall be a lien on the property charged, and may be collected of the owner of the land in the name of and by the contractor, as any other claim in any court of competent jurisdiction. *Galbreath v. Newton*, 45 Mo. App 312.

In *Levy v. Cunningham*, 56 Neb. 348, 76

N. W. 882, where an action was brought by an assignee of tax certificates to recover the redemption money, and the plaintiff failed to prove the assignment, it was held that the action was not brought by the real party in interest.

An action to recover a delinquent assessment upon swamp lands situated in a reclamation district was held to have been properly brought by the district, as it was the real party in interest. *Reclamation Dist. No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43; *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945.

In the latter case *McKinstry, J.*, said: "It seems to be admitted that plaintiff is 'the real party in interest,' and the general rule is that an action must be brought in the name of the real party in interest. Code Civ. Proc. § 367." Both of the above cases cite *People v. Haggin*, 57 Cal. 579, to the effect that actions under the act of March 28, 1868, which was the act under which this proceeding was brought, were properly brought in the name of the people as plaintiff, the court saying in the *Hagar Case*: "It is true that it has been decided here that actions brought under and in pursuance of the provisions of the act of 1868 were properly brought in the name of the people. *People v. Hagar*, 52 Cal. 171; *People v. Haggin*, 57 Cal. 579; and further, that actions brought under and in pursuance of the provisions of the Political Code must be commenced in the name of the reclamation district. *People v. Haggin*, 57 Cal. 579." But in *People v. Haggin*, 57 Cal. 579, the action was brought in the name of the people to enforce the lien of an assessment upon certain lands alleged to have been made for their reclamation. The court said: "The law requires that every action must be prosecuted in the name of the real party in interest. Code Civ. Proc. § 367. . . . Who is the real party in interest here? In our opinion it is manifestly the reclamation district. The money, when collected by suit or paid by the persons assessed, is to go to the credit of the district, and to be paid out for the reclamation of the district. It is assessed, collected, and disbursed for the district,—a district which we hold as a corporation is competent to sue. . . . We are of opinion that the corporation—the reclamation district—was the real party in interest within the rulings of the cases above cited, and that the action should have been brought in the name of the district."

See *Niederhaus v. Heldt*, 27 Ind. 480, *supra*, XVII.; *Eagle River v. Oneida County*, 86 Wis. 266, 56 N. W. 644, *supra*, XXVI.

XXVIII. For possession of land; rents and profits.

A grantor having conveyed land that was in the adverse possession of another, it was held that an action to recover the land from the party thus in possession, in the name of the grantor in such conveyance, was properly brought, as he was the real party in interest. *Steeple v. Downing*, 60 Ind. 478. This was because, as against the party in possession, the deed of the grantee was inoperative and void.

So, an action to recover possession of land must be brought by the grantor where he has made a deed that is void, and he is held to be the real party in interest; and the grantee cannot maintain an action in the grantor's name without his consent. *Lowber v. Kelly*, 9 Bosw. 494.

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In *Hamilton v. Wright*, 37 N. Y. 502, the court said: "When, therefore, the Code had, in § 111, provided that every action should be brought in the name of the real party in interest, a doubt arose whether an action to recover lands thus conveyed could be brought by anyone. If brought in the name of the grantee he could, as against the party in possession, show no title; for, as against such party, his deed was void. If brought in the name of the grantor, it might be shown that he was not the real party in interest, because, if he recover, his recovery would inure, not for his own benefit, but for the benefit of the grantee. The Code was, therefore, amended so as to exclude such conclusion, by adding to the section the provision that 'an action may be maintained, by a grantee of land, in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant.' The purpose was, I think, to limit the operation of the section, as previously enacted,—not to create any new authority, as between the grantor and grantee, for the use of the name of the former by the latter. If, by reason of the giving of the deed, such authority was to be implied, very well; if not, I do not think the Code conferred it."

In *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49, it was held that the holder of the legal title to land, although a trustee for a third person, was the real party in interest, and could maintain an action in its own name to recover possession. In this case the point was made at the trial that the plaintiff was not the real party in interest, but was suing for, and in the interest of, another, who had conveyed the property to him by deed.

In *Dever v. Hagerty*, 160 N. Y. 481, 62 N. E. 586, a grantor of land in the adverse possession of another made a deed to the party in adverse possession. Subsequently the grantor brought an action in ejectment for the benefit of the first grantee. It was held that, as the deed to the first grantee was void on account of adverse possession, the second grantee, being in possession, obtained a good title from his grantor which the grantor could not gainsay or deny. The court discusses N. Y. Code Civ. Proc. § 1501, providing for actions in such cases in the name of the grantor, and says: "As has been intimated, we have inherited this form of procedure from the common law. It was based upon the theory that, under a deed which was void as against a person in adverse possession, the title remained in the grantor, while the grantee took nothing more than a right of entry which was merely a chose in action. As the assignee of a chose in action could not sue upon it at common law, the courts created this method of permitting the assignee to sue in the name of his assignor. As applied to actions in ejectment, it was simply allowing the grantee under a void deed to use his grantor's title for the purpose of getting possession of the land. With the adoption of the Code rule, requiring suits to be brought by the real party in interest, and permitting assignees of choses in action to sue in their own names, the common-law rule was abolished except as to action in ejectment, in which the rule still survives. Thus it is apparent that, if this action had been brought before the execution and delivery of the deed from the plaintiff to the defendant

Hagerty, the plaintiff's first grantee, Caulkins, could have rested upon the title of her grantor, the plaintiff, and could have recovered, unless the tax deed to the defendant Hagerty was regular and valid."

In an action of ejectment it was held that Ala. Code, § 2829, providing for a suit in the name of the party really interested in actions on contracts for the payment of money, did not apply. *Dane v. Glennon*, 72 Ala. 160.

After a recovery in ejectment a purchaser was held to be the proper party plaintiff to sue in his own name for the rents and profits which accrued pending the former action in ejectment. *Limberg v. Higenbotham*, 11 Colo. 156, 17 Pac. 481.

Under Ky. Civ. Code, § 30, providing that every action must be prosecuted in the name of the real party in interest, it was held that an action for mesne profits must be prosecuted in the name of the lessors, and not in the name of John Doe. *Masterson v. Hagan*, 17 B. Mon. 325.

But in an action by an assignee of a claim for rent, issues, and profits, it was held that, if the plaintiff was without ownership or interest in the subject of the suit, he was not the real party in interest, and a judgment in defendant's favor would be affirmed in the absence of a bill of exceptions showing the evidence on this question. *Henley v. Evans*, 54 Neb. 187, 74 N. W. 578.

See *Tarpey v. Deseret Salt Co.* 5 Utah, 205, 14 Pac. 338, *supra*, XVIII.; *McHenry v. Painter*, 58 Iowa, 365, 12 N. W. 338, *supra*, XX.

XXIX. On covenants.

In an action of covenant the real party in interest is the party who is entitled to the proceeds of the judgment to be rendered in that action.

A lessee of a perpetual lease covenanted to pay rent to the lessor, his heirs and assigns. The lessee assigned his interest, and an action for rent was brought against him on the covenants of the lease by the assignee of the reversion. It was held that such assignee was the real party in interest, and was entitled to sue, in her own name, the original lessee, for accruing rent. *Smith v. Harrison*, 42 Ohio St. 180. It was further held that the covenant for rent with the lessor passed with the land, and, although not made with the present plaintiff, it was for her benefit.

And where an assignee of a reversion was also the assignee of the benefits of the covenants in a lease, it was held that he was the proper person to bring an action in his own name for a breach of such covenants, as he was the party beneficially interested. *Masury v. Southworth*, 9 Ohio St. 340. In this case the court said: "It has been decided by this court that the statute of 32 Henry VIII., chap. 34, is not in force in this state, and that an assignee of the reversion cannot maintain an action upon the covenants in the lease. But if the covenant be assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by a suit in equity, our Code of Civil Procedure operates upon the remedy, even more extensively than the statute of 32 Henry VIII., chap. 34. For, whether the covenant be collateral, or inhere in the land, if it be assigned the assignee not only may, but, as the party beneficially interested, must, sue in his own name."

Where lands were purchased by an agent and 64 L. R. A.

conveyed to him for the benefit of another party, under covenants of seisin and against incumbrance and warranty that were broken at the time of the deed, and the party for whom the purchase was made obtained a conveyance from his agent, it was held that such party could maintain an action in his own name on the broken covenants as the real party in interest, although such covenants did not pass to him by the mere conveyance of land, and had not been in terms assigned to him. *Hall v. Plaine*, 14 Ohio St. 417.

A grantee who had conveyed the land to another party could not maintain an action for damages for the benefit of his grantee for a breach of the covenant contained in a deed executed to him. *Sinker v. Floyd*, 104 Ind. 291, 4 N. E. 10. This action was by a grantee for the use of his grantee. In this case the court said: "We are satisfied that under our Code an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages."

Where the lessee covenanted to make repairs and assigned his interest, and the assignee promised to fulfil all the covenants in the contract, and, the lessor having died, the first tenant brought an action to the use of the executors of the landlord against his assignee for failure to comply with the covenants in the lease, it was held that the action should have been brought in the name of the executors, joining such persons as had an interest, as they alone were to be considered as the real parties in interest, within the meaning of the statute, and the action should have been prosecuted in their names only. *Welse v. Gerner*, 42 Mo. 527. The court said, the lessee, having assigned his lease and transferred his entire term, "had no interest in the matter such as to authorize him to institute this suit."

See *Knadler v. Sharp*, 36 Iowa, 232, *supra*, I.; *Ryall v. Prince*, 82 Ala. 264, 2 So. 319, *supra*, III.; *Ætna Ins. Co. v. Aldrich*, 38 Wis. 107, *supra*, XI.

XXX. For conversion and trover.

An action for taking and converting personal property, where the defendant alleged that it was taken on execution in his favor by the sheriff as the property of the defendant in that execution, cannot be defeated by showing that the property did not belong to the plaintiff, where the plaintiff was in possession claiming to be the owner when it was converted, as such possession gave him sufficient interest to maintain an action against a stranger, or anyone, except the owner, who had the right of possession. *Paddock v. Wing*, 16 How. Pr. 547. In this case the court said: "The defendant claims that the Code (§ 111) has changed the law. By that section every action must be prosecuted in the name of the real party in interest except as otherwise provided in § 113. In my opinion the Code has not affected the question we are considering. The plaintiff was 'the real party in interest.' He had an interest in protecting his possession, assuming that the property was not his,—that is, that he was not the owner, but that it had been and was the property of Danforth."

After an attachment was levied the owner of the property sold the same to another party. It was held that his vendee was the real party

in interest in an action against the sheriff for conversion. *Kinsella v. Sharp*, 47 Neb. 684, 66 N. W. 634. The court said that the question of consideration paid by the vendee would make no difference.

A pre-emptor had paid for land, and the presumption was that he had made final proof, and that the final certificate had been issued to him. It was held that the United States could not maintain an action of trover against a transferee for cutting timber. *United States v. Saucier*, 5 N. M. 569, 25 Pac. 791.

See *Allen v. Brown*, 44 N. Y. 228, *supra*, II.; *State ex rel. Ruhlman v. Ruhlman*, 111 Ind. 17, 11 N. E. 793, *supra*, XVII.

XXXI. For seduction.

An action for seduction was held to be properly brought by the woman as she was the real party in interest, as the real issues were as to whether she had been really seduced, the amount of damages the jury should award as compensation for the injury done her, and as punishment against the wrongdoer. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397. In this case the court said: "The plaintiff, being of age, is the real party in interest. She is the only one who now could maintain the action. The father certainly cannot."

But in *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459, it was held that a father, being entitled to the services of his minor daughter, was the real party in interest, and could maintain an action for loss of services and for seduction. In this case the court said: "*Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397, relied on by defendant, has no application. That case held that when the woman seduced is of age, there being no loss of services to the father, the only cause of action in such case is the tort,—the fraud and deceit causing injury to her person and good name. It held that the woman herself can in such case maintain the action, being the party injured. But here, the girl being a minor, the father was entitled to her services. It was incumbent upon him to pay the expenses attendant upon her illness, and the jury, upon common-law and immemorial precedent, might add punitive damages for the wrong done him in his affections and the destruction of his household. He is the party in interest, and can maintain the action under the Code, § 177, and, it has been ruled, could have the defendant held in arrest and bail."

XXXII. Mandamus and *ex rel.* proceedings.

The writ of mandamus was originally styled a prerogative writ issued on behalf of the Crown, and the pleading and practice originally attaching to such writ have more or less clung to the same in this country. It is usually stated in text-books that the relator must be the party interested; but as to whether or not, in the absence of statutory provisions, the relator can ignore the old common-law form, and bring an action directly in his own right and in his own name for mandamus, is a question that seems not to have been discussed in the text-books or in the large number of cases on mandamus. A few of the cases, however, discuss the question as to who is the party really interested, and are as follows:

The remedy of mandamus was invoked for the protection of a purely private right by the individual aggrieved. It was held that the proceedings might be conducted in the name
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of the actual party in interest. *Stoddard v. Benton*, 6 Colo. 508; *Wheeler v. Northern Colorado Irrig. Co.* 9 Colo. 248, 11 Pac. 103.

And where the relator was the only person injured, it was held that mandamus should be brought in his name, and not in the name of the state. *People ex rel. Livingston v. Pacheco*, 29 Cal. 210.

So, under Kan. Code, § 26, providing that every action shall be prosecuted in the name of the real party in interest, and § 689, providing that a writ of mandamus may issue on the information of the party beneficially interested, where an action of mandamus was brought in the name of the state on the relation of a railroad company to compel county commissioners to issue certain county bonds, it was held that the railroad company was the real party in interest, and the state had no interest in the result, and the action should be dismissed. *State ex rel. Atchison, T. & S. F. R. Co. v. Jefferson County*, 11 Kan. 68.

And on application for a peremptory writ of mandamus to compel county commissioners to hold their offices at a place claimed to be the county seat, it was held that it should have been brought in the name of the relator, and not in the name of the state. *State ex rel. Wells v. Marston*, 6 Kan. 524. The court said: "Under said Code there is but one form of action, called a 'civil action.' § 10. 'The party complaining shall be known as the plaintiff, and the adverse party shall be known as the defendant.' § 11. 'Every action must be prosecuted in the name of the real party in interest, except as otherwise provided,' etc. § 26. The statutes do not anywhere otherwise provide; that is, they do not anywhere provide that an action of mandamus may be prosecuted in the name of the state when prosecuted by a private individual. The party prosecuting in such an action is always called the 'plaintiff' in said Code, and never the relator."

But under Kan. Civ. Code, authorizing the issue of a writ of mandamus on the information of the party beneficially interested, it was held that a suit to compel the performance of a purely public duty must be prosecuted in the name of the state. A private citizen must show some specific interest peculiar to himself in order to obtain a writ of mandamus. *Bobbett v. State*, 10 Kan. 9. The court held that the plaintiff failed to show such an interest, and said: "Again, mandamus, like other proceedings under our Code, should be brought in the name of the party interested. *State ex rel. Wells v. Marston*, 6 Kan. 532. Where a public duty is neglected, the public, the community as a whole, is the party interested. . . . But the statute authorizes the issue of the writ 'on the information of the party beneficially interested.' Civil Code, § 689. This evidently refers to an interest peculiar and specific, and not one common and general. All citizens are in a certain sense interested in the proper discharge of their duties by public officers, but it is not such an interest as will enable each citizen to describe himself as 'the party beneficially interested.' The party beneficially interested in the discharge of a purely public duty is the public."

Where an action was brought in the name of the attorney general by a relator to cancel a patent, and the state had no direct interest in the subject-matter or the relief, it was held that the relator was the real party in interest,

and that the attorney general could not withdraw the consent or control the suit. *People ex rel. Rondel v. North San Francisco Homestead & R. R. Asso.* 38 Cal. 564.

An action in the name of the state, by relator, was brought to quiet title, and to have canceled a deed executed by a nonresident corporation to another party. The complaint stated that the corporation was exercising franchises unlawfully. It was held that the relator was the real and only party in interest, and the name of the state as party plaintiff was not contemplated by any provision of the statute, and could not be used when the only object of the action was to enforce the private right of individuals. *State ex rel. Glibert v. Union Invest. Co.* 7 S. D. 51, 63 N. W. 232. In this case the court said: "Where it is claimed, in an action to vacate a charter or annul the existence of a corporation, that said corporation has exercised a franchise or privilege not conferred upon it by law, or has offended against or violated any constitutional provision or statutory requirement, the action must be in the name of the state alone as the real party in interest, and the offending corporation is the real and only proper party defendant. Code Civ. Proc. chap. 26."

In an action of trespass brought in the name of the state "who sues for the use and benefit of" A. for trespass on lands belonging to and being the property in fee simple of the state, a demurrer was filed on the ground that the real party in interest should sue. It was held that Iowa Code, § 1676, providing that every action must be prosecuted in the name of the real party in interest, had reference in part to §§ 949 and 952, which make claims assignable by writing which before were not, so as to enable the assignee to sue in his own name. But this was held to be an action founded on a tort which was not assignable, and the action stood, in respect to this question, on the same grounds as one brought in like manner upon a contract not assigned in fact; and the demurrer to the petition was overruled. *Isbell, J., dissenting*, held that the party for whose use the action was brought was the real party in interest. *State v. Butterworth*, 2 Iowa, 158.

In *People v. Slocum*, 1 Idaho, 62, an action was brought by the People of the United States in the territory of Idaho upon the relation of the District Attorney of said judicial district, suing for the use of a county against the obligors on a treasurer's bond running to the People of the United States in the territory of Idaho. In determining the legal capacity of plaintiffs to maintain the action the court cited the Code, which provided that every action shall be brought in the name of the real party in interest, and said that the county could not sue upon the bond although it was entitled to the indemnity if recovered, and that the action was properly brought. This conclusion was on the ground that when a contract is made with one party in which another has a beneficial and resulting interest, the party with whom the contract is made has the right to recover; quoting a New York decision based upon the New York Code, that a "trustee of an express trust," or a "person in whose name a contract is made for the benefit of another," may maintain an action. The court did not notice or cite the cases which hold that, notwithstanding the latter Code provisions, the beneficiary also may sue. The court further held that the allegation

that it was for the use of the county might be rejected as surplusage, as an unnecessary averment, and yet not defeat the plaintiff's right to recover. The court said: "There are numerous decisions under the Code going to sustain the doctrine that, when a contract is made with one party in which another has a beneficial and resulting interest, the party with whom the contract was made has the right to recover, although he alleges the injury to be only to a stranger to the instrument or contract."

XXXIII. For use of another.

The antiquated practice of bringing an action in the name of the assignor for the use of the assignee is practically abolished by the Code provision requiring an action to be brought by the party really interested.

A suit brought by the original creditors for the use of the assignee was held to be improperly brought upon a due bill that was indorsed, directing the money to be paid to another party. It was held that the latter was the real party in interest, and that, after the assignment, there was no title in the assignors, legal or equitable. *Brady v. Chandler*, 31 Mo. 28.

And so it was held that an action was improperly brought by the assignor for the use of the assignee, in *Hutchings v. Weems*, 35 Mo. 285.

Where an action was brought by a widow against an administrator to reimburse her for funeral expenses of her husband, the court said: "We are not advised why the action is brought in the name of 'G. D. Ray & Son to the use of Mary E. Young,' but, even under the antiquated and obsolete system when that form was in use, Mary E. Young would have been the real party plaintiff; and now the rest is to be disregarded as mere surplusage, and she is the only plaintiff, being the real party in interest." *Ray v. Honeycutt*, 119 N. C. 510, 28 S. E. 127.

Where a bank brought an action for the use of its assignees to set aside certain conveyances of real estate on which complainants had mortgages, and to foreclose the same, it was held that in equity a party in interest should sue in his own name; and, as the bill should be amended, and as the charter of the bank had expired, it was recommended that the names of the persons for whose use the bank sued should be made parties complainant. *Frye v. Bank of Illinois*, 10 Ill. 332.

See *Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3, *supra*, X. d; *Queen Ins. Co. v. Union Bank & T. Co.* 49 C. C. A. 555, 111 Fed. 697, and *Greene v. Niagara F. Ins. Co.* 6 Hun, 128, *supra*, XXI.; *Sinker v. Floyd*, 104 Ind. 291, 4 N. E. 10, and *Welse v. Gerner*, 42 Mo. 527, *supra*, XXIX.; *State v. Butterworth*, 2 Iowa, 158, and *People v. Slocum*, 1 Idaho, 62, *supra*, XXXII.

XXXIV. Summary.

There is some conflict of authority as to whether an assignee for collection may maintain an action in his own name as the real party in interest, but the weight of authority now seems to be in favor of such an action. It is believed that the negotiable instrument law will produce the same result, as it is but an expression of the commercial law; and, whilst heretofore some states have held that the legal title holder of a note should be treated as the real party in interest, they have also held that the equitable owner of a note or chose in action should also be treated as the party in in-

terest, applying both the rule of commercial law and the Code. On the other hand, some states hold that the equitable owner is the only party who may maintain an action. The difficulty lies in the fact that in many cases the Code is not cited, and the cases are determined under the commercial law when brought accordingly, and then, when the action is brought by an equitable owner, it is maintainable under the Code. Where the action is by the holder of the legal title some of the cases hold that he is within the statutory exception allowing an action to be brought by a trustee of an express trust, or party in whose name a contract is made for the benefit of another. A great many cases do not notice this distinction. The difficulties arising from conflicting decisions will probably be settled by the negotiable instrument law allowing the legal holder of a note to maintain his action. In cases in regard to choses in action not notes or bills of exchange it is believed that the statutory provision will control, except in such states as have allowed actions by collecting agents in their own names, to whom the claim has been assigned for collection. There is very little written on this subject, and it seems but little effort has been made heretofore to analyze the cases. Some of the cases clarify the whole matter by allowing the holder of the legal title to sue on the ground that he is the trustee of an express trust and within the exception of the statute, and allow the equitable owner to sue as within the terms of the statute. Where an obligation is payable to two persons, and one assigns his interest, the remaining obligee and the assignee are the real parties in interest. In actions on bonds, unless the statute is restrictive and mandatory, it is a general rule that the party entitled to the damages for a breach of a bond is the party in interest. After a judgment has been assigned the assignee is the party to maintain an action thereon, except in Alabama. It seems that a bank holding paper may assign the same to its cashier, who may maintain an action thereon. This is on the theory that he holds the legal title as under the commercial law. On the other hand, some cases allow the bank, as the real party in interest, to maintain an action on paper assigned to its cashier. In matters affecting a strict legal right of a corporation a stockholder cannot maintain an action. On notes payable to a husband or wife the equitable owner may sue thereon. An executor or administrator is the real party in interest on choses in action beionging to the estate. Some cases hold that a distributee may sue on a chose in action given him for his share of the estate where there are no debts or personal representatives. A les-

see may maintain an action for injuries to his leasehold interest, and the lessor or his agent may sue for rent in contracts payable to the lessor's agent. A partner acquiring the interest of his copartner in a firm account is the real party in interest. A principal is the party in interest in contracts made by his agent. An agent may also sue where the principal was not disclosed in the contract. The pledgee is the party to maintain an action on a collateral where the condition is not performed. A chattel mortgagee is the proper party plaintiff in an action of replevin, as he holds the legal title, and his assignee stands in the same right. In an action of covenant the real party in interest is the party entitled to the proceeds of the judgment. Either the party in possession having a special property, or the owner of the property, may maintain an action for injury to the same. In cases of seduction, in the absence of particular local statutes, the plaintiff must be the woman, if of age, or the father, if the woman is a minor. In mandamus proceedings most of the states cling to the old form of writ, and the action is by the people or state *ex rel.*; but this rule is changing, and in some cases it is held that the party injured, if the public interest is not affected, is the only party that can maintain the action. A large number of cases involving the question of principal and agent, common carriers, bailments, insurance, and partnership seem to have been disposed of on principles of common law, and without reference to the statutory provision existing, requiring an action to be brought by the real party in interest. The intention of the statute is to simplify matters of pleading and procedure, and to adopt the rule in equity requiring all actions to be brought by the equitable owner of the cause of action. Cases which do not refer to the statute are not intended to be included in this note, and should be examined by the pleader as construed by the courts of his state, as the rules are varied and the exceptions many. It is believed that the tendency of the courts, however, is to simplify all matters of pleading, and to adopt as a universal rule that the equitable owner is the real party in interest, with the exception, possibly, of the rule in commercial law allowing the holder of paper to sue, who also may sue as trustee of an express trust.

This note is not intended to include the various exceptional provisions in the several statutes, such as allowing actions by trustee of express trust, administrators, guardians, and officers, except so far as the question has incidentally arisen in cases under the statutory provisions requiring an action to be brought by the real party in interest. I. T.

MINNESOTA SUPREME COURT.

Edward E. CONNERY, Doing Business as
the Connery Fruit Company, *Respt.*,

v.

QUINCY, OMAHA, & KANSAS CITY
RAILROAD COMPANY, *Appt.*

(.....Minn.....)

A railroad car of a foreign company,

*Headnote by LOVELLY, J.

NOTE.—See note to Wall v. Norfolk & W. R. Co., *ante*, 501.

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sent into this state with freight to be delivered here, and then, within the reasonable time necessary for its return, reloaded, and, in the customary and usual course of business, forwarded to the state from which it came, is not liable to attachment issued in an action in our courts.

(April 22, 1904.)

APPEAL by defendant from an order of the District Court for Hennepin Coun-

ty refusing to vacate an attachment which had been levied upon one of defendant's cars. *Reversed*.

The facts are stated in the opinion.

Messrs. Rome G. Brown, Charles S. Albert, and Al J. Smith, for appellant: Public policy exempted the car from the process of attachment.

Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 294; *Strom v. Montana C. R. Co.* 81 Minn. 346, 84 N. W. 46.

Property in the hands of a common carrier, in transit to a place outside of the state, is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons.

Stevenot v. Eastern R. Co. 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256; *Baldwin v. Great Northern R. Co.* 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370, 83 N. W. 986; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72.

Execution cannot be enforced against the property of a canal corporation which is in practical use in the operation of the canal.

Brady v. Johnson, 75 Md. 445, 20 L. R. A. 737, 26 Atl. 49; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240; *Gue v. Tide Water Canal Co.* 24 How. 263, 16 L. ed. 636; *Baxter v. Nashville & H. Turnp. Co.* 10 Lea, 488; *Steiner's Appeal*, 27 Pa. 313; *Winchester & L. Turnp. Road Co. v. Vi-mont*, 5 B. Mon. 1.

Any construction of the attachment laws of Minnesota which would have the effect of laying a burden upon interstate commerce would not only nullify the contract, but would be a burden upon and a regulation of commerce between the states, such as would fall within the inhibition of the commerce clause of the Federal Constitution.

Messrs. George C. Stiles and W. E. Dodge, for respondent:

Cars of a railroad company are in the same position, and entitled to the same rights, and subject to the same liabilities as far as interstate commerce is concerned, as are articles of interstate commerce, and there is and can be no substantial difference between their situation and rights as far as this subject is concerned.

Merchandise becomes articles of interstate commerce only after they are committed to a common carrier for transportation out of the state.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Empty cars which have been used exclusively to transport coal from one state 64 L. R. A.

to another, and which are intended to be used again, are not, while being returned from one point in this state to another, engaged in interstate commerce, though en route to the coal fields outside of the state.

Norfolk & W. R. Co. v. Com. 93 Va. 749, 34 L. R. A. 105, 57 Am. St. Rep. 827, 24 S. E. 837; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Johnson v. Southern P. Co.* 54 C. C. A. 508, 117 Fed. 402; *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; *Lathrop v. Middleton*, 23 Cal. 257, 83 Am. Dec. 112; *Parker v. Porter*, 6 La. 169; *Hall v. Carney*, 140 Mass. 131, 3 N. E. 14; *Beardsley v. Ontario Bank*, 31 Barb. 619; *Stevens v. Buffalo & N. Y. City R. Co.* 31 Barb. 590; *Loudenschlager v. Benton*, 3 Grant Cas. 384; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 328; *Humphreys v. Hopkins*, 81 Cal. 551, 6 L. R. A. 792, 15 Am. St. Rep. 76, 22 Pac. 892; *Titus v. Mabey*, 25 Ill. 257; *Midland R. Co. v. Stevenson*, 130 Ind. 97, 29 N. E. 385; *Potter v. Hall*, 3 Pick. 368, 15 Am. Dec. 226; *Risdon Iron & Locomotive Works v. Citizens' Traction Co.* 122 Cal. 95, 68 Am. St. Rep. 25, 54 Pac. 529; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 378, 75 Am. Dec. 518.

Cars of railway companies may be seized and sold in the same manner as any other personal property at common law.

Central Trust Co. v. Moran, 56 Minn. 188, 29 L. R. A. 212, 57 N. W. 471.

Lovely, J., delivered the opinion of the court:

Appeal from an order denying a motion to vacate a writ of attachment under which one of defendant's freight cars was seized in an action for an alleged delay in forwarding a consignment of strawberries shipped from a point on defendant's road in Missouri to be sent through successive railway carriers to Minneapolis. The complaint alleges a cause of action which, if established, would entitle plaintiff to recover for an alleged negligent delay in transmitting perishable goods to the consignee; but it is claimed by the moving party that the property levied upon, though owned by the defendant and within this state, was not subject to the processes of our courts.

The defendant company was a railway corporation of Missouri, had no line of road or office in this state, and did no business herein; its only property being the car in question, temporarily within our boundaries, to be returned as soon as its errand was fulfilled.

From the facts established on the hear-

ing of the motion, it appears that an agreement existed between the defendant company and the intermediate subsequent common carriers, whereby the defendant, instead of unloading and transferring freight at the points of connection or at state lines, received the car in question to be hauled to the place of destination without breaking bulk or discharging its contents, under an implied agreement to return it as soon as practical, reloaded to some point on or near its line in Missouri; that the car in question was used by the carriers bringing it into this state and delivered to the Minnesota Transfer Company, an independent corporation here paying to the first carriers for the use of the same a *per diem* or mileage; that this method of receiving and returning cars facilitated traffic, and is claimed to be a substantial accommodation to the shipping public and a compliance with the system of freight transportation adopted universally throughout the United States.

Under this custom, it appears that the car in question had been used in an interstate shipment of goods therein from St. Louis to points in Minnesota, North Dakota, and Montana, and at the time of the levy was awaiting reloading by the Minnesota Transfer Company in its yards with a return shipment to points in Missouri. While the car was in fact empty when seized it appears that there was no unreasonable or unnecessary delay in securing its return according to the regular course of business, and that the car was a part of the actual equipment of the foreign railway corporation to which it belonged.

Under our statute, although a cause of action may not have arisen in this state, jurisdiction of a foreign corporation can be acquired by our courts through service of summons on one of its officers or agents who may be found therein, providing it has property here; otherwise not. Gen. Stat. 1894, § 5200. But, within the sensible intent of the statute, such property must be of a kind and value to justify the reasonable probability that the creditor can secure something from a sale thereof which may be applied to the debt on judgment; and we have already held that, while no precise rule is applicable to all cases, the mere fact that freight cars are in transit through the state would not constitute such property for the purposes of meeting the jurisdictional requirements. *Strom v. Montana C. R. Co.* 81 Minn. 346, 84 N. W. 46.

Again, it is in substance provided that, where a foreign corporation has property within the state, a creditor may acquire a lien thereon by attachment or garnishment, 64 L. R. A.

but only to the extent of the property at the time the jurisdiction acquired thereby attaches. Gen. Stat. 1894, § 5211.

Strictly speaking, the freight car which was seized in this case was actually property owned by defendant corporation, and, under a technical reading of this statute, was subject to attachment or garnishment; but we do not think this conclusion absolutely follows in all cases. We have held that the property of nonresidents within the state, while strictly subject to garnishment,—as, for instance, in the case of a common carrier receiving goods consigned for transit to a place outside of the state,—is not amenable to such process. *Stevenot v. Eastern R. Co.* 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256; *Baldwin v. Great Northern R. Co.* 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370, 83 N. W. 986.

From the cases above cited from this court, it would follow that we should not give such literal interpretation to our statutes in securing jurisdictional powers as would overcome by artifice the mere presence of property here which has practically been enforced under exceptional circumstances which required its presence temporarily to meet the necessities of commerce, traffic, public policy, or is made essential to secure benefits to our citizens, and whose presence is not intended to serve any other purpose.

Under the laws of this state common carriers doing business herein are required to establish joint through rates and transfer through car-load shipments to their destination without unloading. Laws 1887, chap. 10, § 2.

The Federal government has expressly required that the movement of railway cars shall not be stopped or delayed at the point where the lines of such railway companies cross the borders of states, or at the point where the carriers deliver the cars to the next connecting carriers; but that shipments shall go forward from the originating point to their destination in the cars in which they are first loaded. U. S. Rev. Stat. § 5258 (U. S. Comp. Stat. 1901, p. 3564).

Under the Interstate Commerce Act (so-called) it is provided, in terms: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage

of freights from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act." 24 Stat. at L. 382, chap. 104, § 7 (U. S. Comp. Stat. 1901, p. 3159).

These well-known provisions of law are expressive of a universal condition that exists upon all the railway lines of this country, and, without giving them effect, and permitting the railway carriers from other states to come into our boundaries with goods which are shipped here and returned without being retarded or so treated that the carriers must protect themselves against litigation away from home, that they must transfer the contents of such cars to others in our state would be provocative of the greatest detriment to the business interest of our own citizens, and be violative of the terms and spirit of the enactments to which we have referred.

It follows that we cannot justify a construction of our attachment or garnishee statutes that would effectuate such a result, and, while it was a part of the contract between the nonresident corporation in this state and the connecting carriers that the freight cars should be loaded and within reasonable time returned, this custom was but a practical method of securing a

compensation for bringing the car into and out of the state in the necessary effort for continuous and unbroken transit which is essential to the purpose of traffic and interstate commerce, hence, it should not be treated as property subject to attachment.

This subject has been thoroughly and exhaustively considered in two recent cases, and the reasoning therein within the lines above suggested meets our approval. *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.* 1 Ill. App. 399-404; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 94 Am. St. Rep. 948, 44 S. E. 294.

Had the car seized in this case been delayed longer than was necessary in the course of business to return it to the place from whence it came, or had it been diverted within the state to uses and purposes exceptional to its presence here under the demands of interstate commerce with the consent of the owning corporation, a different proposition would be presented; but practically it was engaged in a transit into and from the state upon such reasonable conditions as ought not to impose upon it such property conditions and characteristics as should subject it to seizure in coming into and returning from the state for the purpose of giving jurisdiction to litigants here who otherwise would be compelled to contest their causes of action in the tribunals where the property had its undoubted legal situs.

The order refusing to vacate the attachment is reversed, and the cause remanded.

MARYLAND COURT OF APPEALS.

Mayor, etc., of FROSTBURG *et al.*, Appts.,
v.

Marx WINELAND.

(.....Md.....)

1. Equity may review the action of a municipal corporation in declaring ornamental trees adjoining the curb in the street in front of private property to be nuisances, and ordering their removal.
2. Trees which have been standing for forty years without impeding the travel on a public highway are not shown to be nuisances because they extend a few inches outside the curb on a proposed plan for the improvement of the street, where the curb can be so arranged as to carry wa-

ter flowing in the gutter around them, so that it will not interfere with the flow of the water, or the improvement of the street in a workmanlike manner.

(January 12, 1904.)

APPEAL by defendants from a decree of the Circuit Court for Allegany County enjoining them from removing trees from the street in front of plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Mr. Charles G. Watson, for appellants:

The mayor and councilmen are the judges of what obstructs and constitutes a nuisance of the public streets, and their action is not reviewable by the courts.

Methodist Protestant Church v. Baltimore, 6 Gill, 391, 48 Am. Dec. 540; 2 Smith, Modern Law of Mun. Corp. § 1311; *Chase v. Oshkosh*, '81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; *State v. Consolidated Coal Co.* 46 Md. 1; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A.

NOTE.—For trees as nuisance subject to municipal control, see also note to *State v. Clarke*, 39 L. R. A. 670.

For a case in this series holding that the removal of trees from the street without giving the abutting owner any notice or opportunity to transplant them renders a municipality liable in damages, see *Stretch v. Cassopolis*, 51 L. R. A. 345.
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207, 45 Pac. 266; *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; *State v. Leaver*, 62 Wis. 387, 22 N. W. 576. *Messrs. Benjamin A. Richmond and D. J. Blackiston*, for appellee:

Shade trees are a public benefit, and cannot be destroyed without the call of public necessity.

26 Am. & Eng. Enc. Law, p. 561; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Bills v. Belknap*, 36 Iowa, 583; *Phifer v. Cow*, 21 Ohio St. 248, 8 Am. Rep. 58.

Trees in a highway, belonging to the owner, cannot be cut down unless they obstruct or interfere with the public use of the road or street.

Bliss v. Ball, 99 Mass. 597; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678; *Clark v. Dasso*, 34 Mich. 86; *Everett v. Council Bluffs*, 46 Iowa, 86; 2 Dill. Mun. Corp. § 660, note 4; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; 21 Am. & Eng. Enc. Law, p. 977.

Private property which is not a nuisance *per se* by the general law of the land cannot be arbitrarily declared a nuisance and destroyed by municipalities under the small delegation of power to abate nuisances, in advance of some proceeding according to law, declaring the same a nuisance, in which the owner of the property has had an opportunity to participate and be heard.

Alberger v. Baltimore, 64 Md. 1, 20 Atl. 988; *King v. Hamill*, 97 Md. 103, 54 Atl. 625.

Briscoe, J., delivered the opinion of the court:

On the 5th day of November, 1902, the appellee filed a bill in the circuit court for Allegany county, in equity, against the appellants, for an injunction to restrain the mayor and councilmen of Frostburg from cutting down and removing two shade trees at the curb between the sidewalk and the street, and in front of the appellee's property, and within the corporate limits. The bill, in substance, charges that the destruction of the trees is wholly useless and without authority, and that it is not necessary to the proper grading, paving, curbing, or sewerage of the street. It is further alleged that the destruction of the trees, on account of their intrinsic value, their beauty and comfort as shade trees, and their enhancement of the value of said property, will be an irreparable loss, which could not be compensated for in any way by a suit for damages or by any proceeding at law; that said street, although a main business street of the town, is still not entirely devoted to business houses, but is also a most important and fashionable residence street of the town, and thickly occupied by per-

sons living upon the same, from end to end: that said shade trees, so far from being a nuisance, are an ornament and benefit to said street and the people thereon, and their destruction would be a great harm to the citizens of the town, apart from the special harm that would be done to the plaintiff. The bill admits the right of the mayor and council to improve the streets, and to repave or to change the width of the sidewalks or the curbing, but charges that the plan adopted in this case is a wholly unnecessary, unreasonable, unjust, and arbitrary plan, and will result in the useless destruction of the plaintiff's property. A preliminary injunction was issued on the bill, with leave to dissolve after five days' notice to the plaintiff. On the 11th of November, 1902, the defendants filed an answer to the bill, denying that the trees are not an obstruction to the street, but charging that they are a great nuisance, and a serious obstruction to the public use of the street of the town. It admits the passing of an ordinance declaring the two trees to be a nuisance and an obstruction to the paving and curbing of the street, and instructing the street commissioners to remove them, but states the order was passed for the good of the public, and with a view to a proper discharge of their duty as the officers of the town, in having all serious obstructions that are likely to cause damage removed from the street. The answer further denies that the corporation has acted in an unreasonable and arbitrary manner, but insists that they have complete control over the streets and alleys, by and under their charter, with full power to remove all nuisances and obstructions, and to regrade and improve the streets of the town in any manner that, in their judgment, will be to the best interest of the town, and that their acts as a municipal corporation are not reviewable in this court. The case was heard on bill, answer, and proof, and from a decree passed on the 6th day of August, 1903, continuing and making perpetual the preliminary injunction, with certain modifications, this appeal has been taken.

The law has been settled in this state since the case of *Alberger v. Baltimore*, 64 Md. 7, 20 Atl. 988, that where the legislature confers the power on a municipality, in general terms, to provide by ordinance for paving or repaving the streets, the discretion exercised by the city council in regard to the propriety or necessity of the improvement provided by the ordinance cannot be controlled by the courts, except where the power is exceeded, or fraud is charged and shown to exist, or where there has been a manifest invasion of private rights. Judge Alvey, in delivering the opinion of the court,

cites 1 Dill. Mun. Corp. 3d ed. § 94, where it is said that, where the law or charter confers upon the city council or local legislative power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority, cannot be controlled by the courts. In such case the decision of the proper corporate officer is, in the absence of fraud, final and conclusive, unless they transcend their powers.

The first question, then, in the case, resolves itself to this: Was the summary proceeding of the appellants in declaring the two trees in front of the appellee's property to be a nuisance and an obstruction to the paving and curbing of the street, and directing them to be removed and destroyed, so far final as not to be reviewable by the courts? This question, we think, was in effect settled by this court in the recent cases of *New Windsor v. Stocksedale*, 95 Md. 215, 52 Atl. 596, and *King v. Hamill*, 97 Md. 103, 54 Atl. 625. In the latter case it is said that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act, unless the act is shown to be a nuisance *per se*. And in the case of *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, the Supreme Court held that the mere declaration by the city council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities. It is clear, we think, both upon reason and authority, that, when a municipality undertakes to destroy private property which is not a nuisance *per se*, it then transcends its powers, and its acts are reviewable by a court of equity. In *Bills v. Belknap*, 36 Iowa, 583, it is held that, if the removal of trees in a highway is not required for the free and proper use of the highway, no principle of law will permit it to be done against the will and the interest of the owner. In *Clark v. Dasso*, 34 Mich. 88, Judge Cooley says that it must be borne in mind that a tree in a highway is not, under our law, a nuisance *per se*, and only becomes such when it constitutes an actual

injury or obstruction; when the tree is removed, the value of private property is destroyed. And in *Everett v. Council Bluffs*, 46 Iowa, 67, it is said: "A city council has no power to declare a thing a nuisance which is not such at common law, or has not been declared to be such by statutes. Trees growing in a street or highway do not constitute a nuisance unless they make an obstruction to travel." And the same principle is upheld in *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Bliss v. Ball*, 99 Mass. 597; *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678.

As the best-adjudicated cases hold that shade trees in a highway or a street are not a nuisance *per se*, and only become so when they obstruct or interfere with the use of the highway or street, we come to the remaining question; and that is, Does the proof in the record show that the trees here in dispute amount to such an obstruction to the traveling public as to constitute a nuisance? The record contains a large amount of testimony as to these shade trees, and as to their situation and location in the street, and it would answer no good purpose to attempt to reconcile the conflict in this testimony, or to set it out in detail here. As stated by the judge in his opinion in the court below: "These trees have been standing more than forty years, and there is no evidence to show that in all that long time they have impeded travel or worked any great inconvenience, except in one instance, when a wagon came in collision with a projecting limb, which has been cut off. Nor does the evidence tend to establish the fact that the trees are or have been a nuisance. The defendants' whole objection to the trees seems to be based on their fear that they will be an obstruction to the grading and paving of the street, and that, if they remain, they will divert the flow of water from the curb, and flood the street and sidewalk, and cause the accumulation of *débris* on the street, and prevent the making of a pavement and curb in a workmanlike manner. The trees stand in the curb, a convenient and proper place; escaping the obstruction of footmen, on the one hand, and vehicles, on the other." According to the evidence, these trees stand on the outside of the curb, and on the edge of the gutter, and are about 1½ feet in diameter. One of the trees is about 6 inches outside of the curb, and the other from 8 to 10 inches. There is no evidence that the trees will obstruct the sidewalk, or that they present any material obstruction to travel on the street. Messrs. Townsend and Shriver, two civil engineers, testified that the curbstones could be so arranged as to carry the water around

the trees, and when so fixed the trees would be no material obstruction on this account.

Upon the whole case, then, as disclosed by the record, we are of the opinion that the trees in question do not so obstruct the street as to constitute a nuisance.

The cases cited and relied upon by the appellants are clearly distinguishable in principle from this. They are based upon some statute, or rest upon dissimilar facts. The general doctrine, as stated by the appellee in his brief, cannot be denied,—that a city which is invested with power to regrade and repave a street can determine upon the expediency and necessity of so regrading, and upon the kind of pavement to be used, free from the interference of a court of equity; but if a municipality, in doing an act of that kind, arbitrarily or unnecessarily undertakes to destroy private property which is not a nuisance, it then undertakes to do an act beyond its delegated power, and those acts are within the corrective powers of a court of equity.

For the reasons given, the decree of the Circuit Court for Allegany County will be affirmed.

Decree affirmed, with costs.

WESTMINSTER WATER COMPANY,
App't.,
c.
Mayor and Common Council of WESTMINSTER.

(.....Md.....)

1. A contract for a municipal water supply, which is void because perpetual and therefore in excess of the powers of the municipal corporation, cannot be construed to have been intended to exist merely for the lifetime of the water company, and to be valid because such term was not unreasonable.
2. A municipal corporation has no power to contract to levy 5 cents on each \$100 of assessed property within its limits, in perpetuity, in payment for a water supply, under a statute authorizing it to levy annually a tax not exceeding that amount, "and out of the proceeds to pay the water company such sum as the mayor and common council may deem proper."
3. A municipal corporation has no power to contract to pay a water company for a water supply a sum annually, in perpetuity, equal to 5 cents on the \$100 of the "present valuation of assessment," under a statute authorizing it to

levy annually a tax not exceeding 5 cents on the \$100 of assessed property.

4. Mandamus will not lie to compel the levy of a tax to pay the contract price for water furnished a municipal corporation, where the contract was *ultra vires* on the part of the municipality because for a period extending beyond its power to contract, or which fixes a basis for determining the compensation which may, by changing circumstances, exceed the powers of the municipality or become unreasonable.
5. The provisions of the Federal Constitution prohibiting the impairment of the obligation of a contract do not apply to contracts which are not valid

(January 20, 1904.)

A PPEAL by petitioner from an order of the Circuit Court for Carroll County denying a writ of mandamus to compel the levying of a tax according to the provisions of a contract for a municipal water supply. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles E. Fink and Bernard Carter, for appellant.

Messrs. John K. Cowen, John Milton Reifsnider, James A. C. Bond, and Francis Neal Parke, for appellee:

The provision of the United States Constitution against the impairment of contracts does not become operative unless there is a valid contract.

Sutherland, Stat. Constr. § 155; Cooley, Taxn. 3d ed. 554-556; Dill. Mun. Corp. §§ 54, 63, 65, 766; *Hagerstown v. Sehner*, 37 Md. 193; *Baltimore v. Gorter*, 93 Md. 6, 48 Atl. 445; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197.

The capacity of a municipality to enter into a contract requiring the levy of a tax is rigorously restricted to its granted powers, which are strictly construed.

Anson, Contr. 113, 114; Dill. Mun. Corp. §§ 9, 10, 19, 445, 447; *Baltimore v. Eachbach*, 18 Md. 276; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Horn v. Baltimore*, 30 Md. 218; *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458; Sutherland, Stat. Constr. §§ 381, 382.

When the legislature expresses its will the municipality cannot enlarge or modify it, but must obey the written instructions of the granted power.

Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 161; *Baltimore v. Porter*, 18 Md. 300, 79 Am. Dec. 686; Dill. Mun. Corp. §§ 39, 317, 443, 449, 463; *Vansant v. Harlem Stage Co.* 59 Md. 330; *State ex rel. Baltimore v.*

NOTE.—As to the power of public officers to make contracts for a water supply, binding on their successors or for a term of years, see also *note* to *Shelden v. Fox*, 16 L. R. A. 257, and the later cases of *Vincennes v. Citizens' Gaslight & Coke Co.* 16 L. R. A. 485; *Altgelt v. San An-*

tonio, 13 L. R. A. 383; *Columbus Water Co. v. Columbus*, 15 L. R. A. 354; *Saleno v. Neosho*, 27 L. R. A. 769; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518; *Kiehl v. South Bend*, 36 L. R. A. 228; and *Thrift v. Elizabeth City*, 44 L. R. A. 427.

Kirkley, 29 Md. 85; *St. Mary's Industrial School for Boys v. Brown*, 45 Md. 310; *Baltimore v. Gill*, 31 Md. 375; *Horn v. Baltimore*, 30 Md. 218; *Baltimore v. Gorter*, 93 Md. 6, 48 Atl. 445.

The city cannot exhaust its power to levy a tax for two public purposes by levying the whole tax for one of those public purposes.

Cooley, Taxn. 3d ed. 468, 554; *Dill. Mun. Corp.* §§ 39, 449, 463; *Vansant v. Harlem Stage Co.* 59 Md. 330; *Sutherland*, Stat. Constr. §§ 234, 235, 238, 365, 380; *Endlich*, Interpretation of Statutes, §§ 4-9; *Webster v. People*, 98 Ill. 349; *Alton v. Aetna Ins. Co.* 82 Ill. 45; *State, Aldridge, Prosecutor, v. Essex Public Road Board*, 46 N. J. L. 126; *Loomis v. Township Board*, 53 Mich. 135.

Water was needed for fires, but, in order to secure public health and comfort, it was also needed to flush the gutters and the sewers, and to sprinkle, cool, and clean the streets. The tax provided to secure these separate advantages could be no more entirely appropriated for one than a tax to be levied for repairing a public road could be entirely appropriated to the repairing of a part of the road.

Elliott v. Berry, 41 Ohio St. 110; *Sutherland*, Stat. Constr. § 365; *Dill. Mun. Corp.* § 765; *Holland v. Baltimore*, 11 Md. 186; *Baltimore v. Gorter*, 93 Md. 28, 48 Atl. 445.

The city cannot be bound to onerous and unreasonable contracts not authorized by its charter.

Capital City Light & Fuel Co. v. Tallahassee, 186 U. S. 401, 411, 46 L. ed. 1219, 1224, 22 Sup. Ct. Rep. 866; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 200; *Wattles v. Lapeer*, 40 Mich. 624; *Arnold v. Hawkins*, 95 Mo. 569, 8 S. W. 718; *Cummings v. Fitch*, 40 Ohio St. 56.

The city could not surrender the beneficent right to regulate the tax rate without destroying the safeguard solemnly provided by the legislature for the protection of the citizens of Westminster.

Baltimore v. Gorter, 93 Md. 14, 48 Atl. 445; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 87; *Richmond County Gaslight Co. v. Middleton*, 59 N. Y. 228; *Gossler v. Georgetown*, 6 Wheat. 593, 5 L. ed. 339.

When one set of officers agreed perpetually to levy and in perpetuity annually to pay unto the water company the tax of 5 cents in the form set out, those officers sought to prevent their successors in office from ever exercising any discretion as to the rate of taxation, and with respect to the allowance of a discount for the prompt payment of the tax.

State ex rel. St. Paul v. Minnesota Transfer R. Co. 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32; 20 Am. & Eng. Enc. Law, 2d ed. pp. 1142, 1146, 1158; *Dill. Mun. Corp.* §§ 64 L. R. A.

97, 458; *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 376, 20 L. R. A. 126, 26 Atl. 510; *Rittenhouse v. Baltimore*, 25 Md. 336; *State ex rel. McClellan v. Graves*, 19 Md. 352, 81 Am. Dec. 639; *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 250, 23 Atl. 470; *Bear Creek Fertilizer Co. v. Baltimore*, 87 Md. 97, 39 Atl. 550.

In Maryland a monopoly cannot be created in the water supply of a municipality, —especially where there is no legislative authority to grant one.

Dill. Mun. Corp. § 362; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Conover v. Long Branch Commission*, 65 N. J. L. 167, 47 Atl. 222; *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 385, 17 S. W. 75; *Thrifty v. Elizabeth City*, 122 N. C. 31, 44 L. R. A. 427, 30 S. E. 349; *Brinville Water Supply Co. v. Mobile*, 186 U. S. 212, 223, 46 L. ed. 1132, 1137, 22 Sup. Ct. Rep. 820.

Without express legislative authority, a municipality cannot grant an exclusive franchise, or make a contract of unreasonable length.

Dill. Mun. Corp. § 692; *Minturn v. Larue*, 23 How. 435, 16 L. ed. 574; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Detroit Citizens' Street R. Co. v. Detroit R. Co.* 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison E. L. & Fuel Gas Co.* 33 Fed. 659; *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

The city of Westminster could not enter into a contract for an indefinite period; much less, into a perpetual one.

Garrison v. Chicago, 7 Biss. 488, Fed. Cas. No. 5,255; *Flynn v. Little Falls Electric & Water Co.* 74 Minn. 180, 77 N. W. 38, 78 N. W. 108; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Richmond County Gaslight Co. v. Middletown*, 59 N. Y. 228.

In determining the validity of the contract under this phase of the case, the court will not concern itself with what length of time the city could have contracted for, but will decide the question by the legality of what the contracting parties actually attempted to do.

State, Davis, Prosecutor, v. Harrison, 46 N. J. L. 79; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327; *Cincinnati Gaslight & Coke Co. v. Avondale*, 43 Ohio St. 267, 1 N. E. 527; *Miner v. New York C. & H. R. R. Co.* 123 N. Y. 242, 25 N. E. 339; *Smith v. Eastwood Wire Mfg. Co.* 58 N. J. Eq. 331, 43 Atl. 567; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247.

If we are to guess that the contract was to be for the corporate life of the water company, rather than for the corporate life of the city, then the contract was entered into by the parties with the knowledge that the life of the corporation depended upon the will of the legislature.

Phinney v. Sheppard & B. P. Hospital, 88 Md. 638, 42 Atl. 58; *Jackson v. Walsh*, 75 Md. 308, 23 Atl. 778; *Webster v. Cambridge Female Seminary*, 78 Md. 193, 28 Atl. 25; *State v. Northern O. R. Co.* 44 Md. 133.

And in 1900 the legislature made the life of the Westminster Water Company perpetual.

Hodges v. Baltimore Union Pass. R. Co. 58 Md. 603; *Sprigg v. Western Teleg. Co.* 46 Md. 67.

If the city did not have the power to contract in the way and form it attempted to do, then subsequent acts cannot make valid what is *ultra vires* and void.

Dill. Mun. Corp. § 457; *Northern O. R. Co. v. Baltimore*, 21 Md. 93; *Rittenhouse v. Baltimore*, 25 Md. 336; *State ex rel. Baltimore v. Kirkley*, 29 Md. 85; *State ex rel. McClellan v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Baltimore v. Reynolds*, 20 Md. 1; *Baltimore v. Eschbach*, 18 Md. 283; *Horn v. Baltimore*, 30 Md. 223; *Baltimore v. Musgrave*, 48 Md. 272, 30 Am. Rep. 458; *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746; *Bear Creek Fertilizer Co. v. Baltimore*, 87 Md. 97, 39 Atl. 550; *Packard v. Hayes*, 94 Md. 252, 51 Atl. 32; *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686; *Mullan v. California*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670; *Milford v. Milford Water Co.* 124 Pa. 610, 3 L. R. A. 122, 17 Atl. 185.

McSherry, Ch. J., delivered the opinion of the court:

This is an appeal from the circuit court for Carroll county, and was taken from an order refusing to grant a writ of mandamus which had been asked for by the appellant against the appellee. The facts which are necessary to be stated are as follows: By chapter 88, p. 136, of the Acts of the General Assembly of 1876, it was provided that "the mayor and common council of Westminster, may levy annually a tax not exceeding 5 cents on every \$100 to be used and applied to the payment of water rents for the use of water for the public uses of said city,—that is to say, for use on the public streets of said city, and for the suppression of fires, to any incorporated company which may be organized for the introduction of a supply of water into said city; and the said mayor and common council may contract with any such incorporated, or to be incorporated, company for the introduction of water into the said city, to pay such com-

pany annually in such sum not exceeding the proceeds of said levy of 5 cents as aforesaid, as the said mayor and common council may deem proper: Provided that no such payment shall be made until water shall have been actually introduced into said city by such company; and Provided further that said levy of 5 cents as aforesaid shall not be made or used and applied for any other purposes whatsoever." On May 12, 1883, the mayor and council of Westminster passed an ordinance known as No. 62, wherein, amongst other things, it was provided that when mains of the size and length described in the ordinance "shall be laid through the streets and alleys of the city of Westminster with water therein suitable and sufficient for fire extinguishing, street sprinkling, and domestic purposes, by the Westminster Water Company, a body corporate of Carroll county, then and in that event the mayor and common council of Westminster shall annually levy and pay to the said water company the sum of 5 cents on each \$100 of the assessed value of all property within the limits of the said city subject to the levy and taxation by said city, whatever the sum may be, less one third of the expenses of collecting said water taxes each year: Provided that the amount of the said tax to be paid said company in any one year shall not be lower than that produced by the valuation or assessment of the year 1883." On the faith of the foregoing and other terms of the ordinance, all of which were accepted by the water company, the latter expended large sums of money in erecting a plant, building reservoirs, laying mains, and erecting fire plugs in accordance with the provisions of the ordinance just named. The ordinance thus became the contract between the company and the city. On June 29, 1885, a supplemental agreement was entered into between the water company and the mayor and common council of Westminster, whereby some of the provisions of the contract made by ordinance No. 62 were modified, but the terms of that supplemental agreement need not be stated, further, than the one we shall now quote, namely: "Now therefore, for the purpose of rendering said ordinance clearer, and to avoid any future misunderstanding concerning it, this agreement is now entered into by the said contracting parties to bind them and their successors in office forever, as follows." There are further provisions, which we have said it was unnecessary to quote in this opinion. The tax was levied annually and paid to the water company under the provisions of ordinance No. 62 and the supplemental agreement just alluded to, until the year 1902, when the mayor and common council passed an ordinance (No. 145) repealing ordinance

No. 62, and declaring that "the contract in said ordinance with the Westminster Water Company is hereby repealed and terminated;" and in making the levy for the year 1902 the mayor and common council omitted to levy for the use of the Westminster Water Company the sum of 5 cents on each \$100 of the assessed value of the property within the limits of the city, as previously levied under the ordinance No. 62 and the supplemental agreement referred to. Thereupon the pending petition for a mandamus requiring the mayor and council of Westminster to make the levy of 5 cents for the use of the Westminster Water Company was filed. Upon the coming in of the answer, an agreed statement of facts was entered into, and the case was heard. The application was denied upon the ground that the writ of mandamus could not be applied as an appropriate remedy for such wrongs as are alleged in the petition of the relator. The appeal now before us brings up that order for review.

It ought to be stated, though not as tending to influence the decision of this case, that the act of 1876 which gave the city of Westminster authority to contract for a supply of water for the purposes heretofore named was repealed by the act of 1882, p. 451, chap. 295, but the repealing act failed to take effect by reason of an omission to hold an election, upon the result of which its becoming operative depended. But Code Pub. Loc. Laws 1888, art. 7, §§ 238 to 247, incorporated the provisions of the act of 1882, and omitted the act of 1876. The result is that the act of 1876 is no longer in force. By the Local Code a totally different system for levying the water tax and contracting with a water company is provided. A specific sum, not exceeding \$1,800, is required to be levied annually, and under certain conditions a portion of that sum must be paid back by the water company to the city.

It has been more than once held by this court, following the English doctrine, that the writ of mandamus is not one which is granted *ex debito justitiæ*. *State ex rel. Baltimore, U. & P. B. R. Co. v. Latrobe*, 81 Md. 222, 31 Atl. 788. There must be a clear and unequivocal legal right to be enforced, and there must not be any adequate remedy other than mandamus for its enforcement. *Brown v. Bragunier*, 79 Md. 234, 29 Atl. 7. If the right be doubtful, mandamus will not lie. If the right be clear, and there be some other adequate remedy, that remedy, and not mandamus, must be invoked. Obviously, then, the inquiry at the threshold of the case is, Is the right which the water company sets up and seeks to have enforced such a clear legal and unequivocal right as can be

enforced by this process? Under the supplemental agreement it will be borne in mind that the contract of 1883 distinctly and unequivocally purports to bind both the municipality and the water company forever. The municipality is obligated to levy each year, in perpetuity, 5 cents on the \$100 of the assessed value of the property within the city, and to pay the proceeds of the levy to the water company, in consideration for the latter's supplying from its works water for public uses. There are two difficulties in the path of the enforcement of that contract by mandamus: First, it has been, as it must be, conceded that no municipality, without express legislative sanction, has authority to bind itself to levy taxes for the payment of money for all time to come, when the taxes, if thus levied, are to be applied as are those we are dealing with. Secondly, the inequality and the want of mutuality in the provision, which, without regard to varying circumstances that might arise in the future, fixes 5 cents as the rate to be levied each year, would of itself stamp the contract as one not creating such a clear and unequivocal legal right in the relator as to warrant the issuing of a mandamus for its enforcement.

First, starting with the postulate that without previous legislative sanction a contract of the kind we are considering cannot be made in perpetuity, because it would be *ultra vires*, it is argued that the true interpretation of the agreement is not that it was to continue, or was designed to continue, forever, but that it was meant to last for forty years, and no longer, because that period was the limit of the corporate life of the water company; and it was vigorously and ably insisted that a contract of this character for forty years, made under the circumstances we have narrated, was neither illegal nor unreasonable. Now, it is true the books are full of cases where contracts for the furnishing of water by water companies to municipalities, and running for quite a number of years, have been before the courts repeatedly for consideration. Thus, in the case of *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273, a contract for fifty years was sustained; in *Walla Walla v. Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, a contract for twenty-five years was sustained; in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585, a contract for thirty years was held not unreasonable; and in *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155, a contract for twenty years was upheld. *Columbus Water Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 354, 28 Pac. 1097. But it will be

noticed that in all of these, and similar cases which might be cited, there was a specific claim that a definite period of time had been distinctly agreed upon; and the question in some, though not in all, was whether that definite period was a reasonable one. Take, for illustration, *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273. The contract there before the Supreme Court was one made between the state of Louisiana and the waterworks company, and was embodied in an act of the legislature. By the act it was provided that the water company shall have for fifty years from the passage of the act "the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river," etc. In spite of this the city council of New Orleans granted to Robert E. Rivers the privilege to lay a water pipe from the Mississippi river to the St. Charles Hotel for the purpose of supplying the hotel with water. The Supreme Court upheld the validity of the contract between the state and the water company, and struck down the ordinance because it impaired the obligation of that contract. The case of *Walla Walla v. Walla Walla Water Co.* 172 U. S. 9, 43 L. ed. 341, 19 Sup. Ct. Rep. 77, was this: The act of the territory of Washington by which the city of Walla Walla was incorporated declared that the city should have power to provide a sufficient supply of water and to grant to any persons or associations the right to use the streets of the city for laying pipes to supply the inhabitants with water, but the grant was not to be for a longer period than twenty-five years. There was a proviso which enacted "that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the same rights to others." Pursuant to this authority, the city passed an ordinance granting to the water company the right to lay mains, introduce water, and furnish it to the city and its inhabitants for a period of twenty-five years; and the city stipulated that it would not erect, maintain, or become interested in any waterworks during the time for which the rights were granted to the water company. The ordinance was accepted by the company, and the water was introduced. Six years afterwards the city passed another ordinance to provide for the construction by the city of a system of waterworks. Thereupon the water company filed a bill against the city to restrain the latter from erecting waterworks of its own. The injunction was made perpetual, and the case was taken to the Supreme Court. In the course of its judgment that tribunal, speaking through Mr. Justice Brown, said: "As the contract in question

was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the water company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24. Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. . . . Without expressing an opinion upon the point involved in that case [the case of *Brenham v. Brenham Water Co.* 67 Tex. 542, 4 S. W. 143], we are content to say that an ordinance granting a right to a water company, for twenty-five years, to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly, or prevent the granting of a similar franchise to another company." The decree making the injunction against the city perpetual was affirmed by the supreme court. In *Bennett Water Co. v. Millvale*, 200 Pa. 613, 50 Atl. 155, a similar situation was presented, though the form of procedure was not by bill in equity, but by action at law for the violation of a twenty-year contract made by the borough of Millvale with the water company. In *Columbus Water Co. v. Columbus*, 48 Kan. 99, 15 L. R. A. 354, 28 Pac. 1097, a very elaborate opinion was filed, and a large number of cases were examined and cited. The result reached may be summarized in this way: A city of the second class has the power to enter into a contract with private parties or a corporation for water to be furnished to it for fire protection by such party or corporation; and when a city of the second class has entered into such a contract, and a waterworks plant has been erected and maintained at great expense for a period of four years or more, and during that period the corporation owning the plant has furnished water in accordance with a contract entered into and recognized by the city, and the city has levied the proper tax and paid the hydrant rental for three years, and otherwise recognized the validity of such contract,—held, that the court will not hold the contract void, under the facts as stated in the petition, because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and condition of the city as to population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms.

In none of the foregoing cases was the sit-

uation presented with which we are confronted here. The nearest approach to the case at bar is the one last above cited. If this contract had been for forty years, then the single question to be considered would be whether that was a reasonable time; but the contract, on its face, purports to run forever, and the argument is that, inasmuch as the duration of the water company's charter was limited to forty years, when the agreement was entered into, the contract, though professing to run forever, must be read as if it ran for forty years, and no longer; and then, reading it in that way, we are asked to say that the forty years would not be unreasonable. But the fallacy of the argument lies in this: That we must prescind from the contract the words that the parties to it have themselves deliberately incorporated therein, and we must then substitute for the words thus eliminated others that the contracting parties did not see fit to use, and obviously did not intend to use. That is to say, we must declare that the contract as made is one that is void because the parties were without power to enter into it; but, inasmuch as it is void on that ground, the court will by construction make a new one for them, though they did not see fit or intend to make it for themselves, so that when made by the court the new contract would be one that is valid, because when thus made it would run only for a reasonable time. By what authority can the court limit the duration of the contract to a term of forty years, when it was the declared intention of the parties to it that it should continue in force forever, as stated in and declared by the supplemental agreement, which was framed for the very purpose of making clear their object in this particular? Why say forty years, now that the charter of the water company has been indefinitely extended by the act of 1900, chap. 489, and obviously so extended to the end that the design of the contracting parties that the contract should remain operative for all time might be given effect? The extension of the charter of the water company is a circumstance not to be overlooked in determining what the parties understood to be the meaning of the original contract as to the period of time the agreement was to run. No case has been cited where the court has changed an *ultra vires* agreement into a valid undertaking, and we are not prepared to say that a court, upon an application for a mandamus, is at liberty, first, to declare void a contract under which the right to have a mandamus is asserted, and, secondly, in place of the void contract, to construct a valid one, in order that the writ may be issued. Until this can be legally done, the application as here presented must fail.

Much reliance was placed by the appellant on the New Jersey cases. The first of these is *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378, 6 Atl. 24. That was an action of covenant by the water company against the city to recover the rent stipulated to be paid by the city. The city objected that the contract under which the rent was payable was void because it was a contract in perpetuity. It was held that the contract was not indefinite in duration, because it contained a clause permitting the city to terminate it whenever so minded, by purchasing the water company's plant. The next case was *State, Read, Prosecutor, v. Atlantic City*, 49 N. J. L. 559, 9 Atl. 759. That was a proceeding by certiorari to have the ordinance declared void. One of the grounds of invalidity, as alleged, was that the ordinance was *ultra vires* because it continued in force for more than one year. This contention was overruled on the authority of the previous case. The third case was *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665, 15 Atl. 10. That was on error to the supreme court of New Jersey, and the ordinances of October and November, 1880, and the contract of the last-named month, were finally declared invalid. We do not perceive how either of these cases at all conflicts with the views we have thus far expressed. The situation here involved is quite different from that which existed in those cases. We think, therefore, we need discuss them no further.

Secondly, the contract calls for the levy of 5 cents on the assessable basis as that basis existed in 1883. Now, it requires no great stretch of imagination to see that, though the town may not expand geographically, and therefore though no additional water mains or fire plugs may be required, yet the taxable basis may be largely augmented, whereby the sum total of the 5-cent levy would be increased twofold. So that, without the expenditure of a single additional dollar by the water company for supplying more mains or plugs, it would, under the contract, receive twice as much money as originally contemplated. And so the opposite view may be taken. The taxable basis may greatly diminish from various causes, and yet the net amount produced by the rate of 5 cents on the basis as it existed in 1883 must be forever paid, whereby, in point of fact, a higher rate on the decreased basis would have to be levied. Obviously these situations are not within the contemplation of the act of 1876, which permitted the mayor and common council to make the contract with the water company, and yet both might occur if the contract is valid and binding. But, again, both as bearing on the question of *ultra vires* and the unreason-

ableness of the contract, it should be noted that the act of 1876 authorized the city of Westminster to levy annually a tax not exceeding 5 cents on the \$100 of assessed property, and out of the proceeds to pay the water company such sum as the mayor and common council may deem proper. Under the act the city could have agreed to pay a certain, definite sum per annum, or a sliding scale could have been arranged to meet unforeseen contingencies, but in no event could the amount exceed the sum which a 5-cent levy would produce; but definiteness in the sum, or a standard by which definiteness could be ascertained, was clearly contemplated. We have said that events might happen which would cause a 5-cent rate to yield too much, and it was evidently not the purpose of the legislature to permit the city, by contracting to levy 5 cents absolutely and in all circumstances, to put it out of the power of future city authorities to levy less than that rate, if less than that rate would yield a sum sufficient to liquidate the amount which the city might stipulate to pay. By ordinance No. 62 all discretion is taken away from the municipality, and those who hereafter come into office will find their hands completely tied though they may be fully conscious that the sum realized by a 5-cent levy is grossly excessive and burdensome. In *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80, Judge Cooley used this emphatic and apposite language: "It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic; and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition." It is difficult to perceive how ordinance No. 62 can stand unless the fundamental maxim of which Judge Cooley spoke be wholly disregarded. There is a distinction which must not be overlooked. If by the ordinance the city had contracted for a fixed period to pay a certain sum annually, or had provided a standard by which some definite sum could have been ascertained, there would have been no difficulty, because the legislative power of the city to levy a sufficient sum within the 5-cent rate would not have been interfered with. Now, however, the legislative power,

if ordinance No. 62 is valid, has been completely parted with, and no subsequent common council can exercise any discretion in reference to it, even though it is obvious that a 5-cent levy is excessive. A contract to pay a definite sum for a specified period is binding on the successors of the municipal officials who made the contract. Such a contract is not entered into in virtue of the governmental or legislative functions of the city (*Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271), whereas the power to levy a tax belongs to the class of legislative and governmental powers. In the one case successors may be bound; in the other, they cannot be. The provision of ordinance No. 62 requiring 5 cents to be levied forever is an attempt to bind succeeding common councils in the discharge of their legislative and governmental powers. But where did the city get authority to enact that in no event should the sum to be paid the company ever be less than that produced by the 5-cent rate on the basis of 1883? The words of the ordinance are as follows: "Provided that the net amount of said tax to be paid said company in any one year shall not be lower than that produced by the present valuation of assessment." By "the present valuation of assessment" is meant the valuation for the year 1883. Now, if from any cause the basis as it existed in 1883 should materially depreciate, it is obvious that a levy of more than 5 cents on each \$100 would be necessary in order to produce a net amount equal to the amount which the 5-cent rate would yield on the basis of 1883. But the city has no power to bind itself to levy more than 5 cents. Consequently the contract which imposed the obligation contained in the proviso was manifestly *ultra vires*. Yet the relief sought is the enforcement of the entire contract, with this *ultra vires* feature included. For both of the reasons we have suggested, we are of opinion that the court below was clearly right in refusing the mandamus. There are many other cases that were relied on in argument that we have not deemed it necessary to specially allude to.

Finally, it is insisted that the water company's rights are protected by the contract clause of the Federal Constitution. Before, however, that clause can be invoked, there must be a contract, and some act by the state, or by its creature, a municipal corporation, by which the obligation of that contract is impaired. If there is no contract, there can be no impairment of the obligation of a contract. An *ultra vires* contract is no contract at all. It is obvious, therefore, inasmuch as the contract relied on by the water company is invalid

because *ultra vires*, the prohibitive clause of the Federal Constitution cannot be invoked.

In view of the nature of the writ of mandamus, and in view of the *ultra vires* and unreasonable character of the contract which the water company seeks to enforce, we are obliged to affirm the order appealed from.

Order affirmed, with costs.

STATE of Maryland, Appt.,
v.

Louis HYMAN.

(.....Md.....)

1. The court cannot declare an act of the legislature which has a real and substantial relation to the police power void for unreasonableness.
2. The police power extends to prohibiting the use of a room in a tenement or dwelling house for the manufacture of men's clothing, except by the immediate members of the family living there, and then only under permit from a public official.
3. The court will take judicial notice that the manufacture of wearing apparel in improperly ventilated, unsanitary, and overcrowded apartments will be likely to promote the spread of, if it does not engender, disease.
4. Requiring a specified air space for every person employed in a manufacturing establishment is strictly and essentially a health regulation within the police power of the legislature.
5. Persons giving out materials to be manufactured into men's clothing may be required to keep a register of those to whom they are given, to aid the public authorities in their supervision of the places where the work is done.

(February 19, 1904.)

A PPEAL by the State from a judgment of the Criminal Court of Baltimore City quashing an indictment charging defendant with a violation of the statute regulating workshops and factories. *Reversed*.

The facts are stated in the opinion.

Messrs. William Shepard Bryan, Jr., Attorney General, and Jacob M. Moses, for appellant:

The act of 1902 was well within the power of the legislature, and it does not conflict

with any clause of either the state or the Federal Constitution.

Cooley, Const. Lim. 6th ed. 706; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Deems v. Baltimore*, 80 Md. 173, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *State v. Broadbelt*, 89 Md. 585, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Com. v. Atger*, 7 Cush. 84.

This police power—this power to legislate for the public health and public morals and public safety and public convenience—is confided to the discretion of the legislative branch of the state government.

Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 380, 20 L. R. A. 126, 26 Atl. 510; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Mugler v. Kansas*, 123 U. S. 661, 662, 663, 31 L. ed. 210, 211, 8 Sup. Ct. Rep. 273; *Spriggs v. Garrett Park*, 89 Md. 406, 43 Atl. 813; *Stevens v. State*, 89 Md. 674, 43 Atl. 929; *State v. Broadbelt*, 89 Md. 577, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *State v. Knowles*, 90 Md. 646, 49 L. R. A. 695, 45 Atl. 877.

The court, unless the contrary is manifest, will presume that the legislature acted within its constitutional limitations.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Dorchester County v. Meekins*, 50 Md. 39; *Baltimore v. State*, 15 Md. 453, 74 Am. Dec. 572; *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 614, 54 Atl. 602.

If one construction of which a statute is susceptible would make it valid, and another equally plausible construction would make the statute unconstitutional, the validating construction will be adopted by the courts.

Temnick v. Owings, 70 Md. 251, 16 Atl. 719; *United States v. Coombs*, 12 Pet. 76, 9 L. ed. 1006; *Hooper v. California*, 155 U. S. 657, 39 L. ed. 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Broughton v.*

NOTE.—For other cases in this series as to extent to which police power may be exercised in the interests of health, see *Health Department v. Trinity Church*, 27 L. R. A. 710 (requiring water to be furnished on each floor of tenement house); *People ex rel. Nechamcus v. Warden of City Prison*, 27 L. R. A. 718; *State v. Gardner*, 41 L. R. A. 689 (regulating business of plumbers); *State v. Zeno*, 48 L. R. A. 88 (regulating business of barber); *Bailey v. People*, 54 L. R. A. 338 (restricting number of persons which lodging-house keepers may permit to occupy one sleeping room); *St. Louis* 64 L. R. A.

v. Galt, 63 L. R. A. 778 (requiring cutting of weeds on city lots); *State v. Layton*, 62 L. R. A. 163, and *footnote* thereto (regulating manufacture and sale of articles of food).

As to police power over business of junk dealers and dealers in second-hand clothing, see *note* to *Grand Rapids v. Brandy*, 32 L. R. A. 116.

As to power of municipal corporations over nuisances affecting health, see *note* to *Red Wing v. Guptill*, 41 L. R. A. 322, and *note* to *Harrington v. Providence*, 38 L. R. A. 305.

Pensacola, 93 U. S. 269, 23 L. ed. 897; *Gordon v. Baltimore*, 5 Gill, 241.

Statutes limiting the hours of labor have been upheld.

Holden v. Hardy, 169 U. S. 368, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Re Ten-Hour Law*, 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602; *Wenham v. State* (Neb.) 58 L. R. A. 825, 91 N. W. 421.

Requiring immediate payment of wages of discharged employees.

St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419.

And requiring workmen to be paid in cash.

Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Harbison v. Knoxville Iron Co.* 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682, 53 S. W. 955.

Invalidating a sale of a stock of goods in bulk, without ascertaining the sellers creditors.

McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

Forbidding a barber shop to remain open on Sunday.

State v. Sopher, 25 Utah, 318, 60 L. R. A. 468, 95 Am. St. Rep. 845, 71 Pac. 482.

Providing for the inspection of coal mines.

St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The state can discriminate between the restrictions placed upon electric cars and upon other vehicles using the public street.

Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540.

A special tax on the business of hiring persons to go to work beyond the limits of the state is valid.

Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128.

It is within the province of the state entirely to prohibit the sale of cigarettes.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Or unwholesome food.

State v. Layton, 160 Mo. 474, 62 L. R. A. 163, 83 Am. St. Rep. 487, 61 S. W. 171. See also, *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Jones v. Cody* (Mich.) 62 L. R. A. 160, 9 Det. L. N. 499, 92 N. W. 495; *State v. Cook*, 107 Tenn. 499, 62 L. R. A. 174, 64 S. W. 720; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 463, 18 L. R. A. 393, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393; 64 L. R. A.

Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Detroit, Ft. W. & B. I. R. Co. v. Railroad Comrs.* 127 Mich. 219, 62 L. R. A. 149, 86 N. W. 842.

There is no constitutional objection to permitting an executive officer to decide finally and without appeal any question, either of law or of fact.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Deems v. Baltimore*, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Boehm v. Baltimore*, 61 Md. 200.

The fact that it is conceivable that the power may at some time be abused is no ground for holding invalid this statute passed for the salutary purpose of mitigating the evils flowing from the manufacture of sweat-shop clothing.

Bevard v. Hoffman, 18 Md. 479, 81 Am. Dec. 618; *Friend v. Hamill*, 34 Md. 304; *Elbin v. Wilson*, 33 Md. 142; *Hardesty v. Taft*, 23 Md. 530, 87 Am. Dec. 584; *Baltimore v. O'Neill*, 63 Md. 344; *O'Neill v. Register*, 75 Md. 425, 23 Atl. 980; *Knell v. Briscoe*, 49 Md. 414; *State use of Whitehill v. Carrick*, 70 Md. 586, 14 Am. St. Rep. 387, 17 Atl. 559; *Roth v. Shupp*, 94 Md. 55, 50 Atl. 430.

Messrs. Fouts & Norris and Myer Rosenbush, for appellee:

The liberty mentioned in the 14th Amendment to the Constitution means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the terms is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and, for that purpose, to enter into all contracts which may be necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 387, 52 Am. Rep. 34, 2 N. E. 29; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; *Luman v. Hutchens Bros. Co.* 90 Md. 25, 46 L. R. A. 393, 44 Atl. 1051; *Singer v. State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 757, 28 L. ed. 585, 591, 4 Sup. Ct. Rep. 652; *Laulton v. Steele*, 152 U. S. 136, 38

L. ed. 388, 14 Sup. Ct. Rep. 499; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Re Hong Wah*, 82 Fed. 823; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Tiedeman, State & Federal Control*, §§ 120-147.

The manufacture of the articles enumerated is not only a lawful calling, but is universally known to be a necessary and useful occupation, and it is a matter of common knowledge that its prosecution under ordinary conditions is not injurious to the health of the public, or those engaged in it; and an act which arbitrarily prohibits their manufacture, even under the most favorable sanitary conditions, is an unjust and unlawful discriminating in restraint of trade.

Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Le Blanc v. New Iberia*, 106 La. 680, 56 L. R. A. 285, 31 So. 311; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; *Denver v. Bach*, 26 Colo. 530, 46 L. R. A. 848, 58 Pac. 1089; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Re Tie Loy*, 26 Fed. 611; *Re Sam Kee*, 31 Fed. 680; *Janesville v. Carpenter*, 77 Wis. 298, 8 L. R. A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Re Sing Too Quan*, 43 Fed. 359; *Ex parte Patterson*, 42 Tex. Crim. Rep. 256, 51 L. R. A. 654, 58 S. W. 1011; *Bailey v. People*, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616.

The act is, and was intended to be, applicable to entirely separate and distinct conditions from any other, is complete in itself, and should be so construed.

State v. Popp, 45 Md. 432; *Dundalk, S. P. & N. P. R. Co. v. Smith*, 97 Md. 177, 54 Atl. 628.

Arbitrary power is vested in the chief of the bureau of industrial statistics. A statute which clothes a single individual with such power, hardly falls within the domain of law.

Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239, *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Noel v. People*, 187 Ill. 589, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L. R. A. 733, 87 Am. St. Rep. 422, 67 Pac. 755; *Bostock v. Sams*, 95 Md. 400, 59 L. R. A. 282, 93 Am. St. Rep. 394, 52 Atl. 665; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, 64 L. R. A.

The constitutionality of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done.

Ulman v. Baltimore, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; *Janesville v. Carpenter*, 77 Wis. 303, 8 L. R. A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Cooley, Const. Lim.* 6th ed. p. 211; *Com. v. Perry*, 155 Mass. 121, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *People ex rel. Rodgers v. Coler*, 166 N. Y. 14, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People ex rel. Treat v. Coler*, 166 N. Y. 146, 59 N. E. 776.

If the legislature, in the interest of the public health, enacts a law, and thereby interferes with the personal rights of an individual,—destroys or impairs his liberty or property,—it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to, and is appropriate to secure, the object in view, and, in such an examination, the court will look to the substance of the thing involved, and will not be controlled by mere forms.

Blue v. Beach, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 167, 60 Am. St. Rep. 123, 70 N. W. 347; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 267, 50 Am. St. Rep. 443, 31 S. W. 781; *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Cleveland v. Clements & Bros. Constr. Co.* 67 Ohio St. 197, 59 L. R. A. 775, 93 Am. St. Rep. 670, 65 N. E. 885; *Street v. Varney Electrical Supply Co.* 160 Ind. 338, 61 L. R. A. 154, 66 N. E. 895; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 67 N. E. 129.

McSherry, Ch. J., delivered the opinion of the court:

This is an appeal by the state of Maryland from the criminal court of Baltimore city. It is a case wherein Louis Hyman was indicted for a violation of Acts 1902, p. 121, chap. 101. The title of that act is in these words: "An Act to Add Four Additional Sections to Article 27 of the Code of Public General Laws, Title 'Crimes and Punishments,' Subtitle, 'Health—Workshops and Factories, Sweating System,' as the Same was Amended by Chapter 302, Acts of 1894, and Chapter 467, Acts of 1896; Such Four Additional Sections to be Known Respectively as Sections 1490a,

149ff, 149gg, and 149hh, and to Come in Immediately after Section 149d of the Article." The indictment contains five counts. The first count charges that the appellee, Hyman, unlawfully did use and cause to be used a certain room and apartment in a certain tenement and dwelling house by other than the immediate members of the family then living therein for the manufacture of coats, vests, trousers, etc., contrary to the provisions of the above-mentioned act of assembly. The second count charges that the appellee, Hyman, did unlawfully use a certain room and apartment in a certain tenement and dwelling house for the manufacture of coats, vests, trousers, etc., he, the said Hyman, not being then and there an immediate member of the family then living in said room and apartment, contrary to the form of the aforesaid act of assembly, etc. The third count alleges that the appellee, Hyman, being then and there a part of the family, unlawfully did use a certain room and apartment in a certain tenement and dwelling house for the manufacture of coats, vests, trousers, etc., not having first obtained a permit from the chief of the bureau of industrial statistics stating the number of persons allowed to be employed therein, contrary to the said statute. The fourth count charges that the appellee, Hyman, in a certain room and apartment in a certain rear building in the rear of a tenement and dwelling house unlawfully did work at and did hire and employ divers persons to work at making coats, vests, trousers, etc., without first obtaining a written permit from the chief of the bureau of industrial statistics stating the maximum number of persons allowed to be employed therein, contrary to the provisions of the statute, etc. And the fifth count charges that the appellee, Hyman, employing divers persons in a certain tenement and dwelling house to make and wholly and partially finish coats, vests, trousers, etc., failed to keep a register of the names and addresses of all persons to whom such work was given to be made, contrary to the form of the act of assembly, etc. To this indictment and to each count thereof, the appellee interposed a demurrer, and upon hearing the demurrer was sustained, the indictment was on motion quashed, and the traverser was discharged. Thereupon the state took this appeal.

The question which is thus presented is one, not only of importance, but of considerable interest, and, when reduced to its final analysis, it is whether the act under which the indictment was framed is a constitutional exercise of the legislative power of the general assembly. To determine that question it will be necessary to briefly summarize the provisions of that statute. It

will be observed at the outset that the act is ostensibly one intended for the preservation and the protection of the public health and safety. It was incorporated in the Code under the subtitle "Health," and its provisions were designed to promote the public health and welfare. By § 149ee (§ 240), it is, in substance, provided: That no room or apartment in any tenement or dwelling house shall be used except by the immediate members of the family living therein, which shall be limited to husband and wife, their children, or the children of either, for the manufacture of coats, vests, trousers, etc. That no room or apartment in any tenement or dwelling house shall be so used by any family or part of a family until a permit shall first have been obtained from the chief of the bureau of industrial statistics stating the maximum number of persons allowed to be employed therein. Such permit shall not be granted until an inspection of the premises has been made by the inspector or his assistant named by the chief of the bureau of industrial statistics, and such permit may be revoked by the said chief of the bureau of industrial statistics at any time the health of the community or those employed or living therein may require it. That no person, firm, or corporation shall work, or hire or employ any person to work, in a room or apartment in any building, rear building, or building in the rear of a tenement or dwelling house at making in whole or in part any of the articles of wearing apparel mentioned above, without first obtaining a written permit from the chief of the bureau of industrial statistics stating a maximum number of persons allowed to be employed therein. That the said permit shall be posted in a conspicuous place in the room, or one of the rooms, to which it relates. That every person, firm, or corporation contracting for the manufacture of any of the articles mentioned above, or giving out the incomplete materials from which they or any of them are to be made, or to be wholly or partially finished, or employing persons in any tenement or dwelling house or other building to make wholly or partially finish the articles above mentioned, shall keep a written register of the names and addresses of all persons to whom such work is given to be made, or with whom they may have contracted to do the same. By § 149ff (§ 241) it is provided that the chief of the bureau of industrial statistics or his assistant or any inspector shall have authority to enter any room, factory, or place where any goods are manufactured into wearing apparel for the purpose of inspection, and that the person, firm, or corporation owning or controlling

or managing such places shall furnish access to, or information in regard to, such places to the said chief of the bureau of industrial statistics or his deputies at any and all reasonable times while work is being carried on. By § 149gg (§ 242) it is provided that the chief of the bureau of industrial statistics shall appoint two deputies and assistants, whose duties it shall be to make such inspection of the tenements and dwelling houses, factories, workshops, mills, and such other places as he may designate. By § 149hh (§ 243) it is declared that every person, firm, or corporation who shall in any manner violate the provisions of the preceding sections, and who shall refuse to give such information and access to the chief of the bureau of industrial statistics or his deputies, or who shall fail to secure such permit as provided, shall, upon conviction in any court of competent jurisdiction, be fined or imprisoned, or both, as in said section prescribed.

It is insisted by the appellee, and we presume that it was held by the court below, that these provisions of the statute were unconstitutional, and therefore void, because they were arbitrary and unreasonable. It is obvious that the statute was passed in furtherance of the protection of the health of the community. Its enactment was an exercise by the general assembly of the police power of the state. What is and what is not within the limits of the police power has been a source of prolific discussion both in the Federal and in the state courts. One of the legitimate and most important functions of civil government is acknowledged to be that of providing for the welfare of the people by making and enforcing laws to preserve and promote the public health, the public morals, and the public safety. Civil society cannot exist without such laws, and they are therefore justified by necessity and sanctioned by the right of self-preservation. The power to enact and enforce them is lodged by the people with the government of the state, qualified only by such conditions as to the manner of its exercise as are necessary to secure the individual citizen from unjust and arbitrary interference. With respect to its internal police, the authority of each of the states is supreme and exclusive. Whilst by the Federal Constitution the separate and independent states surrendered or transferred to the general government which they established such powers as were deemed to be necessary to enable it to provide for the common defense and to promote the general welfare of the people of the United States, the states themselves reserved complete and sovereign control over their own internal affairs. Accordingly, the Supreme Court has

stated as an "impregnable position" that the states of the Union have the same undeniable and unlimited jurisdiction over all persons and things within their respective territorial limits as any foreign nation has, where that jurisdiction is not surrendered or restrained by the Federal Constitution; and that by virtue of this it is not only the right, but the bounden and solemn duty, of the state to advance the safety, happiness, and prosperity of its people, to provide for their general welfare by any and every act of legislation which may be deemed to be conducive to these ends; and that all these powers which relate to merely municipal legislation, or what may properly be called internal police, are not surrendered or restricted; and that, consequently, in relation to these the authority of a state is complete, unqualified, and exclusive; and, finally, that amongst these powers are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating internal commerce of the state and to prevent the introduction or enforce the removal of prohibited articles of commerce. *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648. "Every holder of property," said Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 84, "however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." This power, said the Supreme Court in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, legitimately exercised, can neither be limited by contract nor bartered away by legislation; or, as said by the same court in *Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1079, no legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. Government is organized with the view of their preservation, and cannot divest itself of the power to provide for them. And so again, in *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252, it was said the constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public

health and public morals nor the public safety, as the one or the other may be involved in the execution of such contract. The exercise of the police power, being for the promotion of the public good, is superior to all considerations of private right or interest, and by virtue of it the state may lawfully impose upon the exercise of private rights such burdens and restraints as may be necessary and proper to secure the general health and safety. *Parker & W., Public Health & Safety, § 12.* The holder of property is bound to know that through agencies other than his own his property may become an occasion of injury to the public, and that in such event it is subject to reasonable regulation in the interest of the public. "Any other doctrine would strike at the root of all police regulations." *Ibid.* In the case of the *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771, this court had occasion to go into an examination of the police power of the state in reference to regulations respecting dairies, and we need not repeat what was there so recently said with reference to the extent of the police power of the commonwealth. That the power is broad, comprehensive, and far-reaching will not be questioned or gainsaid. In the very nature of the case it must be so. It is, as said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 12 L. ed. 256, "the power of sovereignty, the power to govern men and things within the limits of its dominion." It is a power that necessarily belongs to the legislative department of the state government. It is for that co-ordinate branch to determine whether particular things or acts are or are not dangerous to the public health, the public safety, and the public morals; and when that branch of the government has spoken the subject must be considered as closed, unless the judicial department has a revisory jurisdiction; and that brings us to the question whether the courts have such a jurisdiction, and, if they have, what are its legitimate limits?

This inquiry presents the pivotal point of the case. It may be said in the language of the Supreme Court in *Mugler v. Kansas*, 123 U. S. 625, 31 L. ed. 205, 8 Sup. Ct. Rep. 297, "if, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Running through all the cases, both Federal and state, is the doctrine that, if the measure designed for, or purporting to concern, the protection or preservation of the pub-

lic health, morals, or safety, is one which has a real and substantial relation to the police power, then, no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon those grounds. Numerous illustrations of this principle are furnished in reported cases. "For it must now be considered as an established principle of law in this country that there are no limits whatever to the legislative powers of the states, except such as are prescribed in their own Constitutions or in that of the United States; consequently, that the courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law simply because it conflicts with the judicial notions of natural rights or morality or abstract justice." *Parker & W., Public Health & Safety, § 8*, and cases cited in note 2. We may also refer to *Deems v. Baltimore*, 80 Md. 173, 26 L. R. A. 541, 45 Am. St. Rep. 339, 30 Atl. 648, where an ordinance provided that if milk failed, when inspected by one of the local milk inspectors, to be of a certain quality, it should be summarily seized and forfeited; and this court held that the ordinance was a legitimate exercise of the police power, though it involved the destruction of property without judicial procedure. In *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, a statute of the state of Utah limiting hours of labor in mines was held valid as an exercise of the police power. In *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, a statute requiring immediate payment of wages to discharged employees was held to be valid. In *Detroit, Ft. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540, it was held that restrictions placed upon electrical cars, and not upon other vehicles used on the public streets, was a legitimate exercise of the police power. A striking illustration of what may be done, and validly done, under the police power, is furnished in the case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989. The Boston Beer Company was incorporated by the legislature of Massachusetts in 1828 for the purpose of manufacturing malt liquors in all their varieties. In 1869 the prohibitory liquor law of Massachusetts was passed. Under the last-named act a citation was issued requiring the Boston Beer Company to appear in the municipal court of Boston, and show cause why the liquors in its possession should not be forfeited. The beer company appeared, and the trial resulted in a judgment of forfeiture. An appeal was taken to the superior court, where judgment was

again rendered for the commonwealth; whereupon the record was transmitted to the supreme judicial court of the state, which affirmed the action of the superior court, and remanded the case to the latter court, where final judgment was entered declaring the liquors forfeited. To that judgment a writ of error was prosecuted, and the proceedings thus reached the Supreme Court of the United States. In the last-named tribunal the judgment of the state court was affirmed. In the course of the opinion reported in *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it was said: "The plaintiff in error was incorporated 'for the purpose of manufacturing malt liquors in all their varieties,' it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But, although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state." Following the same current of decisions is the case of *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. It was there said, in dealing with a law of Iowa which authorized the abating as a nuisance of a distillery used for the unlawful manufacture and sale of intoxicating liquors, that "a state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said state; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and that such legislation by a state is a clear exercise of her undisputed police power, which does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor in any way contravene any provision of the 14th Amendment to the Constitution of the United States." See also *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, where a statute prohibiting the sale of cigarettes after they had been taken from

the original packages was upheld as within the police power. See also 9 Rose's Notes (U. S.) 524, 525.

There is a class of cases which must be distinguished from those which hold that the unreasonableness of a police regulation adopted by the legislature furnishes no ground for the courts to strike it down. The distinction is plain and simple. The legislature being the sole depository of the law-making power, it is not for courts of justice to say that a given enactment passed in virtue of the police power, and having a direct relation to it, is void for unreasonableness, because, if courts undertook to exercise such an authority, they would, in effect, exert a veto on legislation. But whenever power has been delegated by the legislature to a municipal corporation to adopt and promulgate ordinances for the protection of the public health, morals, or safety, the reasonableness of the measures enacted by the municipality is a feature to which the courts look to see whether the measure is within the power granted; and they do this upon the assumption that the legislature did not intend to empower the municipality to enact unreasonable or oppressive ordinances. Thus, in *Radecke's Case*, 49 Md. 229, 33 Am. Rep. 239, where an ordinance of Baltimore city, which permitted the mayor to revoke any license previously granted to erect a steam engine, was under review, this court said, after alluding to quite a number of cases: "While we may not be willing to adopt and follow many of these cases, and while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority. In applying the doctrine of judicial control to this extent, we contravene no decisions in our own state, and impose no unnecessary restraints upon the action of municipal bodies." The ordinance was set aside as a plain abuse of the authority delegated by the legislature to the municipality. But when dealing with an act of assembly on this subject we have no such situation to confront us. If the act has a real and substantial relation to the police power, no inquiry as to its unreasonableness can arise, because it is the judgment of the lawmakers, and not of the courts, which must control; and if, in the judgment of the former, the thing be reasonable, all inquiry on that ground by the latter is foreclosed.

Tested by the principles hereinbefore announced, we find nothing in the act of 1902 which indicates that its design, its purpose, or its details have not a real and substantial relation to the police power. It may be conceded that some of these provisions, if harshly administered, may be or become oppressive; but it by no means follows that the law itself is therefore not a legitimate exercise of the police power. It is not to be assumed that the public functionary will act in an oppressive or unlawful manner. Discretion must be reposed somewhere. If an official should transcend the legitimate limits of the authority with which the statute clothes him, the injured party is not without redress. Laws are to be upheld, rather than stricken down. Every intendment must be made by the courts in favor of the constitutionality of a statute. *Dorchester County v. Meekins*, 50 Md. 39; *Cooley*, Const. Lim. 216. It is a cardinal rule that, where one construction of the statute would make it valid and another would make it unconstitutional, courts will follow the former, rather than the latter, interpretation, for the reason that it will not be presumed the legislature intended to pass an invalid act. *Temnick v. Owings*, 70 Md. 251, 16 Atl. 719; *Gordon v. Baltimore*, 5 Gill, 241.

Taking now in detail the five counts of the indictment, it is clear, we think, that the first count contains an allegation that the appellee was violating the health regulation prescribed by the statute. It alleges that he was using a certain tenement and dwelling house for the manufacture of coats, vests, and other garments by other than immediate members of his family. We suppose that it is a matter of which a court may take judicial notice that the manufacture of wearing apparel in improperly ventilated, unsanitary, and overcrowded apartments will likely promote the spread of, if it does not engender, disease, and it is obviously within the police power of the state to regulate the number of persons who may be employed in any tenement or other establishment where this manufacturing is carried on, so that the public health may be conserved. What has just been said is equally applicable to the second count, and we need not further discuss it. The third count has relation to a provision of the Code existing prior to the adoption of the act of 1902. By § 149c of article 27 of the Code (§ 238), of which the act of 1894 is an amendment, it was required that at least 400 cubic feet of clear space should be allowed in each room for each occupant in manufacturing establishments, and the act of 1902 required that a permit should be secured from the chief of the bureau of in-

dustrial statistics setting forth the number of persons allowed to be employed in each room. The number thus employed was, of course, regulated by the amount of air surface to which, under § 149c (§238), employees were entitled. The failure to procure such a permit is the charge alleged in the third count. It certainly requires no discussion to show that such a regulation is strictly and essentially a health regulation. The overcrowding of factories and the inhalation of impure air, where there is not sufficient surface afforded to each employee, are obviously calculated to produce or foster disease, and the manufacture of articles of wearing apparel in overcrowded rooms or apartments, under these conditions, is unquestionably liable to spread contamination. The fourth count of the indictment need not be further considered. What has been said in reference to the third is sufficient to support the fourth. The fifth count charges that the appellee did not keep a written register of the names and addresses of all persons to whom work was given to be made. If it is important, as we have said it was, that these overcrowded and unhealthy and unsanitary tenement houses should be subject to the inspection and control of some designated health officer, it goes without saying that the provision would be of little avail if the proprietor could give out the work to others without keeping a register of their names and addresses, because the health officer, without the aid of such register, would be unable to trace the localities where the work was being done. The whole scheme of the act appears to us to be in furtherance of the protection and preservation of the public health, and, whatever criticisms may be made upon the method of its enforcement, no convincing reason has been suggested to show that its terms have not a real and a substantial relation to the subject of the police power of the state.

The statute invades no private right of property, and does not confer upon any official either arbitrary or unrestricted power. It certainly does not in terms expressly do either. It has no relation to homes where manufacturing of the enumerated articles is not carried on. The whole tenor of the enactment distinctly indicates that its provisions are aimed at, and are intended to apply to, tenements and other buildings where the garments specified are manufactured for sale; and that it has no relation to homes or places where apparel not manufactured for sale may be made. Nor does the statute clothe the officers its provisions allude to with arbitrary power. As well might it be said that a police officer who is authorized to summarily seize property

which could only be put to an illegal or criminal use acted arbitrarily in making such a seizure before a judicial adjudication condemned the thing seized. This court has emphatically said in *Police Comrs. v. Wagner*, 93 Md. 191, 52 L. R. A. 776, 86 Am. St. Rep. 423, 48 Atl. 456, "that the state has power to pass such laws as are necessary to protect the health, morals, or peace of society; and where the summary seizure, or even the destruction, of the offending thing is necessary for the public safety, may authorize that to be done; and such laws are not incompatible with those constitutional limitations which declare that no person shall be deprived of his property 'without due process of law.'" In the case just cited the alleged arbitrary seizure of a slot machine by the police authorities of Baltimore city was upheld as being within the legitimate exercise of the police power of the state. In the earlier case of *Ford v. State*, 85 Md. 465, 41 L. R. A. 551, 60 Am. St. Rep. 337, 37 Atl. 172, the traverser was indicted under act 1894, p. 435, chap. 310, for

having in his possession lists or slips of lottery or policy drawings. That was a thing which the statute prohibited, even though the accused party did not know what the lists or slips were, or that they were prohibited articles. The statute was upheld as a legitimate exercise of the police power in the face of the contention that its provisions arbitrarily created an indictable offense, where there was not only a total absence of criminal intent, but a complete ignorance on the part of the traverser as to what the list or slips were. An officer who, under pretext of executing the sweat shop statute, would assume to exert an arbitrary or unwarrantable power, would be answerable for his misconduct, just as would be any other trespasser. Rightly interpreted, we find no imperfections in the statute assailed in this case.

Entertaining the views we have expressed, we must reverse the judgment appealed from, and award a new trial.

Judgment reversed, with costs, and new trial awarded.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

COLUMBIA IRONWORKS, *Appt.*,
v.

NATIONAL LEAD COMPANY *et al.*

(127 Fed. 99.)

1. The question of the jurisdiction of a district court is not involved, so as to require the appeal to be taken to the Supreme Court of the United States rather than to the circuit court of appeals, in the determination that a corporation is principally engaged in such a business that it can be adjudged a bankrupt.
2. The allowance of an appeal within the time prescribed by law is sufficient to remove the case to the appellate court, although the appeal is not perfected by the filing of the bond and issuance of service of citation within that time.
3. The building, sale, and repairing of vessels employed in commerce is within the provisions of a statute permitting bankruptcy proceedings to be instituted against corporations engaged principally in manufacturing and mercantile pursuits.

(January 5, 1904.)

A PPEAL by defendant from an order of the District Court of the United States

for the Eastern District of Michigan adjudging defendant corporation a bankrupt. *Affirmed.*

The facts are stated in the opinion.

Argued before *Lurton, Severens*, and *Richards*, Circuit Judges.

Messrs. Phillips & Jenks, for appellant:

In the construction of the bankruptcy statute, the business in which the corporation is actually engaged, and not the authority or purposes stated in the articles of incorporation, must be the test.

Re Tontine Surety Co. 116 Fed. 401; *Com. v. Arrott Mills Co.* 145 Pa. 69, 22 Atl. 243; *Re Chicago-Joplin Lead & Zinc Co.* 104 Fed. 67; *Re New York & W. Water Co.* 98 Fed. 711; *Re Keystone Coal Co.* 109 Fed. 872.

The difference between the language of the act of 1867 and that of the act of 1898 implies an exclusion of some corporations under the latter act which came within the purview of the former act.

Re H. J. Quimby Freight Forwarding Co. 121 Fed. 139.

Under the present act, only certain specific corporations are subject to the bank-

NOTE.—As to what constitutes "manufacturing" within meaning of exemption of persons engaged therein from taxation, see, in this series, *Com. v. Northern Electric Light & P. Co.* 14 L. R. A. 107, and cases in note thereto; also *People ex rel. Brush Electric Illuminating Co. v. Wemple*, 14 L. R. A. 708; *Com. v. Pottsville Iron & Steel Co.* 22 L. R. A. 228; *Com. 64 L. R. A.*

v. Juniata Coke Co. 22 L. R. A. 232; *Frederick Electric Light & P. Co. v. Frederick City*, 36 L. R. A. 130; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 41 L. R. A. 228.

As to what is a manufacturing establishment, see *Stone v. Howard Ins. Co.* 11 L. R. A. 771.

rupt act, and it is incumbent upon the petitioners to establish clearly that the corporation against which they are proceeding comes within one of the specified classes, and the tendency of the decisions of the courts is to the effect that, unless the business of the corporation as actually carried on is, in the general and ordinary sense of the words, within one of the specified classes, proceedings will not lie against the company.

Re Chesapeake Oyster & Fish Co. 112 Fed. 990; *Re Minnesota & A. Constr. Co.* (Ariz.) 60 Pac. 881; *Re Parmelee Library*, 56 C. C. A. 583, 120 Fed. 235; *Re Morris*, 43 C. C. A. 91, 102 Fed. 1004; *Re Surety Guarantee & T. Co.* 56 C. C. A. 654, 121 Fed. 73; *Re Tonline Surety Co.* 116 Fed. 401; *Re San Gabriel Sanatorium Co.* 95 Fed. 271; *Re H. J. Quimby Freight Forwarding Co.* 121 Fed. 139; *Re Philadelphia & L. Transp. Co.* 114 Fed. 403; *Re Pacific Coast Warehouse Co.* 123 Fed. 749; *Re Fulton Club*, 113 Fed. 997; *Re Oriental Society*, 104 Fed. 975; *Re White Star Laundry Co.* 117 Fed. 570; *Re Cameron Town Mut. F. Lightning & Windstorm Ins. Co.* 96 Fed. 756.

A corporation engaged in collecting, storing, and preparing ice for market, and transporting it, is not a manufacturing corporation.

People v. Knickerbocker Ice Co. 99 N. Y. 181, 1 N. E. 669.

Mining corporations did not come within the act until it was expressly amended to include them.

Re Elk Park Min. & Mill. Co. 101 Fed. 122; *Re Rollins Gold & S. Min. Co.* 102 Fed. 132; *Re Woodside Coal Co.* 105 Fed. 56; *Re Keystone Coal Co.* 109 Fed. 872; *Byers v. Franklin Coal Co.* 106 Mass. 131; *Re Tecopa Min. & Smelting Co.* 110 Fed. 120.

A corporation engaged in slaughtering and refrigerating mutton is not a manufacturing corporation.

People ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408, 41 L. R. A. 228, 50 N. E. 53.

An ice cream confectioner was held not to be a manufacturer within the Louisiana statute.

New Orleans v. Mannessier, 32 La. Ann. 1075.

The words, "manufacturing process," used in a statute, and defined as meaning any manual labor incident to the making of an article or part of an article, did not include the building of a ship.

Palmer's Shipbuilding & Iron Co. v. Chaytor, L. R. 4 Q. B. 212, 10 Best & S. 177, 38 L. J. Mag. Cas. N. S. 63, 19 L. T. N. S. 638, 17 Week. Rep. 401; *People v. New York Floating Dry-Dock Co.* 92 N. Y. 487.

Messrs. Ferguson & Goodnow, Bern-
64 L. R. A.

ard B. Selling, and William B. Hatch,
for appellees:

An appeal is not taken within ten days, unless the steps required to give the appellate court jurisdiction have been taken within the ten days specified in the statute.

Brandenburg, Bankr. 2d ed. pp. 381, 382; *Norcross v. Nave & M. Mercantile Co.* 42 C. C. A. 29, 101 Fed. 796.

Commerce and manufacturing must be construed in the broadest light of modern conditions.

Carter v. Alling, 43 Fed. 213; *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 162, 60 Am. Rep. 287, 26 N. W. 311; *Lawrence v. Allen*, 7 How. 795, 12 L. ed. 918; *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440; *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

When manufacturing becomes the principal part of even a farmer's business, which requires him to buy articles from others, and to manufacture them for sale, he thereby becomes a manufacturer and trader within the meaning of the act.

Re Kenyon, 6 Nat. Bankr. Reg. 238.

The language of the legislature in enacting the law must be considered in construing the application of the act.

Com. ex rel. McCormick v. Keystone Electric Light, Heat & P. Co. 193 Pa. 245, 44 Atl. 326.

The term "manufacturer" in the act of May 25th, 1878, should receive the largest, fullest, and most extensive meaning of which it is practically susceptible.

Endlich, Interpretation of Statutes, § 103; *Com. v. Keystone Bridge Co.* 156 Pa. 500, 27 Atl. 1; *United States v. Windmuller*, 42 Fed. 292; *Robertson v. Rosenthal*, 132 U. S. 460, 33 L. ed. 392, 10 Sup. Ct. Rep. 120; *Norris Bros. v. Com.* 27 Pa. 494; *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 803; *Baumgarten v. Magone*, 50 Fed. 69; *Palmer's Shipbuilding & Iron Co. v. Chaytor*, L. R. 4 Q. B. 212, 10 Best & S. 177, 38 L. J. Mag. Cas. N. S. 63, 19 L. T. N. S. 638, 17 Week. Rep. 401; *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669; *Com. v. Lowell Gaslight Co.* 12 Allen, 75; *Re San Gabriel Sanatorium Co.* 95 Fed. 271; *Forbes Lithograph Mfg. Co. v. Worthington*, 132 U. S. 655, 33 L. ed. 453, 10 Sup. Ct. Rep. 180; *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440; *Schriefer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481.

Severens, Circuit Judge, delivered the opinion of the court:

Certain creditors of the appellant, the Columbia Ironworks, a Michigan corporation, filed their petition in the district court, sitting in bankruptcy, setting forth that the appellant was a corporation engaged prin-

cipally in manufacturing and mercantile pursuits, within the meaning of § 4, subsec. b, of the bankrupt act of July 1, 1898, chap. 541 (30 Stat. at L. 547, U. S. Comp. Stat. 1901, p. 3423), which had become insolvent, and within four months preceding the filing of the petition had committed several acts of bankruptcy,—among them, that it had made a general assignment for the benefit of its creditors,—praying that it might be adjudged bankrupt. The Columbia Ironworks appeared, and answered that it was not a corporation engaged principally in manufacturing or mercantile pursuits, and denied that it had committed any other of the acts alleged in the petition, except in making the assignment for the benefit of its creditors. To this answer the petitioners filed a replication. A reference was ordered to take proofs, and, upon the filing of the report, an order was made adjudicating the corporation a bankrupt. Thereupon the corporation appealed to this court, assigning as error that the district court erred in holding that it had jurisdiction to hear the cause and determine that the corporation was bankrupt; and, further, that it erred in holding that the corporation was engaged principally in manufacturing or mercantile pursuits.

In this court a motion was made by the appellees to dismiss the appeal upon the ground that this court did not have jurisdiction thereof, but that the appeal should have been taken to the Supreme Court of the United States, for the reason that the question of the jurisdiction of the district court was involved, in that its order adjudged that the Columbia Ironworks was a corporation engaged principally in manufacturing or mercantile pursuits, within the true intent and meaning of the bankrupt act, and upon the further ground that the appeal was not taken within ten days from the adjudication in bankruptcy. This court postponed the hearing of said motion to the hearing upon the merits. We think the motion to dismiss the appeal for want of jurisdiction thereof should be disallowed, upon the authority of the case of *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 21 Sup. Ct. Rep. 899. There can be no question in respect of the jurisdiction of the district court over the subject-matter, and it seems quite clear that it also had jurisdiction to determine whether the corporation was principally engaged in such a business as that it could be adjudged a bankrupt. That question was one of the elements involved in its determination. It appears that the appeal was prayed and allowed within ten days, as prescribed by the act, but that the bond was not filed, nor the citation issued and served, until a few days after the ex-

piration of the ten days. But the general rule is that, when an appeal is allowed within the time prescribed by law, it is sufficient for the purpose of removing the case, though it is necessary, in order to perfect the appeal, that a bond should be filed, and that a citation should be issued and served, where, as in this case, the appeal is not prayed in open court. The filing of the bond and the service of the citation are steps to be taken in perfecting the appeal, and, if these steps are taken before a motion to dismiss the appeal is made, the court will ordinarily decline to dismiss the appeal because of the delay in filing the bond and serving the citation. In the present case the delay was for a few days only, and we do not think the interests of the opposite party were to any appreciable extent impaired thereby. The motion to dismiss upon that ground is therefore denied.

With respect to the merits, it appears that the corporation was organized under a statute of Michigan providing for the incorporation of manufacturing companies (Comp. Laws 1897, chap. 188, §§ 7037-7073). And article 2 of its charter stated the purpose or purposes of the corporation to be as follows: "To construct and repair vessels of all kinds, carry on a general ship-building and ship-repairing business, construct and operate a marine dry dock in connection therewith, and also the business of steel structural work of all kinds."

By the record it appears that the incorporation was affected about November 5, 1901, and the corporation had at the time of the filing of the petition in bankruptcy been engaged in business nearly two years. A considerable part of the first year was occupied in getting its plant in order for business. After that time its business had consisted of the building of two steel vessels, under contract,—one for the price of \$95,000, and the other at a price not fixed. Two other contracts for the building of steel boats had been taken by the company, one of which had been begun, the boats to cost about \$260,000 each; and the repairing of two vessels,—one to the extent of \$4,200, and one to the extent of \$2,100. The material for the construction and repair of vessels came to the plant largely in the unmanufactured and raw state, and it was converted from the crude and raw material by hand labor and machinery into the forms and shapes and designs requisite for the construction and repair of vessels. No doubt, the question is to be determined upon the consideration of what the corporation actually does, rather than what it is authorized by its charter to do. But the business of this corporation appears to be that which it was authorized to engage in, namely, the

building and repairing of ships, and principally in building.

We think that upon these facts the finding that the corporation was principally engaged in manufacturing was justified. The principal objection urged to this conclusion is that the building and sale of ships is neither a manufacturing nor mercantile business, and many cases are cited which are supposed to be in point, where various forms of construction have been held to be not within the purview of the language of the bankruptcy act, or similar language employed in other legislation, such as the construction and operation of mining plants for the getting out and sale of ores and coals, dry docks, floating docks, railroads, and depots, and other constructions of a fixed and localized character. With respect to mining companies, it should be observed that, probably in consequence of the decisions holding them not to be subject to the bankruptcy act, Congress, by the act of 1903 (Act Feb. 5, 1903, chap. 487 [32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1903, p. 409]), amended the law so as to include them. But we do not think the similarity of such works and business to that of building vessels employed in commerce is such as to furnish a rule for the latter. The business in question is the building of articles of commerce, as much as the building of locomotives and railway cars, or the manufacture of their constituent parts. The distinction would seem to run along the line of those articles which are more or less fixed in place, and not ordinarily the subject of bargain and sale as articles of commerce, as contradistinguished from those which are movable and ordinarily regarded as subjects of sale and manual transfer,—articles of trade in the common course of mercantile business. The associated words seem to import that Congress intended to include all those corporations which were engaged in the manufacture or sale of articles of commerce.

By express designation it included printers and publishers, so as to remove all doubt as to whether their productions were to be regarded as articles of trade; but in the case of vessels, so universally employed in commerce, it was unnecessary.

We have found no case decided under the bankrupt act precisely in point, but there are a number of decisions arising under the laws of the states imposing taxes on "manufacturing corporations" which are quite pertinent for the purpose of defining the meaning and scope of the term. Thus, in *Com. v. Keystone Bridge Co.* 156 Pa. 500, 27 Atl. 1, a statute of the state exempted from taxation corporations organized exclusively for manufacturing purposes; and the question was whether a corporation engaged in the manufacture of wood, iron, and steel bridges was within the terms of the statute. And it was held that it was. Doubt was expressed as to whether the word "manufacturing" could be properly applied to the putting of bridges in place, but it was held that the preparation of the parts for putting them together from material either raw or unfinished was "clearly manufacturing, within any accepted definition of the word." Other cases in which like definition has been given to the words are *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 162, 60 Am. Rep. 287, 26 N. W. 311; *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 1 N. E. 669; *Com. v. Lowell Gaslight Co.* 12 Allen, 75; *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440. And see *Schrieffer v. Wood*, 5 Blatchf. 215, Fed. Cas. No. 12,481; *Lawrence v. Allen*, 7 How. 795, 12 L. ed. 918.

The distinction between the manufacture of the material and building it into ships, and that of building engines, boats, yaws, and other small craft, is only one of size and degree, and not of principle.

We are of opinion that the order appealed from should be affirmed, with costs.

MINNESOTA SUPREME COURT.

Caroline E. BOARDMAN *et al.*, *Respts.*,
v.

Frederick HOWARD *et al.*, *Appts.*

(.....Minn.....)

*Under a lease, by the terms of which the tenant is required to return the

*Headnote by LOVELY, J.

premises in as good condition as received, except where damaged by fire, etc., this condition, which relates to the building, forbids the tenant to leave thereon his own distinguishable property, which had been injured and made worthless by a fire, where the tenancy had been terminated by agreement of the parties.

(July 17, 1903.)

NOTE.—Tenant's duty to leave the premises in good condition.

I. Scope, 649.

II. The implied obligation.

a. Its extent in general, 649.

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II.—continued.

b. As to damages by fire and accident, 651.

c. As to removal of rubbish, 652.

III. The obligation under express covenants.

a. In general, 652.

APPEAL by defendants from a judgment of the District Court for Ramsey County denying a new trial after verdict in plaintiffs' favor, in an action brought to recover rent alleged to be due and unpaid, and the expense of placing the leased property in the condition in which the covenants of the lease required the tenant to leave it. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stevens, O'Brien, & Albrecht,
for appellants:

The lease was terminated by the fire.
Gen. Stat. 1894, § 5871.

The mere fact that the tenant removed his goods after the fire would not constitute a tenancy at that time.

Fleischman v. Toplitz, 134 N. Y. 349, 31

N. E. 1089; 1 McAdam, Land. & T. p. 472; Taylor, Land. & T. § 520; *Lanpher v. Glenn*, 37 Minn. 4, 33 N. W. 10.

No covenant of the lease was violated.

If the landlord chooses to terminate the lease by making an entry upon the premises he must take the premises as he finds them, and he cannot be permitted to complain of their condition when the tenant, under the circumstances of the case, could have had no opportunity to change the condition.

Wood, Land. & T. § 302.

By no reasonable rule of construction can the covenants of this lease be construed to cover the cost of removing the debris from the premises.

Coppinger v. Armstrong, 8 Ill. App. 210;

III.—continued.

b. *Repairs necessitated by natural decay.*
652.

c. *Repairs necessitated by reasonable use.* 653.

d. *Effect of condition of property at commencement of term.* 654.

e. *Repairs in particular.*

1. *Papering, painting, and whitewashing.* 655.

2. *Other repairs.* 656.

3. *Alterations.* 657.

f. *Fire or unavoidable accident.*

1. *In general.* 657.

2. *Injuries caused by third persons.* 660.

g. *Injuries caused by imperfect construction.* 661.

h. *Buildings erected during term.* 661.

i. *Liability of tenant holding over.* 661.

j. *Liability of assignee of lessee.* 662.

k. *Removal of rubbish.* 662.

l. *Pictures.* 662.

m. *Other cases.* 663.

n. *When right of action accrues.* 664.

o. *Measure of damages.*

1. *In general.* 665.

2. *Effect of demolition of premises by lessor.* 667.

I. Scope.

The whole question of a tenant's duty to repair is very intimately connected with the subject of this note, because, if he is under obligation to keep the premises in any implied or specified condition or degree of repair, he is undoubtedly under an obligation to so leave them at the end of the term; but, in order to determine more specifically the result of the decisions involving the precise question under discussion, all cases dealing with the duty of a tenant to repair generally, or to maintain the premises in good condition, have been excluded, and only those taken wherein the duty of the tenant, arising under a covenant in the lease to deliver up the premises in good condition, is discussed, or where, in the absence of such a covenant, the duty of the tenant to do so is in question.

II. The implied obligation.

a. Its extent in general.

Although the lessee may have bound himself
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self by no express covenant as to the condition in which he will leave the premises leased at the end of his tenancy he is nevertheless, not free from a certain implied obligation in that respect. The decisions all recognize the existence of such an obligation, the only lack of harmony being as to its extent.

Early English decisions make the obligation the least onerous, compelling, only, that the tenant keep the buildings wind and water tight.

Thus, in *Auworth v. Johnson*, 5 Car. & P. 239, it was held that a tenant from year to year, in the absence of an express covenant to sustain and uphold the premises, is only bound to keep them wind and water tight; and, it appearing that the house leased was in a very dilapidated condition when the tenant took it, and that the repairs demanded by the landlord would require new materials because the old were actually worn out, the jury were charged that the tenant was not liable.

And in *Leach v. Thomas*, 7 Car. & P. 327, an action for waste, against an out-going tenant from year to year, the court said that such a tenant was not bound to make substantial repairs, but must only keep the premises wind and water tight.

In *Ferguson v. —*, 2 Esp. 500, 5 Revised Rep. 757, an action against a tenant from year to year after the expiration of the lease, for the sum necessary to put the building into complete and tenantable repair, Lord Kenyon said that a tenant from year to year was bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that had been broken by him, so as to prevent waste and decay of the premises, but that he was under no obligation to put a new roof on an old worn-out house, as the landlord in the case at bar demanded.

The obligation is extended in a slight degree in *Horsefall v. Mather*, Holt N. P. 7, 17 Revised Rep. 589, which was an attempt to recover against a tenant at will, who, upon leaving the premises, which were in good repair when he entered upon them, had in some degree damaged the ceiling, the walls, and other parts of the house by removing the shelves and fixtures. It was urged that the duty of the tenant included the keeping of the premises in good and tenantable repair, and delivering them up at the expiration of the term in the condition in which he received them; but the court held that the tenant's liability was not so ex-

Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65; Taylor, Land. & T. § 343.

Mr. Henry C. James, for respondents: Defendants concede that their lease did not end until December 1st, and the removal of this rubbish became necessary at the time of the fire, November 19th.

Boston Block Co. v. Buffington, 39 Minn. 385, 40 N. W. 361; *Roach v. Peterson*, 47 Minn. 291, 50 N. W. 80.

Lovely, J., delivered the opinion of the court:

This is an action to recover unpaid rent; also, for expenses of the landlord incurred in removing property damaged by fire and left on the premises by the tenant after sur-

tensive, saying: "He is bound to use the premises in a husbandmanlike manner; the law implies this duty, and no more."

For the mere wear and tear of the premises, however, according to *Torriano v. Young*, 6 Car. & P. 8, a tenant from year to year is not liable.

But he must, even in the absence of express covenants, abstain from any acts beyond a reasonable use, which would unnecessarily injure the property, as appears in *Genau v. District of Columbia*, 20 Ct. Cl. 389, an attempt by a lessor to recover for the dilapidated condition of the premises after they were vacated by the lessee. The lease had been lost, and, therefore, the action was brought upon the implied covenants incident to the relation of landlord and tenant. It appeared that at the time the lessee took possession the premises were in good, tenantable condition, and that at the time it abandoned them they were in a ruinous and untenable condition beyond the ordinary damage incident to a reasonable use. The court declared that, independent of an express agreement, the law imposes upon the lessee an obligation to treat the premises in such a way that no substantial injury shall be done during the continuance of the lease, so that they may be restored to the owner unimpaired by the negligent conduct of the lessee; and that, while the latter is bound only to make tenantable repairs, such as keeping fences in order, replacing windows and doors broken during the tenancy of the lease, and is not liable for the ordinary wear and tear of the premises incident to the reasonable use of the same, he is under the obligation not to impair the property beyond the ordinary wear and tear.

It is said in *Davenport v. United States*, 26 Ct. Cl. 338, that without an express understanding the lessees are bound to use leased property so as not to damage it beyond the reasonable wear and tear.

The court says, *obiter*, in *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301, that, independently of any express agreement to keep the premises in repair and restore them in good condition, the law imposes upon every tenant, whether for life or for years, the obligation so to treat the premises that no substantial injury shall be done to them; that they may revert to the lessor at the end of the term unimpaired by any wilful or negligent conduct on lessee's part.
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rendering the same. The cause was tried to the court, who made findings of fact, and held, as a conclusion of law, that plaintiffs were entitled to recover a portion of one month's rent; also, a specific sum for expenses incurred by the landlord in taking away injured goods of defendants after they had quit. This appeal is from an order denying a new trial.

The following facts are embraced in the findings of the court and are supported by the evidence: Plaintiffs leased a building in the city of St. Paul to defendants for three years from January 1, 1901, at a stipulated monthly rental. The tenants took possession, and occupied it for the storage and sale of household furniture. On the 19th of November following, the premises became

A covenant on the part of lessee to surrender possession of the premises upon the expiration of the term in the same condition they were in when he entered into possession, the natural wear and tear excepted, was declared in *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, to be merely the expression of the implied obligation, resting upon a lessee, which obliges him to pay the rent as it accrues, make tenantable repairs, avoid the exposure of the premises to ruin and destruction by acts of commission or omission, and on the expiration of the term quietly to surrender possession.

It appearing that during the occupancy under a lease ornamental trees were destroyed, fences and walls torn down, and the materials used for sidewalks and the erection of buildings, or carried away; and that stone was quarried and gravel dug from the premises and taken away,—this was held voluntary waste, and therefore within the prohibition of the implied agreement existing on the part of the lessee, even in the absence of an express agreement. *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65.

According to *Downing v. De Klyn*, 1 E. D. Smith, 563, a lessee vacating premises under an agreement with the landlord is bound to leave them substantially in the condition in which they were at the time of the agreement, and has no right to carry away with him the doors, windows, and floors of the house.

Where a lessee, upon vacating the premises, informed the landlord that he had notified the water department to cut off the supply, and the landlord, relying upon this information, took no steps personally to see that it was done, the lessee was held liable for damages resulting from bursting pipes and injury to ceilings and furnace from the water which had not in fact been shut off. *Burland v. Munyon's Homeopathic Home Remedy Co.* Rap. Jud. Quebec, 14 C. S. 411.

In a case reported by the Monthly Law Digest and Reporter from *Département du Nord. Valenciennes* (1893), a landlord brought an action against his tenant to recover damages on account of the house having been left full of bugs. Judgment was rendered for 600 francs to defray the expense indicated by an architect as necessary for the occasion, and 237 francs for a loss of rent since the tenant left the premises.

The relation of a rectory incumbent to the

untenantable by reason of a fire occurring without fault of either party. On the succeeding 1st of December, plaintiffs entered without opposition by defendants, and engaged in repairs to make the place serviceable for reoccupation. During the month, defendants were permitted to take out their damaged property, and continued to do so until the 1st of the next January, when they informed plaintiffs that they had entirely removed therefrom and surrendered the premises. After the building was given up by the tenants, there still remained therein a large quantity of injured furniture and rubbish of no value, but distinguishable as having been a part of defendants' stock. This worthless material was removed by the plaintiffs at their own expense, to facilitate

repairs and their future use of the premises. The court found the reasonable amount of this expense, and that defendants were liable therefor.

By the terms of the written lease it was provided that upon its expiration, or when terminated by forfeiture or otherwise, the tenants would "yield up the premises in as good condition as when the same were entered, . . . loss by fire, inevitable accident, or ordinary wear excepted." There are other provisions in the lease relative to the surrender of the premises upon notice, as well as for the removal of offal and garbage, which were discussed on the argument; but under the view we have adopted these portions of the rental contract do not affect the result, and need not be considered. There

rectory and buildings is undoubtedly slightly different from that of the ordinary tenant, so that the rule in regard to his duties as to the premises does not apply in other cases. *Wise v. Metcalfe*, 10 Barn. & C. 312, 5 Mann. & R. 235, 8 L. J. K. B. 126, was an action for dilapidations by the successor against the executor of a deceased rector. The question was by what rule the dilapidations were to be estimated. Three rules were proposed: First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and whitewashing being in proper condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored, when necessary, according to their original form without addition or modern improvement; second, that they were to be left as an out-going lay tenant ought to leave his buildings where he is under covenant to leave them in good and sufficient repair, without papering, painting, or whitewashing; third, that they were to be left wind and water tight only, or in such condition as an out-going lay tenant, not under and obliged by covenant to do any repairs, ought to leave them. The second rule was the one adopted, the court stating that the incumbent was bound to maintain the parsonage and buildings in good and substantial repair, restoring and rebuilding when necessary according to the original form without addition or modern improvement; and that he was not bound to supply or maintain anything in the nature of ornament to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong.

The fact that the landlord has a remedy by an action in covenant does not prevent him from availing himself of the action on the case upon the implied obligation to leave the premises in proper condition as appears in *Kinlyside v. Thornton*, 2 W. Bl. 1111, where the landlord, after the expiration of the lease, brought an action on the case in the nature of waste against the tenant. Since there was a covenant in the lease to yield up the premises, it was contended that the action should have been brought in covenant. The court held that because the landlord had the action by covenant he did not thereby lose the old remedy of action on the case.

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b. As to damages by fire and accident.

The law is undoubtedly settled that there is no implied obligation requiring the lessee to rebuild or stand the loss when the leased premises are accidentally destroyed by fire.

According to *Wolfe v. McGulre*, 28 Ont. Rep. 45, in the absence of an express contract a lessee is not liable for permissive waste, and an accidental fire from negligence is permissive, not voluntary, waste.

The court held in *Maggott v. Hansbarger*, 8 Leigh, 532, that the tenant was not bound to reconstruct buildings accidentally consumed by fire, in the absence of an express covenant so clear as to leave no doubt that he intended to take that duty upon himself.

It is admitted in *Armstrong v. Maybee*, 17 Wash. 24, 61 Am. St. Rep. 898, 48 Pac. 737, that, in the absence of an express covenant to rebuild, the lessee is under no obligation to do so when the premises are destroyed by fire.

The court, in combatting a contention that it was the duty of a tenant at will to deliver up premises in the condition in which he received them, says, in *Horsefall v. Mather*, Holt, N. P. 7, 17 Revised Rep. 589: "Can it be contended that a tenant at will is answerable if premises are burned down? Would he be bound to rebuild if they became ruinous by any other accident? And yet, if bound to repair generally, he might be called upon to this extent."

The same rule seems to apply in regard to any other form of accidental injury.

So, in the absence of an express agreement, it was held in *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65, that an implied obligation exists on the part of the lessee so to use the property as to make repairs unnecessary as far as possible, but that such implied obligation has never been so construed as to make the tenant answerable for accidental damages, or to bind him to rebuild if the buildings are burned down or otherwise destroyed by accident.

Where the lease was in parol for one year, with no agreement to repair or deliver the premises in good condition at the end of the term, the tenants were held not liable in damages for the destruction of the building by an explosion when they exercised reasonable care in their use of the property leased. The court says, *arguendo*, that, in the absence of an express covenant on the subject, the law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the

is no controversy over the amount found to be due as unpaid rental for a part of the month of November, but it is insisted that, after defendants had removed the portion of their stock which they took away in December, they might without breach of duty allow a considerable portion to remain upon the surrender of the building. A reasonable construction of the facts found by the trial court authorizes the view that the relations between the landlord and tenants were actually terminated by agreement on the 1st of December, when the landlord, desiring to

take possession of his property to make repairs, entered on that day, and that the tenants were licensed by the landlord thereafter to be there for the purpose of taking away their property, and continued to do so until it became apparent that the *débris* and rubbish resulting from the partial destruction of the injured furniture which had been their property was valueless, when they ceased to remove it, but left it in the building, thus imposing upon the landlord this burden.

We have no doubt that the provision in

lessor, unimpaired except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee; but that the implied covenant does not extend to the loss of buildings by fire, flood, or tempest, or enemies, which it was not in the power of the lessee to prevent. *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923.

So, it was declared in *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, that, in the absence of an express covenant to do so, a lessee is not liable to repair or restore the premises, if, by unavoidable accident, or by act of God or the public enemy, they are injured or destroyed.

But in one decision, *Meyers v. Hussenbuth*, 32 Misc. 717, 65 N. Y. Supp. 1026, the court says that there is an implied covenant in every hiring that the tenant will surrender the premises at the end of the term in as good condition as they were in at the commencement of the term, reasonable wear and tear and damages by the elements excepted; and that this obligation is not confined to cases of ordinary and gradual decay, but extends to accidental injuries. The action in this instance was for waste against the tenant on account of accidental injuries to the premises by third persons, and a judgment in favor of the tenant was reversed, and a new trial ordered.

c. As to removal of rubbish.

It was conceded by the court in *Wilson v. Prescott*, 92 Me. 115, that, if tenants, upon vacating premises, left them in an untenable condition by leaving ashes thereon, they would be liable for the extent of the injury, in a special action adapted to the facts of the case.

III. The obligation under express covenants.

a. In general.

Whether the state of repair in which the premises are left is a sufficient compliance with the lessee's covenant to leave in the condition specified becomes a question of fact in each case, varying, of course, with the requirements of the covenant and the extent to which it has been complied with by the tenant. A few general rules, however, are recognized and admitted almost universally. Thus, under ordinary covenants, the tenant is not liable for the natural decay of the premises when the repairs needed are so extensive that he would have practically to rebuild or reconstruct the decayed portion; also, he is not liable for the ordinary wear and tear or reasonable use of the premises; and their condition at the time he took possession is a material consideration, because his duty as to delivering them up in good repair is a com-

parative one only, dependent upon their nature, quality, and condition at the time he executed the lease. Of course, these rules have no force in the face of covenants particularly affecting any one of them.

b. Repairs necessitated by natural decay.

The rule as to a tenant's duty in regard to natural decay of the leased buildings when he has covenanted to leave them in good repair is stated as follows in *Sheppard's Touchstone*, 169: "If one covenant to keep and leave a house in the same, or as good, plight as it was at the time of the making of the lease, in this case the ordinary and natural decay of it is no breach of the covenant; but the covenantor is hereby bound to do his best to keep it in the same plight, and therefore to keep it covered."

And, similarly, it is said in 1 *Leigh*, N. P. 616, that "where a covenant to repair is to keep and leave the house in as good a plight as it was at the time of making the lease, the covenantor is only bound to do his best to keep it in that plight, and therefore to keep it covered. The ordinary and natural decay is no breach."

Tindal, Ch. J., in charging the jury in *Gutteridge v. Munyard*, 1 *Moody & R.* 334, 7 *Car. & P.* 129, used the following language in regard to the tenant's immunity from liability for the effects of natural decay: "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labor to keep the house as nearly as possible in the same condition as when it was demised."

Where a mortgagee had held possession of the mortgaged premises for forty years, and had made some repairs, he was held not liable for a diminution in the rental value, because, as the court said, it could not be supposed that after forty years' possession he was bound to leave the premises in as good condition as he found them. *Russel v. Smithies*, 1 *Anst.* 96.

So, in an action at the end of a term upon a covenant to keep up all repairs of a mill, where the lessor showed that it would cost \$40 to set the mill going and \$150 to put it in the same condition as at the beginning of the term, it was held that the tenant was not bound to do more than keep the premises in substantial repair, and was under no obligation to insure the lessor against natural wear and decay, and a verdict was given the latter for \$45. *Harris v. Goslin*, 3 *Harr. (Del.)* 338.

the lease for the surrender of the premises by the tenants in as good condition as when received applies to the building itself. The exception relating to injury of the building by fire, while it would excuse the tenants from repairing or rebuilding, would not justify them in imposing burdens upon the landlord arising strictly from the tenants' occupancy and use of the premises; hence the injury by fire to the goods of defendants was a misfortune they had to assume themselves. A part of this was the injury to the furniture still belonging to them, and which,

under the terms of the lease as well as upon reasonable considerations of justice, it was their duty, rather than the landlord's, to remove. It would follow that the tenants, under the privilege to take away their goods, could not enjoy it so far as beneficial, and leave a part of their damaged property in the building to encumber plaintiffs' possession, and the expenses incurred by the landlord in removing the rubbish which defendants left and declined to take away is a legal obligation against them.

Order affirmed.

A tenant was held not liable for the expense of laying a new floor in an improved manner, when at the end of his term it was in a decayed condition. *Soward v. Leggett*, 7 Car. & P. 613.

So, a tenant was held not bound to put up new woodwork if the old was entirely destroyed by natural decay. *Crawford v. Newton*, 36 Week. Rep. 54.

Arguendo, it was conceded in *Thomas v. Conrad*, 24 Ky. L. Rep. 1630, 71 S. W. 903, that, under a covenant to surrender the premises in as good order as when received, natural decay and injury excepted, the lessees were under no obligation to replace a roof which had become so worthless by natural decay that it could not be repaired.

But a tenant, who had covenanted to keep premises in good and tenable repair, and to so give them up, was held liable for pulling down some of the buildings, although they were old and wretched hovels in a ruinous condition. The court held that the fact that the buildings were ruinous was no answer to the covenant to keep in repair, because the tenant was thereby bound to keep them as nearly as possible in the tenable state in which they were when leased. *Woolcock v. Dew*, 1 Fost. & F. 337.

Sturges v. Knapp, 31 Vt. 1, is somewhat of an exception, unless it may be distinguished on account of being railroad property. The covenant of lessees of a railroad to return the road at the termination of the lease in as good condition as it was at the commencement of the term, natural wear only excepted, was construed to import that the road was to be kept in good running condition during the term and returned in that condition, and that all structures which, by decay or accident, became unsafe for use must be renewed at the expense of the lessees.

And in *Percival v. Cooke*, 2 Car. & P. 460, 31 Revised Rep. 677, the executors of a deceased incumbent, while held not bound to put a rectory house into a finished state of repair, were held bound to restore what was actually in decay, and to make such repairs as were actually necessary for the preservation of the premises. The relation of a rectory incumbent to the premises, however, is slightly different from that of the ordinary tenant.

c. Repairs necessitated by reasonable use.

"Wear and tear," "reasonable use and wear," "reasonable and ordinary use," are phrases used in covenants and by the courts to signify the deterioration premises suffer during a tenancy by reason thereof when the tenant is a reasonably careful and prudent man. A number of decisions unanimously hold that for such deteriorations, even in the absence of an express

exception in the lease, the tenant cannot be held liable, unless, of course, he is expressly bound by covenant in that respect. What acts are permissive within the terms "reasonable and ordinary use" and "wear and tear," when such exceptions are made in the lease, and whether the condition of the premises at the end of the tenancy is consistent with a reasonable and ordinary use, are questions of fact for the jury. It is stated in *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606, that if the damage ensues from a reasonable use of the premises a tenant is not liable therefor under a covenant to quit and surrender them in good condition at the end of the term; and that the question as to reasonable use is one of fact to be submitted to the jury.

And it was held in *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957, where the lessee was permitted to sublet a portion of the premises to be used as a printing office, that the lessor could not recover for discolored, shaken, and cracked walls and damaged floors, under lessee's covenant to turn over the premises at the end of his term in as good condition as they were in at the time of the making of the lease, because the injuries alleged to have been done to the building were no greater than were incident to the conduct of the business carried on with the consent of the landlord; and the covenant above referred to, the court stated, must be taken with the limitation that the landlord will permit such wear and tear of the premises as is incident to the use to which it is put.

A lease contained a covenant to deliver up at the end of the term in good repair all the trees in an orchard on the premises, reasonable use and wear only excepted. It appearing that, while the tenant had cut down some of the trees which were decayed and past bearing, he had planted an equal number, and therefore that the lessors were likely to get back the premises at the end of the term in better condition in respect to trees than at the granting of the lease, it was held that the acts of the tenant in reference to the orchard must be considered allowable within the exception "reasonable use and wear." *Doe ex dem. Jones v. Crouch*, 2 Campb. 449.

But barking and plowing up young apple trees by cultivating a crop among them was held in *Thompson v. Cummings*, 39 Mo. App. 537, not permissible under a covenant to deliver up the premises in as good condition as when received, ordinary wear and tear excepted.

It was held a proper question for the jury whether the use had been reasonable, where a lessee rented dwelling-house premises to be used for the purposes of a public school, cove-

nanting to surrender them at the expiration of the lease in the same condition they were in at the commencement, reasonable use and wear thereof as a public school and damages by the elements excepted, when the evidence showed that upon the termination of the lease the premises were left with broken window panes, battered doors, missing balusters, filthy walls, and the cellar was filled with refuse. *McGregor v. Board of Education*, 107 N. Y. 511, 14 N. E. 420.

So, in *Browning v. Garvin*, 48 App. Div. 140, 62 N. Y. Supp. 564, it was held a proper question for the jury whether tenants had not unnecessarily damaged floors, stairs, and brick work in removing their property from a building after a fire, when they had covenanted to surrender possession in as good condition as the property was at the commencement of the term, reasonable use and wear thereof and damage by fire or the elements excepted.

It was held error in *Smith v. Stagg*, 15 Jones & S. 514, for the judge to charge unqualifiedly that the defendant was bound to surrender premises in as good condition as they were when he took them, where the covenant sued on provided that they should be surrendered in as good condition, etc., damages by the elements, reasonable wear and tear, excepted.

Where there was a conflict of evidence as to whether the condition of a leased building at the end of the term was occasioned by the acts and omissions of the tenants, or by the natural deterioration and decay of the building itself. It was held that the burden of proof was upon the landlord to establish that the want of repair was not caused by the reasonable use, wear and tear, of the premises. *Hawkins v. Ringler*, 47 App. Div. 265, 62 N. Y. Supp. 56.

d. Effect of condition of property at commencement of term.

The nature and condition of the property when leased are a most material consideration in determining the amount and kind of repairs properly required from the tenant. This was recognized by Lord Esher, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20, and the following rule was formulated by him: "The age of the house must be taken into account, because nobody could reasonably expect that a house two hundred years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it."

Earlier cases had recognized the same doctrine.

In *Gutteridge v. Munyard*, 1 Moody & R. 334, 7 Car. & P. 129, an action brought for failure to yield up the premises in repair, where it appeared that the buildings were between two and three centuries old, Tindal, Ch. J., in comment-

ing upon the evidence to the jury, said that where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a new form at the end of the term, or of greater value than it was at the commencement of the term; that the tenant is bound by reasonable applications of labor only to keep the house as nearly as possible in the same condition as when it was demised.

And, under a covenant to keep and deliver up premises in good repair at the end of the tenancy, it was held in *Payne v. Haine*, 16 Mees. & W. 541, 16 L. J. Exch. N. S. 130, that, if the premises were old and in bad repair at the time of the demise, the tenant was bound to put them in good repair as old premises, since he could not keep them in good repair without putting them into it. The court says: "The cases all show that the age and class of the premises let, with their general condition as to repair, may be estimated, in order to measure the extent of the repairs to be done. Thus, a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term."

So, the court declared in *Harris v. Jones*, 1 Moody & R. 173, that the tenant was only bound to keep up the house as an old house, not to give the landlord the benefit of new work, and that the question for the jury was whether the covenant to yield up the premises at the end of the term in good, substantial condition had been substantially complied with, not strictly and literally.

And a covenant to keep and deliver up premises in good and tenantable repair was held, in *Stanley v. Towgood*, 3 Scott, 314, 3 Bing. N. C. 4, 2 Hodges, 132, 6 L. J. C. P. N. S. 129, to be complied with by keeping the premises in substantial repair according to their nature; and as to that question the state of repair at the time of the demise was held material.

Also in *Mantz v. Goring*, 4 Bing. N. C. 451, 6 Scott, 277, 1 Arnold, 198, 7 L. J. C. P. N. S. 204, an action for breach of covenant to keep in repair, the general state of the premises at the commencement of the term, whether new or old, was held to be a material consideration.

So in *Burdett v. Withers*, 7 Ad. & El. 136, 2 Nev. & P. 122, W. W. & D. 444, 6 L. J. K. B. N. S. 219, 1 Jur. 514, an action for breach of a covenant to keep and yield up premises in good repair, it was held that evidence to show the previous state of the premises was proper.

Winn v. White, 2 W. Bl. 840, goes on the theory that an agreement by a tenant to leave a farm in as good condition as he found it is an agreement to leave it in tenantable repair if it was in that condition at the commencement of the lease.

Where a lessee took a house and furniture in a clean state, and agreed to leave them as he found them, he was held bound to use the furniture in a tenantlike manner, and to clean it in a reasonable way before he left it. *Stanley v. Agnew*, 12 Mees. & W. 827, 13 L. J. Exch. N. S. 197.

It was held, incidentally, in *Jaques v. Gould*, 4 Cush. 384, that whatever repairs might be necessary to keep the premises in as good condi-

tion as they were in when the lessee took possession, except as excepted in the lease, the lessee was bound to make, where the lessee covenanted to deliver up the premises at the end of the term in as good order and condition, reasonable use and wear, fire, and other unavoidable casualties, excepted, as the same then were, or might be put into by the lessor.

A new trial was granted in *Roberts v. Freeborn*, 14 Daly, 529, 2 N. Y. Supp. 56, an action for breach of a covenant to surrender the premises in as good condition as they were in at the time of the letting, in order to determine more carefully what the condition of the premises at the time of the letting was, since it did not appear but that rotten beams, and holes in the floor, for which the defendant lessee had been adjudged liable to repair, were in existence prior to the commencement of his tenancy.

In *Belcher v. McIntosh*, 2 Moody & R. 186, 8 Carr. & P. 720, where the premises were old and dilapidated, the court said in its instructions to the jury that the agreement, which was that the lessee should put the premises into habitable repair, was not that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes for which they were used.

A covenant to repair and make good any damages occurring through neglect on his part was held not to bind the tenant to restore the premises upon the termination of his lease to any better condition than he found them; and, therefore, where, at the beginning of the term, the wall paper was defaced by nail holes, and was patched up by pasting paper over the holes, and the woodwork was only slightly renovated, the tenant was not held liable for extensive renovations made by the landlord after the termination of the lease, consisting of repapering and refinishing the woodwork, etc. *Smith v. Maxfield*, 9 Misc. 42, 29 N. Y. Supp. 63.

In an action after the expiration of the term to recover the cost of repairs which it was plain the tenant should have made under a covenant to make all necessary repairs and surrender the premises in as good state and condition as reasonable use and wear will permit, damages by the elements excepted, it was held that such covenant bound the tenant to make only such repairs as were necessary to its use of the premises, and did not bind it to make all the repairs which the premises needed at the time of the making of the lease. *White v. Albany R. Co.* 17 Hun, 98, 8 N. Y. Week. Dig. 86.

The jury were told in *Haldane v. Newcomb*, 12 Week. Rep. 135, 9 L. T. N. S. 420, an action on a contract to leave in repair, that they were to consider evidence as to the state of repair of the premises at the time of the demise only so far as it went to show the age, character, and class of the buildings, their general condition, and the extent to which the tenant had performed his covenant to repair.

In *West v. Hart*, 7 J. J. Marsh. 258, the covenant, which was "to keep the farm and buildings in good repair, and leave them in the same good order at the end of said term of three years," was distinguished from the covenant in *Brashear v. Chandler*, 6 T. B. Mon. 150, and construed to mean that the premises were to be kept and delivered up in the same state of good repair that they were in at the time of the making of the lease.

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But in *Brashear v. Chandler*, 6 T. B. Mon. 150, a covenant which provided that the lessee was to deliver up the farm "in good tenable repair in every respect" was construed to mean that the farm was to be put into good tenable repair whatever its situation might have been when rented and when delivered up, that the buildings should be fit to dwell in with comfort, the inclosures should be sufficient to protect and secure the crops, and the premises should be tenable in every respect.

e. Repairs in particular.

1. Papering, painting, and whitewashing.

It will be observed that the courts, in determining tenants' liability to make particular repairs, apply the principles shown in the decisions above set out.

In *Crawford v. Newton*, 36 Week. Rep. 54, an action to recover for breach of a covenant to keep the inside of the premises in tenable repair and so deliver them up at the end of the term, it was proved that a tenant had not painted or papered the house during the tenancy, that parts of the woodwork were worn away or decayed, and that holes were left in the wall from which the tenant's fixtures had been removed. In holding that the tenant was not bound to do any painting or papering which was required only for the purposes of ornamentation, under a covenant to keep the inside of the house in tenable repair, *Cave, J.*, says that tenable repair does not mean anything in the way of decorative repair, and that "paper is decorative repair. No doubt if a man takes a house which is papered new for him for three years, he must return the house with the paper not stripped off, or torn off, or any thing of that kind, but subject only to the fair wear and tear of the paper. Where he takes a house for a term of years, and there is nothing to do but to keep the inside in tenable repair, and he remains there so long that the paper in the natural course of things becomes useless for a future tenant, he is not bound to put on a new paper, although he may do it if he likes to please himself. It is not one of those things necessary to keep the house in repair. The house is just as much in repair whether it has paper on the walls or whether it has not. The house is none the less fit for being papered afterwards, none the less fit for being dealt with by the landlord afterwards, if the tenant thinks fit to strip the paper off the walls, and to have the simple walls uncovered by paper at all. In the absence of a covenant that he shall paper and paint, I do not see what is to prevent him doing that, provided his term is not so short a term that it amounts to an absolute destruction of the paper he found there."

In regard to the extent of a tenant's obligation to repaper under a covenant to leave premises in good tenable repair, *Lord Esher* says, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20: "I agree that he is not bound to repaper simply because the old paper has become worn out, but I do not agree with the view that, under a covenant to keep a house in tenable repair, the tenant can never be required to put up new paper. Take a house in Grosvenor square, if, when the tenancy ends, the paper on the walls is merely in a worse condition than when the tenant went in, I think the

mere fact of its being in a worse condition does not impose upon the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably minded tenant of the class who take houses in Grosvenor square would not think the house unfit for his occupation. But suppose that the damp has caused the paper to peel off the walls, and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say then that the tenant was bound, under his covenant to leave the premises in tenable repair, to put on new paper. He need not put up paper of a similar kind—which I take to mean of equal value—to the paper which was on the walls when his tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition." In regard to an ornamental ceiling, the same justice says: "Take, again, the case of a house in Grosvenor square having an ornamental ceiling which is a beautiful work of art. A tenant goes in and finds such a ceiling in the house, and in course of time the gilding becomes in such a bad condition, or so much worn off, that the ceiling is no longer ornamental. I should think that a reasonable tenant, taking a house in Grosvenor square, would not require a gilded ceiling at all. If that be so, on the mere covenant to leave the premises in tenable repair, I should think that the tenant who has entered into that covenant was not bound to regild the ceiling at all."

In regard to the extent of a tenant's obligation to repaint the inside woodwork, under a covenant to leave the premises in good tenable repair, Lord Esher says, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20: "If the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor square. If the tenant leaves a house in Grosvenor square with painting only good enough for a house in Spitalfields he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor square."

Similarly, Cave, J., in *Crawford v. Newton*, 36 Week. Rep. 54, says, in regard to painting, that the rule is somewhat different from that as to papering; that "the inside of a house is quite as good, although not so pleasant and as sound, whether it is papered or not. That is not the case with regard to the painting. Painting is partly for decoration, but it is also for the protection of the woodwork. If the tenant does not paint as an ordinary tenant would do, and under those circumstances the woodwork becomes destroyed, or the painting which was on is left in such a condition as to require more than ordinary repair and expense in renewing it, that seems to me to be a defect and is a want of tenable repair."

The contention in *Maxon v. Townshend*, 2 Times L. R. 717, 2 Q. B. Div., was that, under a covenant to deliver up premises well and sufficiently repaired in regard to specified repairs named in the lease, the lessee was bound to repaper and repaint the house at the end of the term before yielding it up. The court said that the tenant's duty in this regard was purely a question of circumstances, and, accepting the evidence of a surveyor who had surveyed the

house with the covenants in his hand, allowed the lessor the amount estimated by that witness as sufficient.

In regard to the extent of the tenant's liability to whitewash, under a covenant to leave in good tenable repair, Lord Esher says, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20: "As to whitewashing, one knows it is impossible to keep ceilings in the same condition as when they have just been whitewashed. But if, though the ceilings have become blacker, they are still in such a condition that a reasonable man would not say, 'I will not take this house because of the state of the ceilings,' then I think that the tenant is not bound, under his covenant to leave the house in tenable repair, to whitewash them."

2. Other repairs.

Leaving cracked glass in windows was held to be a breach of a covenant to leave premises sufficiently repaired, in *Pyot v. St. John*, Cro. Jac. 329.

And in *Holbrook v. Chamberlin*, 116 Mass. 161, 17 Am. Rep. 146, a lessor was held entitled to recover the value of glass broken during the term of the lessee, who had covenanted to surrender up in good repair, and who had assigned his interest in the lease.

Where the lessees had covenanted to keep and "deliver up the premises in good order and repair," a defense was held insufficient, to an action for rent, brought after they had vacated, and for damages for repairs made necessary by their negligence, which set forth that the premises were in an uninhabitable condition owing to defective drainage, on account of which they vacated the premises before the end of their term. *Hollis v. Brown*, 159 Pa. 539, 28 Atl. 360.

The tenant was held not liable for the expense of laying a new floor in an improved manner, when at the end of his term the old one was in a decayed condition. *Soward v. Leggett*, 7 Car. & P. 613.

And Cave, J., in *Crawford v. Newton*, 36 Week. Rep. 54, says that, "if the whole of the woodwork is gone and decayed, the defendants are not bound to put new woodwork up. The tenant was bound to keep the house in repair. When that can be done by repairing a piece of a door, or anything of that sort, he is bound to do it; but when the whole flooring is rotten he is not bound to put in a new flooring, and when the whole of the inside has gone he is not bound to put up a new inside to the house."

But where the covenant was to keep in tenable repair, Lord Esher, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20, declared that, if a floor was rotten when the tenancy commenced, it was the tenant's duty to put it into tenable repair, and, if it was perfectly rotten at the end of the tenancy, he must put down a new floor, although, if he can make it go by repairing it, he may satisfy his obligation in that way.

The covenants as to the condition the property was to be left in, in *Scott v. Haverstraw* (Clay & Brick Co. 62 Hun, 620, 16 N. Y. Supp. 670), were construed to bind the lessee to leave upon the premises a fully equipped brick yard covering the whole premises with smooth regular surfaces; and to erect and leave a steam en-

gine for the manufacture of brick with suitable buildings and all machinery required therefor; and to leave all sheds and other improvements in good order and condition.

This decision was affirmed in 135 N. Y. 141, 31 N. E. 1102. The court there said, in regard to the covenant to leave the surface of the yard in a smooth condition, which was violated by the lessee leaving it broken, that the condition of the surface stipulated for was necessary in order to manufacture bricks successfully in the manner in general use when the lease was made, and that the lessor's purpose was to have the yard at the expiration of the term in the condition in which business could be successfully prosecuted; and that the fact that, since the lease was executed, other methods for making brick had been devised which rendered the smooth condition of the yard unnecessary, did not change the construction to be put upon the covenant, nor the lessee's liability under it.

Failure to repair a pavement was held to be a breach of a covenant to leave the premises sufficiently maintained and repaired, in *Pyot v. St. John*, Cro. Jac. 329.

Lessees were held under no obligation to replace a roof which had become so worthless by natural decay that it could not be repaired, in *Thomas v. Conrad*, 24 Ky. L. Rep. 1630, 71 S. W. 903, although they had covenanted to surrender the premises in as good order as when received.

8. Alterations.

Carrying away a shelf, although it was not fixed to the premises, was held to be a breach of a covenant to leave in sufficient repair at the end of the term, in *Pyot v. St. John*, Cro. Jac. 329.

Tenants were held liable for having opened two doorways in the walls of the leased premises, in *Gange v. Lockwood*, 2 Fost. & F. 115, when they had covenanted to surrender the premises at the end of the term free from all dilapidations.

Where a lessee was permitted by the lease to make alterations, but had agreed to surrender the premises at the expiration of the term in as good condition as reasonable use and wear would permit, damages by the elements excepted, it was held, in *Re Jewell*, Fed. Cas. No. 7302, that, if alterations were made which affected injuriously the condition of the building as it was before making the alterations, it should at the expiration of the lease be restored to its former condition in respect to the changes so made.

Under a lease which allowed the lessee to alter the buildings, but required him to place them in the same condition at the expiration of the lease as they were in at the commencement of the term if asked to do so by the lessor; but stated no time at which the lessor must give notice to the lessee to do so.—It was held, in *Reed v. Harrison*, 186 Pa. 337, 46 Atl. 415, that the fact that the lessor failed to give notice of his desire that a building be restored to its original condition until three weeks after the termination of the lease did not relieve the lessee from his obligation to comply with his agreement in that respect.

1. Fire or unavoidable accident.

1. In general.

The duty of a tenant in case of the destruction of the premises is as follows:

tion of the leased premises by fire or unavoidable accident, when he has covenanted to yield them up at the end of the term in good condition, or has made any other agreement of a similar effect, is not yet definitely settled by the decisions. In the absence of any exception in the lease which can be construed so as to include destruction by fire or accident, the cases are not in harmony as to the tenant's liability. A numerous array, including the older authorities, goes on the theory laid down in *Broom, Legal Maxims*, 233, that, "where there is a general covenant by the lessee to repair and leave repaired at the end of the term, the lessee is clearly liable to rebuild in case of the destruction of the premises by accidental fire, or by any other unavoidable contingency, as lightning, or an extraordinary flood. And the principle on which this rule depends is that, if a party, by his own contract, creates a duty or a charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; for, if he had chosen to guard against any loss of this kind, he should have introduced it into the contract by way of exception; and, accordingly, an exception of accidents caused by fire and tempest is now usually introduced into leases, in order to protect the lessee."

Thus, a covenant to keep a house in good and sufficient repair, and so leave the same, was held, in *Chesterfield v. Bolton*, 2 Comyns, 627, to bind the lessee to rebuild the house when it was burned down by accident.

And, according to *Pym v. Blackburn*, 3 Ves. Jr. 34, 38, a lessee, having covenanted to leave the premises in good and sufficient repair, is bound to rebuild in case of fire.

So, a covenant to keep in repair during the term was held to require the lessee to rebuild in case of accidental fire, in *Bullock v. Dommitt*, 6 T. R. 650, 2 Chitty, 608, 3 Revised Rep. 300.

And according to *Ely v. Ely*, 80 Ill. 532, if a lessee enters into a covenant to keep the building in repair at his own expense, and to deliver it up at the end of the term in as good order and condition as when he received it, without making any exception of loss by fire, he is under the obligation to reconstruct the building in case it is burned.

It is declared in *Bigelow v. Collamore*, 5 Cush. 231, to be a well-settled principle of law, that when a lessee covenants to keep the demised premises in repair, and at the termination of the lease to surrender them in as good condition as they were in at the commencement of the term, if the buildings are destroyed, although without the fault of the tenant, he will be bound to rebuild, or make the loss good to the lessor.

A lessee who covenanted to surrender and yield up the premises in as good condition as they were in at the date of the lease, reasonable use and wear thereof excepted, was held bound, in *Phillips v. Stevens*, 16 Mass. 238, to rebuild the house and barn destroyed by fire during the term.

It was held, incidentally, in *Schmidt v. Pettit*, 1 MacArth. 170, that a covenant in a lease that the tenant will deliver the premises at the expiration of the lease in as good order as they were in at the commencement of the term binds the lessee to rebuild in case the premises are destroyed by fire.

So, *Priest v. Foster*, 69 Vt. 417, 38 Atl. 78, supports the doctrine that when a lessee agrees

to return the leased property in as good condition as it was in when he took it, he is liable in damages for failure to do so, notwithstanding the property was destroyed by fire.

And in *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659, a covenant to return mill property in reasonably good condition and repair was held to bind the tenant to do so, even though the mill was destroyed by fire. This decision was upon the ground that, when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

Following *Hoy v. Holt*, it was held in *Gettysburg Electric R. Co. v. Electric Light, Heat, & Power Co.* 200 Pa. 372, 49 Atl. 952, to be the duty of the lessee to restore buildings which had been destroyed by fire when it had covenanted to "keep and maintain all of said property leased to it in good repair, and at the termination of this lease restore the same to the said party of the first part in good condition."

On the ground that the law of the question was doubtful, the court, in *Ross v. Overton*, 3 Call. (Va.) 309, 2 Am. Dec. 552, refused to set aside an award of arbitrators that a lessee who had covenanted to deliver up mill property, with all improvements, at the expiration of the term in proper tenable repair was bound to comply with his covenant, although the mill house was entirely demolished by an extraordinary and unexpected movement of the ice, which the lessee was powerless to prevent.

The covenant of lessees of a railroad to return the road at the termination of the lease in as good condition as it was in at the commencement of the term, natural wear only excepted, was construed in *Sturges v. Knapp*, 31 Vt. 1, to import that the road was to be kept in good running condition during the term, and returned in that condition, and that all structures which, by decay or accident, became unsafe for use must be renewed at the expense of the lessees.

In *Pasteur v. Jones*, 1 N. C. (Conference) 194, a suit in equity, where the lessee, in compliance with a covenant to build and leave in repair, had put buildings upon the land, which were afterwards destroyed by fire, it was held that the lessee was liable for the value of the buildings, or that he must rebuild. But in this case the consideration for the use of the land was that the lessee should leave upon the premises the building specified, and the value of the structure destroyed was about what the lessee ought to have paid, and what the lessor would have been entitled to, for the use of the land during the time it had been occupied by the lessee.

A distinction is made in *Nave v. Berry*, 22 Ala. 382, between a covenant "to repair and deliver up" and one simply "to deliver up," on the ground that, while the former binds the lessee to rebuild in case of loss by fire during the term, the latter is simply an obligation against holding over; and, if the buildings are burned or destroyed during the term without the fault of the lessee, he is not bound to rebuild or pay for the improvements so destroyed. In the case at bar the covenant was merely "to deliver up."

A number of cases make a distinction between a covenant to keep in repair and one to surrender in good condition, or words to like effect, on the ground that the lessee is bound to restore the premises in any event under a covenant to repair, but is not liable in the case of

accidental fire or injury when he merely agrees to surrender up in good condition.

So, in *Warner v. Hitchins*, 5 Barb. 666, a distinction is made between a covenant to repair and one to surrender in good, or the same, condition, on the ground that the former imposes a much more extended liability, and is the proper one where the lessee assumes to keep and make the premises good from whatever cause the injury may arise, whether from unavoidable accident or negligence; and that the latter is the one adopted when the object is to secure the utmost care and diligence of the lessee in protecting and preserving the property; and, therefore, in the absence of an express covenant to repair, it was held that the tenant was not liable, under a covenant to surrender up the possession of the premises at the expiration of the lease in the same condition they were in at the date of the lease, to put new buildings in place of those destroyed by accidental fire during the term.

Following *Warner v. Hitchins*, it was held in *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 538, that a lessee is not liable for the loss of the premises by accidental fire under a covenant for their redelivery at the end of the term in good order, excepting usual wear and tear and unavoidable accidents.

And in *Wainwright v. Silvers*, 13 Ind. 497, a vendor in possession of the premises as tenant, who had agreed to deliver up the premises in as good repair as they were in at the time of the agreement, was held not liable to restore a dwelling house accidentally destroyed by fire. The court says: "The law as between landlord and tenant, we understand to be that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. It is not sufficient to charge him that he agreed or covenanted to surrender the premises at the end of his term in the same repair or condition they were in at the time of the contract.

Similarly, the legal effect of a covenant to keep demised premises in repair, and at the determination of the lease to surrender them in as good condition as they were in when the lease was made, was declared, in *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143, to require the lessee to return the leased premises as agreed, notwithstanding any accident by inevitable necessity; and, therefore, a corporation which had bound itself by such an agreement was held bound to make good all damages resulting from a fire, although the result of accident.

But in *Levey v. Dyess*, 51 Miss. 501, the court draws the following conclusions after a review of the authorities: That the lessee is not responsible for the accidental, casual destruction by fire of the property demised, unless he has made himself so by a covenant to repair, or keep in repair, or its equivalent; and that a covenant to redeliver or restore to the lessor in the same plight and condition, usual wear and tear excepted (or other words of like import), does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss upon him.

While admitting that without an express covenant to rebuild the lessee is under no obligation to do so when the premises are destroyed by fire, the court held, however, that the following covenant could be construed only to impose on the lessee the obligation to rebuild the mill, which was destroyed by fire, though without

negligence on his part: "The lessee shall maintain all of the machinery and buildings of said mill in as good condition and repair as the same now are in, and return the same to the lessor at the expiration of said lease in as good condition as the same are now in, reasonable wear and tear excepted. . . . That he (lessee) will maintain all the said mill, machinery, and buildings in as good condition and repair as the same are now in, and return the same to lessor at the expiration or termination of this lease in as good condition as the same are now in, reasonable wear and tear from ordinary use alone excepted." *Armstrong v. Maybee*, 17 Wash. 24, 61 Am. St. Rep. 898, 48 Pac. 737.

A recovery was allowed against the estate of a lessee for a failure to keep property in repair, only so far as it was caused by something else than ordinary wear and unavoidable casualties, in *Bail v. Wyeth*, 8 Allen, 275, where the lease provided, by a written clause, that the property was to be kept in repair and maintained in good condition by the lessee, and, by a printed clause, that the lessee would quit and deliver up the premises at the end of the term in as good order and condition (reasonable use and wearing thereof, fire, and other unavoidable casualties excepted) as the same now are, or may be put into by the said lessor. It was held that the exceptions mentioned were intended to qualify both of the covenants to repair and to deliver up the premises.

A number of decisions, in harmony with the doctrine shown in the cases last above set out, are to the effect that, under a covenant to surrender up in good condition, or words to like effect, even in the absence of a clause exempting the lessee from liability in case of the destruction of the leased premises by unavoidable accident, he will be held liable under such circumstances only in case of his own negligence or fault.

Thus, a vendor in possession of the property as tenant, who had covenanted to give up the possession of the premises in as good condition as the same were then, any natural wear excepted, was held bound to restore the buildings upon their being destroyed by fire through his negligence, carelessness, or misconduct, or to suffer a reduction in the purchase price equal to the amount it would cost to rebuild. *Gibson v. Eller*, 13 Ind. 124. Had the building been consumed accidentally, the court gave as its opinion that the vendor would not have been bound to put up new buildings in place of those destroyed.

And where the evidence showed culpable negligence on the part of lessees, they were held liable for the destruction of buildings on the leased premises by fire when they had covenanted to return the premises at the close of the season in good order with the exception of the usual wear and tear. *Klock v. Lindsay*, 28 Can. S. C. 453.

Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814, adheres to the doctrine that a covenant to restore premises in good running order, ordinary wear and tear excepted, does not bind the lessee to rebuild in case of casual destruction of the property by fire, or impose the burden of the loss upon him if the fire was not occasioned by his negligence.

Where lessees who leased a river landing covenanted to deliver it up at the expiration of the lease in good order and condition, and to make good all damages thereto, except the usual wear

and proper use of the same, it was held in *Waite v. O'Neil*, 72 Fed. 348, that the lessees were not bound to restore the premises after their destruction by an extraordinary flood, when they could not have prevented the ravages of the river,—at least without the expenditure of enormous sums of money,—and when they could not restore the premises to their original condition without an expenditure of money far in excess of the value of the property leased.

Kelly v. Duffy (Pa.) 9 Cent. Rep. 410, 11 Atl. 244, goes on the theory that in an action brought after the termination of the lease on the covenant to surrender premises at the expiration of the term in as good order and condition as they were in at any time during the term, ordinary decay and inevitable casualty only excepted, where the premises were destroyed by fire, lessee is not liable if he made every practicable effort which, under the circumstances, ought to have been made to save the building; and that whether he did so or not is a question for the jury.

Another class of cases goes still further away from the old English rule first above shown, and refuses to hold a lessee liable in the absence of a clear and express covenant to rebuild, in case of casual destruction of the leased premises by fire or unavoidable accident, on the ground that it is unjust to interpolate into the lease by implication a meaning which was foreign to the minds of the parties at the time of its execution.

The earliest and clearest exponent of this doctrine is *Pollard v. Shaffer*, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239, where it was held that a tenant who had covenanted to deliver up the premises in good repair was excused from compliance therewith when the buildings were destroyed by a hostile army. The court was of the opinion that, in order to bind the lessee under such circumstances, the covenant ought to be special and express, and so clear that no other meaning could be put upon it. The court says, *arguendo*: "Neither party has been guilty of any default; the injury has been done by a common enemy, whom both together could not possibly resist or prevent, and the premises would have been thus damaged in the possession of the plaintiff himself. Suppose, when the lease was executed that the lessee had been asked, 'Is it your meaning, that, in case the buildings shall be destroyed by an act of God, or public enemies, you are to rebuild or repair them?'—His answer would have been, unquestionably, 'No; I never entertain such an idea.' Should the like question have been put to the lessor, his answer would certainly have been, 'No, I do not expect anything so unreasonable.'"

In *Maggort v. Hansbarger*, 8 Leigh, 532, the covenant was to return the property with its appurtenances. During the term several buildings on the premises were consumed by fire, accidentally or by some unknown incendiary. The court held that the tenant was not bound to rebuild in the absence of an express covenant so clear as to leave no doubt that he intended to take that duty upon himself.

In view of a state statute providing that, in the construction of instruments creating or conveying interest in real estate, it shall be the duty of the courts to carry into effect the true intent of the parties so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law, the court declared itself released from the English common-law rule, and held that

an express agreement of a lessee to keep leased premises in good repair, and at the expiration of the term to surrender them in as good condition as they were in when he entered, natural decay, wear and tear, excepted, did not bind him to rebuild buildings destroyed by a hurricane. *Wattles v. South Omaha Ice & Coal Co.* 50 Neb. 251, 36 L. R. A. 424, 61 Am. St. Rep. 554, 69 N. W. 785.

And in *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446, it was declared that, under a covenant to surrender possession of the premises in the same condition they were in when the lessee entered into possession, or, in other words, in the absence of an express covenant to do so, the lessee is not liable to repair or restore premises injured or destroyed by unavoidable accident, or act of God or the public enemy.

In *Halbut v. Forrest City*, 34 Ark. 246, the theory is advanced that where there is an agreement to redeliver the premises in any prescribed condition of good order it is a question of the real intention and meaning of the parties whether or not the tenant meant to assume the position of an insurer against a casual destruction of the premises by fire, and that the circumstances and probable intention of the parties are properly considered in this respect. The court says that the tendency of the more recent decisions is adverse to extending the responsibility of the tenant when the covenant is not special and express, and so clear as to leave little doubt that he really meant to take the risk of an insurer.

In other cases where the lessee covenanted to return the property in good condition (or words to that effect), "loss by fire or unavoidable accident excepted," or "damages by the elements excepted," the cases turn on whether the injury suffered comes within the exception.

Thus, a tenant covenanting to yield up premises in as good condition as when entered upon, loss by fire or inevitable accident or ordinary wear excepted, was held liable for the expense of replacing a window broken by a stone accidentally kicked by a passing team, on the ground that such an injury to the premises was not an inevitable accident, it being possible for the tenant to have protected the window by a blind or wire netting. *Peck v. Scoville Mfg. Co.* 43 Ill. App. 360.

It was said, *arguendo*, in *Kramer v. Cook*, 7 Gray, 550, where by the lease the lessee was to restore the premises at the end of the term in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties, excepted, as they were in when he took possession, that the falling of the wall by reason of not being properly shored up was not an unavoidable casualty, and that the duty of repair would be on the lessee, and not on the lessor.

The partial destruction of a building by fire was held to be within the statutory provision that a mere agreement of a lessee to repair or leave in repair will not bind him to restore buildings destroyed by fire or other casualties. *Sun Ins. Office v. Varble*, 103 Ky. 758, 41 L. R. A. 792, 46 S. W. 486.

In a covenant to deliver up the premises in like condition as when taken, reasonable use and wear thereof and damages by the elements excepted, "damages by the elements" was held to include the loss of the buildings by fire occurring without the fault of the lessee. *Van* 64 L. R. A.

Wormer v. Crane, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686.

Where lessees had covenanted to deliver the premises at the expiration of the lease in as good condition as they were in at the commencement of the term, reasonable wear and tear and accidents by fire excepted, it was held in *Evans v. Skelton*, 16 Can. S. C. 637, that a fire which occurred without the fault of the lessees was an accident within the terms of the lease.

A lessee who had agreed to deliver the premises at the expiration of the term in as good order, state, and condition as they might be found in at the commencement of the same, reasonable wear and tear and "accidents by fire" excepted, was held not liable in damages for the destruction of the building by a fire the origin of which remained a mystery, because, in the absence of fault or negligence upon the part of the lessee, such a fire would be considered an accident within the terms of the lease, and because the landlord had not proved that it was the lessee's fault which caused the fire. *Ford v. Phillips*, Rap. Jud. Quebec, 22 C. S. 206.

It is said *obiter*, in *Turner v. Townsend*, 42 Neb. 376, 60 N. W. 587, that perhaps a tenant at the expiration of his lease would not be compelled to restore, or pay for the restoration of, a window which had been blown out by a storm, as it might be that a storm would be considered an inevitable accident within the meaning of the tenant's covenant to yield up the premises at the expiration of the term in as good condition as when received, loss by fire or other unavoidable accidents excepted.

2. Injuries caused by third persons.

The fact that injuries to the premises were caused by third parties makes no difference in the lessee's liability to leave the premises in good repair, if he has covenanted to do so.

Thus, lessees who had covenanted to yield up the premises in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted, were held liable to replace or pay for a large plate glass which was cracked at the time they surrendered the property. Their liability was held not affected by the fact that the crack in the glass was not caused by any act or omission of their own, on the ground that, having to do all necessary repairs, they were, therefore, absolutely responsible for an omission to do so, no matter what caused the injury aside from any fraud of the lessors. *Cohn v. Hill*, 9 Misc. 326, 30 N. Y. Supp. 209.

So, a tenant was held liable for the value of plumbing work which was cut out and stolen by persons unknown after the tenant had moved out near the end of the term, in *Regan v. Luthy*, 16 Daly, 413, 11 N. Y. Supp. 709.

The damage suffered by the destruction of a leased building by the negligent acts of a third party was incidentally held recoverable against the lessee under a covenant that the buildings should revert to the lessor without damage, in *Cook v. Champlain Transp. Co.* 1 Denio, 91.

And a covenant in a lease to surrender the premises at the expiration of the term in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted, was held, in *Parrott v. Barney*, 1 Sawy. 423, Fed. Cas. No. 10,773, not to protect the lessee from liability for waste resulting

from accidents occurring without his fault, through the wrongdoing of third parties.

And in *Myers v. Hussenbuth*, 32 Misc. 717, 65 N. Y. Supp. 1026, which was an action for waste against a tenant on account of accidental injuries to the premises by third parties, the court said that the obligation of the tenant to surrender the premises at the end of the term in as good condition as they were in at the commencement of the term, reasonable wear and tear and damages by the elements excepted, was not confined to cases of ordinary and gradual decay, but extended to accidental injuries; and a judgment in favor of the tenant was reversed, and a new trial ordered.

But a tenant was held not liable, under his covenant to surrender the premises at the expiration of the term in good condition, for serious damages inflicted upon the leased property by the municipal authorities, when he diligently invoked the aid of the court in the attempt to prevent the wrong. *Beekman v. Van Dolsen*, 63 Hun, 487, 18 N. Y. Supp. 376.

g. Injuries caused by imperfect construction.

Lessees were held not liable for the cost of rebuilding a dwelling house upon the demised premises under their covenant to yield up the premises unto the lessors in such good and substantial state and condition as the lessors were bound to deliver up the same premises to their superior landlord upon the expiration of their lease thereof, when it appeared that the dwelling house rebuilt, which was at least one hundred years old, had been originally placed upon a platform of timber on muddy soil, and that the rotting of the timber caused the walls to bulge, so that after the termination of the lease the building had to be pulled down on account of its dangerous condition. The theory of this holding was that, the original construction of the house being faulty, whatever happens by natural causes to such a house in the course of time is "results from time and nature, which fall upon the landlord," and the failure of a tenant to do anything in regard to them is not a breach of a covenant to repair or leave in repair. *Lister v. Lane* [1893] 2 Q. B. 212, 62 L. J. Q. B. N. S. 583, 4 Reports, 474, 69 L. T. N. S. 176, 41 Week. Rep. 626, 57 J. P. 725.

And lessees who covenanted to deliver up mill property at the expiration of their tenancy in as good order and repair as they found it, natural wear and tear and fire excepted, were held not liable to repair the mill when, during the term, it fell down in consequence of a defect in its construction unknown to them, and while they were using it with reasonable and proper care. *Hess v. Newcomer*, 7 Md. 325.

But in *Lockrow v. Horgan*, 58 N. Y. 635, an action to recover for repairs and for improvements removed by the tenant, where a lease contained a covenant on the part of the lessee to make such improvements as he might require, also to make all necessary repairs, and to keep the same in tenable order at his own cost, and to leave all the improvements upon the premises at the expiration of the lease, the defense was that the premises became untenable because of the settling of the rear wall of the building owing to the original defective construction of the foundation, and the tenant had; therefore, abandoned them; but the court held that, under the covenants referred to, the tenant was bound to make repairs irrespective of the cause of the defect, and that the settling

of the wall could not be considered within the exceptions mentioned in the covenant to surrender up in good condition, *viz.*, reasonable use and wear and damages by the elements.

h. Buildings erected during term.

From the few cases on the question, it seems that a covenant to leave in repair applies, not only to buildings in existence at the time the lease was executed, but also to all buildings subsequently erected upon the premises during the tenancy.

Thus, a covenant to leave in repair, it was held, in *Brown v. Blunden, Skinner*, 121, extended to a malt house erected by the lessee after the commencement of the term, on the ground that the covenant was a continuing one. And in *Lant v. Norris*, 1 Burr. 287, a covenant to leave in repair was held to apply, not only to buildings upon the premises at the time the lease was given to lessee, but to all those that might be erected during the term, when the lessee had covenanted to spend a certain sum of money within the stated time in erecting and rebuilding buildings upon the premises.

So with reference to a covenant to erect buildings and leave them in repair. *Pasteur v. Jones*, 1 N. C. (Conference) 194.

A tenant who, with the permission of the landlord, erected buildings upon waste land adjoining the leased premises, and continued in possession of them until the end of the term, was held liable to yield up those buildings in repair to the same extent that he would be liable to do so under his covenant in regard to the leased premises; and an allowance against his estate for dilapidations of the buildings erected was held proper. *White v. Wakley*, 26 Beav. 17, 28 L. J. Ch. N. S. 77, 4 Jur. N. S. 988, 6 Week. Rep. 791.

A tenant, who had covenanted to erect three houses and keep them in repair, and also to deliver up in sufficient repair all houses thereafter to be erected upon the premises, was held bound to leave in repair five houses, when he erected that number instead of three. *Douse v. Earle*, 3 Lev. 264, 2 Vent. 126.

But in *Cosgrave v. Hammill*, 173 Pa. 207, 33 Atl. 1045, an allegation in an affidavit of defense in an action against the lessor for breach of a covenant was declared "simply impudent" which set forth that leased premises were to be yielded up in as good repair as when received, and that, on the contrary, the same were in a very dilapidated condition, had been allowed to become so with intent to defraud, and that to put them in good and sufficient repair would require the expenditure of a certain amount. The reason for the court's criticism of this allegation was that it appeared that the premises, when leased, were a vacant lot, and that the only building on it was to be thereafter erected by the lessee of a size, style, cost, and subsequent use entirely in his own discretion.

i. Liability of tenant holding over.

A tenant holding over under a prior lease was held bound to leave the premises in a state of repair required by the covenants of that lease. *Ponaford v. Abbott*, Cab. & El. 225.

It was held in *Haeussler v. Holman Paper-Box Co.* 49 Mo. App. 631, that the grantee of a reversion could recover against a tenant who was holding over after the expiration of the

lease, and, therefore, was a tenant from month to month, for all breaches of the covenants of the original lease which could be held applicable to a month-to-month tenancy; and, therefore, that he could recover for a breach of covenant to leave the premises in the condition in which they were received, natural wear and decay and effects of fire excepted.

j. Liability of assignee of lessee.

A covenant to surrender up in good condition seems in the few cases reported to be regarded as one running with the land, and therefore the courts hold the assignee of the lease to the duties of the assignor in this respect.

Incidentally, in *Cook v. Champlain Transp. Co.*, 1 Denio, 91, the assignee of the lessee was held liable to the lessor for the destruction of a building, under a covenant that the buildings should revert to the lessor without damage, etc.

A covenant to occupy and leave premises in tenantable repair at the expiration of the term was held, in *Shelby v. Hearne*, 6 Yerg. 512, to run with the land; and the court stated that an assignee of the reversion may sue the lessee if the premises be out of repair at the end of the term.

The action in *Harris v. Goslin*, 3 Harr. (Del.) 338, was brought against the assignee of the lessee at the end of the term, under a covenant to keep up all repairs of a mill.

k. Removal of rubbish.

The question discussed in *BOARDMAN v. HOWARD* has, so far as discovered, come up very infrequently; but, with one exception, the effect of the decisions reported is in harmony with the result reached in the above case. The decisions in several instances, however, it will be observed, have been based upon breaches of more explicit covenants than a general one to leave the premises in good condition; and, therefore, in a sense each decision based upon the breach of such a covenant stands upon its own merits, and is not entirely in point with *BOARDMAN v. HOWARD*, or any other case based upon a covenant not entirely similar. Thus, in *Fleischman v. Toplitz*, 25 Abb. N. C. 304, 10 N. Y. Supp. 471, Affirmed in 134 N. Y. 349, 31 N. E. 1089, the lessee had covenanted to surrender the premises at the expiration of the term in good order and repair, ordinary wear and tear and injury by the elements excepted, and also, at his own expense, to comply with all the rules and orders of the board of health. It was held that he was bound to remove the carcasses of a number of horses which were upon the premises at a time when it was destroyed by fire, their removal having been ordered by the board of health; but it was held that the landlord was bound to remove the debris of the burned building in order to enable the lessee to remove the carcasses.

An agreement that the tenant was not to permit or allow bats to be thrown into a river near bulkheads, so as to destroy or interfere with free navigation or use of the water, or to make it in any degree more shallow, was held, in *Scott v. Haverstraw Clay & Brick Co.* 135 N. Y. 141, 31 N. E. 1102, to require the tenant at the end of the term to remove any bats thrown, or which had fallen, into the water in violation of this covenant, or to pay to the landlord the reasonable expense of removing them.

It was held in *Haeussler v. Holman Paper* 64 L. R. A.

Box Co. 40 Mo. App. 631, that the grantee of a reversion could recover for a breach of covenant to leave the premises in the condition in which they were received, excepting natural wear and decay or the effects of fire. The breaches complained of included a failure to remove rubbish and ashes.

Under a covenant providing that "peaceable possession of the said premises shall be given to said party of the first part in as good condition as they now are, all rubbish and spawls to be removed, the usual wear and inevitable accidents excepted," it was contended that the lessee was bound to remove all spawls and rubbish which might be on the premises at the expiration of his term, including any that might have been there when the lease was made; but this contention was not sustained on the ground that the words "all spawls and rubbish to be removed" were but a part of the general clause intended to amplify the expression that the lessee return the premises "in as good condition as they now are," and that to require the lessee to remove all spawls and rubbish placed there by his predecessors would be to require him to leave the premises in very much better condition than when he secured them. *Copinger v. Armstrong*, 8 Ill. App. 210.

But in *Thorndike v. Burrage*, 111 Mass. 531, where there was a covenant to "peaceably yield up, in good, tenantable repair, reasonable wearing and use thereof excepted," the court briefly held, without giving its reason, that leaving ashes and rubbish on the premises at the expiration of the tenancy was no breach of the agreement.

l. Fixtures.

The question of the right to remove fixtures is not discussed in this note, except when the right is contested on the ground that its exercise will violate a covenant to leave the premises in some specified condition or degree of repair, or when an action is prosecuted for injuries occasioned to the premises on account of the manner in which fixtures were removed. Cases discussing merely whether a covenant to leave specified portions of the premises in good repair applies to objects in question are not included.

In holding that a tenant at will could remove a padlock and some loose boards, the court, in *Whiting v. Brastow*, 4 Pick. 311, said that, according to later decisions in England and this country, a tenant, at the expiration of his estate, might remove such improvements as were placed there by him, the removal of which would not injure the premises or place them in a worse plight than they were in when he took possession.

So, the right to remove a frame addition was denied in *Friedlander v. Ryder*, 30 Neb. 783, 9 L. R. A. 700, 47 N. W. 83, not on the ground that it was attached to the freehold, but because it was so annexed to the main building that its removal would greatly injure the demised premises. The court stated that the modern decisions are to the effect that a tenant can only remove such improvements, erected by him, the removal of which will not materially injure the premises, or put them in a worse condition than they were in when he took possession.

And a tenant was allowed to remove a tile floor and electric-light apparatus, in *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465, when

by so doing the premises were left in as good condition as they originally were in.

A lessee who had covenanted to surrender the leased premises and all appurtenances in as good state as reasonable use would permit was allowed to remove trade fixtures placed on the premises by himself, consisting of buildings and machinery, but was assessed a certain amount for a failure to keep and leave the premises in the condition specified. *Brown v. Reno Electric Light & P. Co.* 55 Fed. 229.

It is declared in *Pellenz v. Bullerdeck*, 13 La. Ann. 274, that, under the Louisiana law, a tenant has a right to remove improvements and additions, provided he leaves the property in the state in which he found it; but, where the additions are made with lime or cement, or the like, the lessor should be notified by the lessee of the intention to remove, for he has the right to retain them by paying a fair price.

Tenants, under a covenant to yield up in repair, were held, in *Foley v. Addenbrooke*, 13 Mees. & W. 174, 14 L. J. Exch. N. S. 169, to have the right to remove the machines and articles specified in their lease, doing as little damage as possible, and leaving the premises in a state fit to be used for a similar purpose by another tenant.

Damages done to premises in removing machinery which the tenant had the right to remove under his lease were held not recoverable in *Hunt v. Potter*, 47 Mich. 197, 10 N. W. 198, when it did not appear that he did not exercise due care and caution.

But a tenant who had covenanted to yield up the premises in good and sufficient repair was denied the privilege of removing any part of a veranda which he had erected, the lower part of which was attached to posts which were fixed in the ground. *Penry v. Brown*, 2 Starkie, 403.

And in *Murray v. Moross*, 27 Mich. 203, an action for breach of a covenant to deliver premises up at the end of the term in like condition as when taken, it was held that the tenant would have no right to remove a box stall which he had put up in the barn on account of injuries occasioned thereto by his horses, if its removal would injure the freehold and prevent its return in like condition as when taken.

Where a lease provided for the surrender of the premises at the expiration of the term "in as good state and condition as reasonable use and wear thereof will permit, damage by the elements alone excepted," and did not reserve or grant the right to remove buildings, it was held, in *West Coast Lumber Co. v. Apfeld*, 86 Cal. 335, 24 Pac. 993, that the tenant had no right, at the expiration of the lease, to remove a building permanently erected upon the leased premises.

A lessee who had covenanted to deliver up a mill in as good condition as when received, natural wear excepted, was held under no obligation to leave a boiler in the mill at the end of his tenancy, which he had put there to take the place of one which had become entirely worthless by age. *Mason v. Fenn*, 13 Ill. 525.

A tenant entitled by his lease to remove trade fixtures was held to have waived that right by taking a subsequent lease which contained no reservation of the right, and covenanted to keep the premises in good repair and deliver them up in as good condition as when received. *Sanitary District v. Cook*, 169 Ill. 184, 39 L. R. A. 369, 61 Am. St. Rep. 161, 48 N. E. 461, 44 L. R. A.

And a lease giving the lessee the right to remove buildings was held abrogated in that respect by a later one which did not reserve the right, but provided for the surrender of the premises at the expiration of the term, "reasonable use and wear thereof, and damages by the elements, excepted." *Jungerman v. Bovee*, 19 Cal. 354.

So, in *Watras v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694, it was held that a lessee who, under a former lease, had the right to remove trade fixtures, lost that right under a subsequent lease making no reference to the old one, and reserving no right in the fixtures, but covenanting to deliver up the premises at the end of the term in as good condition "as the same now are."

m. Other cases.

In a few decisions, the covenants agreed upon, or the circumstances involved, present situations which do not allow the cases to come within any of the classes or subdivisions made.

The court declared, in *McBride v. Daniels*, 92 Pa. 332, that where a tenant agreed to take all proper care of a farm the same as a careful and prudent farmer should of his own property, and return the same at the end of the lease in as good condition as when received, except natural wear and unavoidable accidents, if he permitted Canada thistles to grow and go to seed on the farm, or pastured the meadows with sheep to such an extent as to destroy them, or did not leave as many acres in grass as he had agreed, each of these causes presented a proper subject for damages.

A lessee of a wharf, who had covenanted to keep and return it in serviceable condition, was held not liable, in *Meyers v. Myrrell*, 57 Ga. 516, for the expense incurred by the lessor in repairing the wharf in compliance with the demand of the city authorities that it be done for the purpose of preventing "injury to the river," when it did not appear that the wharf had not been kept and returned in serviceable condition, or that the repairs were called for by the municipal authorities "for the safety or convenience of vessels lying at the wharf," for which purposes lessee had also covenanted to repair.

An outgoing tenant was held liable for waste in *Watherell v. Howells*, 1 Campb. 227, on the ground of having plowed up strawberry beds which were in full bearing at the time, notwithstanding his claim that he had paid a sum of money for the beds in question to the person who assigned the lease to him; but the court held that the lessor's reversionary estate had been injured by the plowing up of the beds before they were exhausted, which it could scarcely be doubted had been done maliciously.

The court asks the question in *Spafford v. Meagley*, 1 Ohio Dec. Reprint, 364, whether a covenant to keep fences in repair during the occupancy requires the tenant to leave them in repair at the expiration of his lease. And in answering this question in the affirmative it is said: "Although it may be supposed to have been the leading object of the parties to secure the preservation of the crops, yet it may be presumed the lessor intended the premises should be kept in a suitable condition for immediate and future use at the close of the term. Although the contract does not, in words, require that he should restore the premises in as good condition as he received them, yet he

is bound to keep them in this condition while he occupied them. If he had done this he would have left them in the condition he found them. A covenant to keep in repair is the same as to deliver up in repair."

n. When right of action accrues.

The old common-law rule is stated in general in Sheppard's Touchstone, 173, as follows: "If one covenant to leave a wood in the same plight he finds it, and he cut down trees, in this case the covenant is broken presently, for it is now become impossible to be performed by his own act; but if in this case some of the trees be blowed down with the wind, or the like, by this the covenant is not broken, for it is now become impossible to be done, by the act of God, and in this case the covenantor is not bound to supply it. And so, likewise, of a covenant to repair houses, or if one covenant to sustain houses or sea banks, or covenant to leave them in as good case as one doth find them, and the houses be burnt, or thrown down by tempest or the like, or the banks be overthrowa by a sudden flood, or the like accident,—in this case the covenant is not broken by this accident only; but, if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken. And if houses be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant, for I may re-edify them, and therefore no action will lie upon this covenant until the end of the term."

The weight of authority undoubtedly is in favor of the doctrine that no action lies for a breach of a covenant to leave in good condition, until the expiration of the tenancy.

Thus, in holding that no action can be brought for the breach of covenant to surrender the premises in good condition until the expiration of the tenancy, the court says in *Agate v. Lowenbein*, 4 Daly, 262, that until that time the tenant has a *locus penitentiae* to put the premises into the required condition.

And according to *Hoskinson v. Bradford*, 1 Pittsb. 165, the right of action does not arise until the end of the term for breach of a covenant to leave the land in good order, because such a covenant is not broken until the land is left out of order.

It is said, *obiter*, in *Kling v. Dress*, 5 Robt. 521, that no action lies until after the end of the term, on a covenant to leave premises in good condition, even if the lessee pulls down the buildings.

A lessee who had covenanted to keep the leased premises in good order and repair during the continuance of the lease, and at the expiration thereof to surrender the property in a like good order and repair, was declared, in *Payne v. James*, 42 La. Ann. 230, 7 So. 457, to have the privilege of delaying the making of the necessary repairs until any time before the expiration of the lease; and, therefore, the court stated that the time for action on the part of the lessor did not arrive until the expiration of the lease.

The rule is recognized in *Haas v. Brown*, 21 Misc. 434, 47 N. Y. Supp. 606, that an action to recover under a covenant to surrender up the premises in good condition at the expiration of the term may not be maintained until the termination of the lease.

A judgment rendered against the assignees of 64 L. R. A.

a lease for damages done to the premises by the original lessees was held erroneous in *Montague v. Jamison*, 16 Ky. 1. Rep. 238, on the ground that, since the lease required the lessees to leave the premises in a stated condition, the assignees, at the end of the term, might have left the property in the condition required by the lease; and, if they did not do so, the lessor's remedy was then for a breach of the contract.

It was held that an action to recover under a covenant to deliver up premises in good order, for an amount expended by the landlord in repairs, could not be had before the end of the term, because no obligation arose under such a clause until that time. *Rosenbloom v. Finch*, 37 Misc. 818, 76 N. Y. Supp. 902.

And, similarly, in *Wright v. Tileston*, 60 Minn. 34, 61 N. W. 823, when it appeared that, at the time lessor made repairs to property rendered necessary by the violence of the elements the lessee's term had not expired, it was held that the lessor could not, after the expiration of the lease, attempt to recover the amount expended in an action for breach of covenant to yield up in good condition; but the action must be regarded as one in tort, for negligence in the care of the premises.

However, some cases recognize the doctrine laid down in Sheppard's Touchstone, above referred to, that, if the damage done by the lessee is something that cannot be repaired, lessor need not delay until the expiration of the tenancy in order to sue for breach of a covenant to leave in good condition.

Thus, although an action against a lessee before the end of the term upon a covenant to deliver the premises at the termination of the lease in as good condition as when received was held prematurely brought in *Gulf, C. & S. F. R. Co. v. Bettagast*, 79 Tex. 256, 15 S. W. 228, the right to recover during the running of the lease for cutting trees and carrying away the timber was not denied.

And an action brought prior to the expiration of the lease to recover a sum of money as damages for broken panes of glass, against the guarantor of the lessee, who had covenanted to surrender the premises leased in good condition, was held premature in *Fratt v. Hunt*, 108 Cal. 288, 41 Pac. 12, on the ground that no cause of action for a breach of that covenant could arise until the time came for a return of the property; but, as to the question of property destroyed and lost, the court conceded that a cause of action in damages would arise at the date of its destruction, regardless of the time of the expiration of the lease; for, even though the lessee's stated time for a performance had not yet arrived, if he voluntarily placed it out of his power to perform, he committed a breach of the contract, and was liable at once.

A distinction is made in *Schieffelin v. Carpenter*, 15 Wend. 400, between a covenant to keep the premises in good condition and repair and at the expiration of the term to yield them up in good repair, and a covenant only to leave in good condition. The court declares the law to be well settled that, under a covenant to keep the premises in good condition and repair, and at the expiration of the term to yield them up in like good repair, the landlord need not wait until the expiration of the term before bringing an action for the breach, under an idea that the tenant may, before he leaves

the premises, put them in good condition. If the covenant is only to leave the premises in as good condition as the tenant found them, however, the court admits that an action will not lie until the end of the term.

To the same effect, it is said in *Snowhill v. Reed*, 49 N. J. L. 292, 60 Am. Rep. 615, 10 Atl. 737, that "where the covenant is simply to yield up the possession of the premises at the expiration of the term, there can be no breach until the term is ended, for the tenant has the whole term within which to repair. Although the lessee is liable to an action before the expiration of his term on a covenant to keep the premises in good repair, on a covenant to leave them in as good state as he found them no action will lie until the end of the term."

Whether, on a covenant to leave in good condition at the end of the term, an action may be brought prior thereto, but at the actual termination of the tenant's tenancy, when the latter vacates before the expiration of the period named in the lease, is discussed in the following cases:

In *Snowhill v. Reed*, 49 N. J. L. 292, 60 Am. Rep. 615, 10 Atl. 737, a lessee who leased premises for the term of one year entered into an agreement with the lessor by which it was agreed that, in consideration of the tenant's relinquishing possession before the end of the term, the landlord would release the tenant from the payment of a specified portion of the rent. After the surrender of the premises in pursuance of this arrangement the lessor commenced an action for breach of a covenant in the lease, that upon its expiration the tenant would deliver up the premises in as good repair as they were at the commencement of the lease, reasonable wear and tear and damages by fire, war, and trespass only excepted. It was proved that the tenant, while in possession, had removed and destroyed counters and shelving fixtures, and painted a sign in large letters on the building, and had permitted the walls of the room to be stained by heaping tobacco against them. The question was whether the covenant referred to could be broken before the end of the term so that an action would lie; but the court held that the time for its performance was the time of the expiration of the lease, whether by surrender or by the efflux of time. One judge dissents on the ground that the tenant had the full term specified in the lease in which to put the premises in the condition specified by the covenant, and, therefore, that the covenant was not broken when the surrender was made and accepted; and that the effect of a surrender by mutual consent is to terminate the relation of landlord and tenant, and with it all covenants in the lease which had not then matured.

Upon appeal to the court of errors and appeals, reported as *Reed v. Snowhill*, 51 N. J. L. 162, 16 Atl. 679, eight stood for reversal and one for affirmance. The ground of this decision was that the words, "on the expiration of said lease," in the covenant, contemplated the end of the full term; that the tenant had until that time to put the premises in the condition specified, and that, if the parties made any subsequent agreement, and their intention in this regard was changed, it should not be left as a doubtful inference, but should appear in clear terms; and, since it did not so appear in the agreement of surrender, the compliance with the terms of that agreement operated to cut off any further rights under the covenant in ques-

tion which had not yet matured and become actionable.

An action brought after the vacation of the premises, but before the end of the term, for deteriorations committed by the lessee during his occupancy, was held premature in *Amiot v. Bonin*, Rap. Jud. Quebec, 23 C. S. 42, on the ground that no cause of action could arise in that respect until the termination of the lease agreed upon between the parties.

But the court, in *Marshall v. Rugg*, 6 Wyo. 270, 33 L. R. A. 683, 44 Pac. 700, 45 Pac. 480, refuses to follow *Reed v. Snowhill*, 51 N. J. L. 162, 16 Atl. 679, and holds that, when a lease is terminated before the end of the term by agreement of the parties, the lessor does not lose his right to recover for a failure of the tenant to comply with a covenant to turn over the property at the expiration of the lease in as good order and condition as when he entered upon it.

So, a lessee covenanted to leave 4 acres of the land fallowed and plowed. The lease was for ten years, but he was given the privilege, upon a year's warning to surrender before that period, which he afterwards did without leaving the ground in the condition agreed. It was held that the landlord, by accepting the surrender, did not waive the tenant's obligation to comply with the covenant; although, had the covenant been to leave the ground plowed and fallowed at the end of ten years, it would have been otherwise. *Austin v. Moyle*, Noy, 118.

The lessor's right to an injunction when tenants, in violation of a covenant to surrender up the premises in good condition, just before the end of the term commenced pulling down and carrying away the materials of several buildings, and threatening to do so as to the whole, has been upheld in one case, *London v. Hedger*, 18 Ves. Jr. 355. The court held that the covenant in the lease would not preclude an injunction from issuing on behalf of the lessor.

Necessity of notice to repair.

A previous notice to repair was held to be unnecessary to an action for a breach of a covenant to leave in repair, in *Wood v. Day*, 7 Taunt. 646, 1 J. B. Moore, 389.

And in *Harriet v. Butcher*, Cro. Jac. 644, a previous notice to leave in repair was held unnecessary, for, as the court says, a tenant ought to leave it sufficiently repaired without notice at his peril; and, where a lease provides for a three months' notice to make repairs before any liability to make them falls upon the tenant, such a notice was held to refer only to repairs necessary to be made during the term.

o. Measure of damages.

1. In general.

While several rules have been advocated for the measure of the damages in actions for breach of covenants to leave premises in any specified condition, the one upon which the great majority of the decisions has settled as the proper one is that the lessee is liable to the extent of the amount required to do what he covenanted to do, but did not do.

Thus, the proper measure of damages in actions for failure to leave premises in repair was held, in *Woodhouse v. Walker*, L. R. 5 Q. B. Div. 408, 49 L. J. Q. B. N. S. 612, 42 L. T. N. S. 770, 28 Week. Rep. 765, 44 J. P. 666, to be the sum which was reasonably necessary to

put them in the state of repair in which the tenant for life ought to have left them.

Lopes, L. J., in *Ebbetts v. Conquest* [1895] 2 Ch. 377, 73 L. T. N. S. 69, 44 Week. Rep. 56, gives, *arguendo*, the following rule: "Where the term has come to an end, and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant."

In an action against a tenant's estate for dilapidation, where the tenant had covenanted to keep the premises well and substantially repaired, and to so leave them at the end of the term, the court said that the tenant was bound to give up possession of the premises in as good a state of repair as when he took possession; and, therefore, if they were in a state of tenantable repair, he was bound to deliver them up in such repair at the end of the term, and, for failure to do so, that the landlord was entitled to charge the tenant's estate with such a sum as was necessary to put the premises into a proper tenantable state of repair. *Brown v. Trumper*, 26 Beav. 11.

In *Davies v. Underwood*, 2 Hurlst. & N. 570, 27 L. J. Exch. N. S. 113, 3 Jur. N. S. 1223, 6 Week. Rep. 105, Watson, B., says that the great object of a covenant to leave premises in repair is not to put money into the pockets of a lessor, but to enforce the performance of the acts stipulated for; and, therefore, that the damages recovered are usually such as are sufficient to put the premises into repair. A lessee was held entitled, upon the forfeiture of his lease, to recover damages against a sub-lessee for a failure to leave the premises in proper repair as the latter had covenanted to do, and to recover substantial damages to the amount necessary to make good the defect in the premises.

The rule as to the measure of damages upon a breach of covenant to leave premises in repair at the end of the term was held, in *Joyner v. Weeks* [1891] 2 Q. B. 31, 60 L. J. Q. B. N. S. 510, 65 L. T. N. S. 16, 39 Week. Rep. 583, 55 J. P. 725, to be that the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into a state of repair in which they ought to have been left.

Where a lessee covenanted that, upon the termination of the lease, he would deliver up certain parts of the property in as good repair as the same were in at the commencement of the lease, or pay a sum sufficient to put said parts in repair, it was held that the measure of damages was a sum sufficient to make the repairs stipulated for, and that, if this could only be done by the use of new materials, no deduction would be allowed the tenant on that account, as, if he had complied with the covenant, he could have supplied the new materials at his own cost, and, having failed to do so, the landlord must be allowed the cost of doing what he should have done. *Burke v. Pierce*, 27 C. C. A. 462, 55 U. S. App. 59, 83 Fed. 95.

In *Watriss v. First Nat. Bank*, 130 Mass. 343, an action brought after the termination of the lease for breach of contract to yield up in good condition, in that the lessee removed fixtures that were part of the freehold, the measure of damages was held to be the sum which would put the premises in the condition in which the tenant was bound to leave them, allowing for reasonable wear and tear. 64 L. R. A.

The true measure of damages was held, in *Morgan v. Hardy*, L. R. 17 Q. B. Div. 770, to be the one laid down in the 4th edition of *Mayne on Damages*, 253, that, where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them. And it was held that the tenant's liability could not be limited by the fact that, owing to the buildings being older than they were at the beginning of the lease, or relatively inferior as compared with improvements in the neighborhood, or, looking at their probable future occupation by tenants, of an inferior grade, they might obtain as good a rent or be sold as high, omitting some repairs in the way of restoration, and doing some at a cheaper rate than would be required by adhering strictly to the covenant.

In *Scott v. Haverstraw Clay & Brick Co.* 62 Hun. 620, 16 N. Y. Supp. 670, the measure of damages for the tenant's failure to comply with his covenant was held to be the reasonable cost and expense of replacing everything which ought to have been left according to his agreement.

The measure of damages for the failure upon the part of the lessee to replace partitions, and restore a building to the same good condition that it was in at the beginning of the lease, as he had covenanted to do, was held, in *Willoughby v. Atkinson Furnishing Co.* 93 Me. 185, 44 Atl. 612, to be the amount of money necessary to do what the lessee had covenanted to do, but did not do.

Where a tenant covenanted to yield up the possession of the premises at the end of the term in as good and sufficient repair as when received, but allows the property to become dilapidated, and the landlord, with the tenant's consent, enters upon the premises before the end of the term and makes extensive repairs, the tenant is liable under his covenant, in an action brought after the lease is terminated, only for repairs necessary to put the property in the condition in which he covenanted to leave it; and, therefore, the measure of damages is the cost of the repairs made by the landlord, which the tenant failed to make in compliance with his covenant to return the property in as good condition as he found it in. *Darlington v. De Wald*, 194 Pa. 305, 45 Atl. 57.

In regard to the extent of the tenant's liability for the cost of repairs made by the landlord after the termination of the lease, which he himself should have made under a covenant to leave in good, tenantable repair, Lord Esher says, in *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42, 59 L. J. Q. B. N. S. 389, 63 L. T. N. S. 171, 38 Week. Rep. 730, 55 J. P. 20: "If he leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he has himself in fact done."

It is pointed out in *Davenport v. United States*, 26 Ct. Cl. 338, that there is no fixed rule of law or of fact between repairs which are nec-

essary because of ordinary wear and tear and those needed because of the improper use made of the premises by the lessees; that the determination of the amount necessary for repairs is a matter of judgment and discretion after an examination of the nature and character of the different items of repairs; and that, while the lessor is entitled to receive his property in good condition, wear and tear excepted, he is not entitled to charge the lessee with all the decay and damage that may have happened during the continuance of the lease.

A different rule than the one shown in the above cases is advocated in *Daggett v. Webb*, 30 Tex. Civ. App. 415, 70 S. W. 457, where the court held the rule of damages in cases where the tenant covenants to keep the premises in as good condition as they were in when he received them, ordinary wear and tear excepted, and to so deliver them to the owner or reversioner at the end of the lease, to be the difference in value of the premises with the improvements in the condition as received by the lessee, ordinary wear and tear excepted, and the value of the premises at the expiration of the lease without them.

And, similarly, it was held in *Fagan v. Whitcomb* (Tex. App.) 14 S. W. 1018, that the proper measure of damages in an action by a landlord against a tenant for injury to premises during a lease, where the landlord had not made any repairs, was not what it would be worth to put the property *in statu quo*, but the injury to the market value of the reversion.

Where it appeared that during the running of a lease the tenant paid a certain sum into court in satisfaction of an action against him for breach of a covenant to repair, but made no repairs at that time or thereafter, it was held, in *Henderson v. Thorn* [1893] 2 Q. B. 164, 62 L. J. Q. B. N. S. 586, 69 L. T. N. S. 430, 41 Week. Rep. 509, 5 Reports, 404, 57 J. P. 679, an action brought at the end of the term for breach of a covenant to leave in repair, that the landlord could not recover the full sum claimed as damages for the failure to leave the premises in repair, but that he must subtract therefrom the amount previously paid to him, as well as an allowance for such depreciation as would have occurred had the covenant to repair been performed on the first occasion between that date and the end of the term. The theory of this holding was that the amount paid in satisfaction of the former action must be considered as damages for injury to the reversion, and not as the sum then required to put the premises in repair.

In a few instances the lessor has been allowed, in addition to the amount necessary to put the premises into the agreed condition of repair, an additional sum as recompense for the time the premises necessarily stood idle after the termination of the tenancy while repairs were being made.

Thus, in *Birch v. Clifford*, 8 Times L. R. 103, Q. B. Div., which was an action after the expiration of the tenancy for damages for breach of covenant to deliver up the premises in good repair, and the damages claimed were the amount necessary to put them in repair, and also an additional sum for the time during which the premises would be useless owing to the repairs not having been done, the court held that the lessor was entitled to the compensation which he claimed, but stated, in 64 L. R. A.

gard to the amount claimed for the period during which the premises would be useless, that it probably would not be assessed at the full amount of the rent for the time taken in doing the repairs; and a sum which the parties had agreed upon between themselves was allowed.

Damages suffered by the landlord on account of his inability to rent premises in consequence of the state of dilapidation in which they were left, in addition to an amount expended in repairs, was allowed in *Woods v. Pope*, 1 Scott, 538, 1 Bing. N. C. 467, 6 Car. & P. 782.

And in a case reported by the *Monthly Law Digest & Reporter* from *Département du Nord, Valenciennes* (1893), judgment was rendered for a loss of rent since the tenant had left the premises, as well as the amount necessary for repairs.

2. Effect of demolition of premises by lessor.

In a few instances it has been urged that if, after the termination of the tenancy and upon the premises again coming into the lessor's hands, he caused them to be demolished for purposes of his own, that fact ought to operate to reduce the liability of the lessee for a failure to leave the premises in any condition or degree of repair agreed to by covenant; but without an exception, so far as discovered, the courts have held the lessee's liability unaffected by circumstances of that nature.

In *Joyner v. Weeks* [1891] 2 Q. B. 31, 67 L. J. Q. B. N. S. 510, 65 L. T. N. S. 16, 39 Week. Rep. 583, 55 J. P. 725, it was held that the rule that a lessee who had covenanted to leave premises in repair at the end of the term must pay the reasonable and proper amount necessary for putting the premises into the state of repair in which they ought to have been left, was not affected in the present instance by the fact that the landlord had redemised the premises on terms that were not affected by the want of repair; and that he had agreed that part of the premises might be pulled down. Lord Esher, M. R., came to the conclusion that, if anything could prevent the application of the rule above referred to, it could only be something in the condition of the premises which affects the relation between the lessor and the lessee in respect of them, and that contracts made between lessor and a third person must be disregarded.

A tenant, who had covenanted to keep and yield up premises in repair, was held liable, after the expiration of his tenancy, for an amount estimated to be necessary to put them into repair, notwithstanding that before the expiration of the lease the landlord had entered into a verbal agreement to grant third parties a lease of the premises, and, in conformity with that agreement, the buildings were pulled down shortly after the tenant's lease came to an end. *Rawlings v. Morgan*, 18 C. B. N. S. 776, 34 L. J. C. P. N. S. 185, 11 Jur. N. S. 564, 12 L. T. N. S. 348, 13 Week. Rep. 746.

The fact that the landlord, upon resuming possession of leased premises, proceeded at once to pull down and reconstruct part of the buildings, was held in *Inderwick v. Leech*, Cab. & El. 412, 1 Times L. R. 95, to make no difference in his right to bring an action against the tenant for breach of covenant to deliver up demised premises in repair. M. M. M.

MICHIGAN SUPREME COURT.

Emma COURTEMANCHE

v.

SUPREME COURT OF INDEPENDENT
ORDER OF FORESTERS, *Plff. in Err.*,

(.....Mich.....)

1. **Accidental death of an assured, resulting from taking poison to frighten his wife into giving him money, is not within the provision of the policy that it does not include assurance against self-destruction or suicide.**
2. **Negligence of an assured, resulting in his death, is not within the provision of a life insurance policy that it does not include assurance against self-destruction or suicide.**

(March 8, 1904.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dickinson, Stevenson, Cullen, Warren, & Butzel, for plaintiff in error:

The proviso includes every case in which assured kills himself by a voluntary act, the ordinary and direct tendency of which is to produce death, and the physical consequences of which he has sufficient mental capacity to foresee.

Pierce v. Travelers' L. Ins. Co. 34 Wis. 389.

The decedent cannot escape the responsibility in law of the inevitable probabilities and certainties resulting from a conscious act. He cannot be heard to deny his assumption of such consequences.

Lawrence v. Mutual L. Ins. Co. 5 Ill. App. 280; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 157, 42 L. ed. 699, 18 Sup. Ct. Rep. 300.

Mr. W. F. Denfeld, for defendant in error:

Unless there are stipulations to the contrary in the policy, in accident insurance, as in life and fire insurance, injury by negligence is covered by the contract.

NOTE.—For a case in this series holding that a stipulation against liability for death from suicide, sane or insane, will not defeat recovery on a policy of insurance, although insured died from an overdose of morphine voluntarily taken, where it is not shown that self-destruction was intentional, see *Brown v. Sun L. Ins. Co.* 51 L. R. A. 252.

As to presumption against suicide of insured person, see *Mutual L. Ins. Co. v. Wiswell*, 35 L. R. A. 258, and note on page 262; *Johns v. Northwestern Mut. Relief Asso.* 41 L. R. A. 587; *Standard Life & Acci. Ins. Co. v. Thornton*, 49 L. R. A. 110; and *Cox v. Royal Tribe of Joseph*, 60 L. R. A. 620.

64 L. R. A.

2 May, Ins. 3d ed. ¶ 530; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149, 36 N. E. 891; *Cornish v. Accident Ins. Co.* L. R. 23 Q. B. Div. 453, 58 L. J. Q. B. N. S. 591, 38 Week. Rep. 139, 54 J. P. 262; *Lovelace v. Travelers' Protective Asso.* 30 L. R. A. 209, and note, 126 Mo. 104, 47 Am. St. Rep. 638, 28 S. W. 877.

A death cannot be a suicide and also an accident, and, unless the terms of the policy warranted it, a charge of negligence would be error.

2 May, Ins. 3d ed. ¶ 530, pp. 1221, 1222. In fire insurance mere negligence, even of the insured himself, does not defeat the policy.

Wertheimer-Swarts Shoe Co. v. United States Casualty Co. 172 Mo. 135, 61 L. R. A. 766, 95 Am. St. Rep. 500, 72 S. W. 635; 2 May, Ins. 3d ed. ¶ 408.

In construing the benefit certificate issued by defendant, and the constitution and by-laws applicable thereto, a liberal construction, favorable to the plaintiff, should be adopted.

Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 151, 69 N. W. 249; *Turner v. Fidelity & C. Co.* 112 Mich. 430, 38 L. R. A. 529, 67 Am. St. Rep. 428, 70 N. W. 898; *Healey v. Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 372, 23 Am. St. Rep. 637, 25 N. E. 52; 1 May, Ins. 3d ed. ¶ 175.

Death from accident, or from an unexpected or unintended act, is not within the exception of death caused by the hand of the insured.

Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660; *Pierce v. Travelers' L. Ins. Co.* 34 Wis. 389; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Blackstone v. Standard L. & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156.

Hooker, J., delivered the opinion of the court:

The plaintiff is the widow of one Oliver Courtemanche, and beneficiary in a certificate of membership in the defendant society, a mutual benefit association. This policy contained the following limitations upon, or exceptions to, liability, viz.: "(1) Except as provided in subsections 2 and 3 of this section, the contracts for benefits heretofore or hereafter undertaken by the supreme court do not include assurance against self-destruction or suicide, whether the member

be sane or insane. (2) Any brother who commits suicide shall *ipso facto* avoid all his benefit certificates, and *ipso facto* forfeit all benefits whatsoever to which his beneficiary or beneficiaries, heir or heirs, or legal personal representative or representatives would otherwise have been entitled, under the constitution and by-laws, to receive from the supreme court, or from any branch of the supreme court; . . . " subsection 1 being printed on the policy. In an action brought upon this certificate, the plaintiff recovered death benefits to the amount of \$1,000, that being the face of the policy. The defendant has asked us to review the cause upon error.

The most important question arises over a claim that, if the death was due to the voluntary taking of carbolic acid by deceased, not with the intent of causing death, but to frighten his wife into giving him money, she could not recover. The evidence was practically conclusive that the deceased died from taking carbolic acid, and there was proof from which the jury might have reached either of three conclusions: (1) That it was a case of suicide in the ordinary sense; (2) that the drug was taken under the belief that it was another and harmless drug; (3) that it was knowingly and intentionally taken for the purpose of frightening the wife, and not with an intention to cause death. The court instructed the jury that in the latter case the beneficiary would not be precluded from recovering upon the policy, and error is assigned upon this instruction.

Counsel for defendant cite, in support of their contention, the case of *Lawrence v. Mutual L. Ins. Co.* 5 Ill. App. 282. In that case the deceased came to his death from repeated doses of laudanum, the first prescribed by a druggist, and others taken upon deceased's own judgment, after severe vomiting, under the belief that he had vomited up a portion of that taken. The policies contained the following provision: "If the said person upon whose death the policy matures shall die in consequence of a duel, or of the violation of law, or by disease, violence, or accident brought about by intoxication, or shall impair his health by narcotics, or alcoholic stimulants, . . . the company shall be released from all liability on account of this contract. It is hereby declared and agreed that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract; but in every such case the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death, within sixty days after its occur-

rence, pay the net reserve held upon it by this company at the beginning of the year in which death occurs, calculated by the present legal standard of the state of New York, first deducting therefrom any indebtedness which shall have accrued to the company on account of this contract." The court said: "The present appeal, then, must be decided precisely as though the defendant had expressly admitted that the deceased, at the time of his death, was sane; that his death was involuntary, and that it occurred without negligence on his part, and as the wholly unexpected, and therefore accidental, result of means which he was using in good faith for the purpose of alleviating his physical suffering. The question, then, is, whether the accidental death of a sane person is within the meaning of the foregoing condition of the policies in suit, simply because some act of the deceased, performed with no design or intention of producing death, but for an entirely innocent purpose, and without negligence, happens to be the proximate cause of his death. We are clearly of the opinion that a purely accidental death can in no proper sense be termed an act of self-destruction. In all the cases where construction has been given by the courts to conditions in life policies relating to the death of the insured by his own hand, the terms 'suicide,' 'self-destruction,' and 'death by his own hand,' have been held to be practically synonymous. To say of a purely accidental death that it was a 'suicide,' or a 'death by his own hand,' would be simply an abuse of language. That which is purely accidental or fortuitous can no more be charged to the account of the person whose act happens by the occasion of the accident than to that of anyone else. It is only where death results from an express design on the part of the deceased, or from some act which, though performed with no intention of producing death, is of itself culpably negligent, that the deceased can be charged with the responsibility of self-destruction. If a person in the pursuit of a proper object, and in the exercise of due care, should accidentally fall into a body of water and be drowned, or should unwittingly expose himself to the smallpox or the yellow fever, not knowing at the time of the existence of the contagion, and die of the disease, it would in no proper sense be a case of self-destruction. If in either case, however, he should be culpably negligent in exposing himself to danger, although not intending to destroy his life, he would be, in the common judgment of men, the efficient instrument of his own death. . . . Upon principles quite analogous to the foregoing, it may be held that in case of a sane person, where there is an absence both of

intention and culpable negligence, the death of the insured must be regarded as accidental, and not within a proviso against self-destruction. With this construction, full effect may be given to all of the words of the condition in the policies under consideration. Voluntary self-destruction obviously can mean nothing more than the taking of one's life purposely and intentionally. Involuntary self-destruction would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact result, in death. The condition would thus be held to include all cases where there exists on the part of the insured any direct and immediate legal or moral responsibility for his own death. To go beyond this, and relieve the insurers from liability in all cases where the acts of the insured, without design or negligence on his part, do in fact contribute to shorten or terminate his life, would in most cases render life policies of very little value to the insured."

The foregoing indicates that the court was of the opinion that death through culpable negligence would not be covered by the terms of the policy. That this was at most a *dictum* appears from the following conclusion of the opinion: "It follows that the defense in this case rests solely upon a charge against the insured of culpable negligence. This fact seems to be recognized by the learned counsel for the defendant, and accordingly they have endeavored in their argument to demonstrate the negligence of the insured from the evidence in the case. If they desired to avail themselves of this defense, they should have allowed the question of negligence to be presented to the jury; but, having withdrawn it from the only tribunal legally competent to decide it, they are not now in a position to insist that any negligence has been proved."

The case was again tried, resulting in a verdict for the plaintiff. The court charged, in substance, that the plaintiff should recover, unless the death was the result of "either gross carelessness, or circumstances constituting him a suicide," and continued as follows: "The jury are further instructed, on the subject of negligence and gross carelessness, that, so far as the defense in this case depends thereon, that the burden of proof rests upon the defendant; and that gross carelessness consists of something more than the omission to do that which, under the circumstances of a case, an ordinarily careful man would have done to avoid injury."

The appellate court criticised the charge in this language: "It is plain that these instructions place upon the language of the 64 L. R. A.

policy an interpretation quite different from the one adopted by us on the former appeal. In our view, the exemption of the insurance company from liability depends, not upon the degree of the negligence of the insured, but upon its culpability. Indeed, we are unable to see how the ordinary division of negligence into degrees, such as slight, ordinary, and gross, can have any application here, though it may serve a very useful purpose in cases where the doctrine of contributory or comparative negligence is invoked. The true inquiry here is whether the death of the insured was the proximate result of his own negligent act, and whether such act was, under all the circumstances of the case, a culpable act. . . . The words 'voluntary' and 'involuntary' must be regarded as being used in the policy in a sense somewhat analogous to that in which they are employed in the criminal law. They do not include cases of death by accident or 'misadventure,' but they must be held to include all cases where death results immediately and proximately from the culpable negligence of the insured. Doubtless, also, if death should ensue from the performance by the insured of an unlawful or criminal act, it would be a case of involuntary self-destruction within the meaning of the policy. It follows from what we have said that the instructions limiting the effect of the condition of the policy under consideration to cases of gross negligence, and attempting to apply to this case the rules ordinarily applicable to that degree of negligence, were erroneous." [8 Ill. App. 491.]

It would seem to us, from the discussion in that case, that the defendant had nothing to complain of in the charge, for to our minds culpability implies something more than any degree of negligence; however, that does not seem to have been the view taken, and we must consider the case as holding that, while no degree of negligence without culpability will relieve a defendant, any degree of culpability will, and we do not see how there was any culpability, other than mere negligence of some degree, shown in that case. The provisions of this policy are not as broad as that involved in the Illinois case, which states that "self-destruction, though involuntary, is not a risk assumed by the company," while the policy before us excepts "assurance against self-destruction or suicide."

We approve the doctrine that losses by insurance companies through fire, accident, or death cannot be avoided, under ordinary provisions, although they are due to want of care. Any other doctrine would make insurance nearly valueless, especially accident insurance; and if there is any doctrine ap-

plicable to cases arising upon contracts of insurance, akin to that of contributory negligence in actions of tort, we are not aware of it. Upon the other hand, there is some apparent force in the claim that insurance companies and those who contract with them do not anticipate that the insured will intentionally, deliberately, and unnecessarily incur the hazard of death by poison to coerce another into the payment of money to him, or for any other reason.

This is a peculiar case. Perhaps none could arise where the act of the deceased (if defendant's claim is true) could present a more pusillanimous act. We can imagine cases in which acts of great hazard and danger would be heroic, and of which we should be reluctant to say that policies were avoided because the insured intentionally and understandingly faced almost certain death, as in the case of succoring the drowning or the burning. Between these two extremes all kinds of cases can be imagined where risks are taken for pleasure, for profit, or from humanitarian motives, and we see no way of distinguishing between them, unless it be upon moral grounds. Perhaps the word "culpability" is a proper one to use if not enlarged to include negligence, in which no moral question is involved, but we think such a question would be more appropriately raised under a provision excepting cases of death caused while engaged in an unlawful act,—a provision found in most policies, and regarding which the authorities are numerous.

We are cited to the case of *Ritter v. Mutual L. Ins. Co.* 169 U. S. 157, 42 L. ed. 699, 18 Sup. Ct. Rep. 300, in support of the proposition that the act of the insured should preclude recovery. The question in that case was whether a recovery could be had in a case of suicide while sane, in the absence of a provision in the policy excepting such cases. It was held that recovery could not be had in such a case, upon the ground that the parties did not contemplate insurance against deliberate, intentional self-destruction. The case is compared to and classed with the wilful burning of insured property, and several similar cases are cited and discussed, viz.: *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, where the beneficiary murdered the insured; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541, where a married woman died from an unlawful operation voluntarily submitted to; *Supreme Commandery, K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332, where it was held that suicide was an exception to the contract of insurance, though not specifically made so by the policy: also the case of *Amicable Soc. v. Bol-*

land, 4 Bligh, N. R. 194, 2 Dow & C. 1, cited in support of the doctrine that, as a general proposition, "the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy." In that case the assured was executed for forgery. In disposing of the case the court said: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against,—that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money,—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes,—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that, in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void?"

Counsel persuasively apply the same test to this case, and urge that a policy which in express terms should contemplate and provide insurance against the danger resulting from the voluntary taking a chance of death, as in this case, would be void, as opposed to public policy. If the proofs showed that this was an experiment to determine whether death would follow the taking of the drug, showing that the contingency of death was not overlooked, it is possible that we might be justified in saying that such act, if followed by death, was not within the intent of the parties to the contract; but there is nothing in this case to indicate a design to take life, or that deceased thought that he was courting danger of death. We cannot suppose that anyone would approve such an act as taking poison to coerce a wife, through sympathy or fear, but we are not sure that the test applied in the *Bolland Case* can be safely treated as an infallible one. We are unable to find any case where this has been so held, or any where the rule has been applied, except where the act has been crim-

inal or accompanied by an intention to produce death. In the Alabama case cited it is said: "The doctrine asserted in *Fauntleroy's Case* [4 Bligh, N. R. 194, 2 Dow & C. 1] that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary, criminal self-destruction—suicide, as defined at common law—should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce, by construction, or implication, exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance made with the assured is that the risk is of death proceeding from other causes than the voluntary act of the assured producing, or intended to produce, it;" and that "the extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

If one points a loaded pistol at himself, with no intention to fire, his death, being caused by its unintentional discharge, would be accidental, and not suicidal, and the beneficiary under such a policy as this should be allowed to recover, for the death, though self-destruction in one sense, in another was not, the immediate cause being the unexpected and accidental discharge, and not the pointing of the pistol, which was in itself a harmless, though perhaps a risky, act. The death in such case is a fortuitous result, not even a probable one, and such deaths are covered by policies. The case in question cannot be distinguished in principle from the foregoing, except in the greater degree of danger of a fatal result, or in the nature of the motive actuating the deceased. In the former the victim would believe he would be safe as long as he did not pull the trigger; in the latter that he would not die if he limited the dose taken to an amount that would be insufficient, ordinarily, to cause death. A fatal result in either case, being unintended, and unexpected, would be accidental, regardless of the motive which should prompt the act. It should be stated that such a death might not be covered by a policy which by its

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terms excepts cases where death or accident is due to voluntary exposure to danger, as in the Illinois policies discussed.

From the foregoing it would seem to follow that negligence is not a reason for relieving the insurer, and the motive certainly would not be in some of the instances we have mentioned. We do not see that the fact that the motive alleged here was to work upon the sympathy or fears of his wife would make the death of the insured any the less accidental, or that the act was a criminal one, and we are of the opinion that the court did not err in declining to direct the jury that they should treat this claim as a sufficient defense, if proved.

Upon the trial the defendant's counsel introduced in evidence a letter written by plaintiff to defendant's lawyer, at his suggestion. Plaintiff testified: "After the death of my husband, I talked with Mr. Elliott G. Stevenson, of Detroit, once at Mr. Allen's office in this city, and once in Bay City. The talk I had with him at Saginaw led up to the writing of the letter that is introduced in evidence. I didn't see him at a meeting of the Foresters. I don't know what he came to Saginaw for. It was something about the Foresters, and I knew he was in town, and I made it my business to see him, because I wanted to see what he had to say about paying that insurance, and he told me that the executive council was to meet in a short time, a week or two afterwards, and he would see what he could do for me, and he told me to write him a letter a short time before, so he would have that to put before the council, whatever it was, to show if I could give any excuse for it; if I knew of any reason at all why he should have committed suicide, or anything of the kind." The letter is as follows:

Mr. E. G. Stevenson.

Dear Sir:

My husband, Oliver Courtemanche, was a member of Court Valley 232, of East Saginaw, and died Sep. 28/98. The Corinors jury brought in a verdict of Sueside while Under the Influence of Liquor which was Intirely False and unjust as he had not been Drinking at all that Day. Dr. F. W. Freeman who conducted the Post Mortem also sais that there was not a Drop of Liquor or Beer of any kind in his stomach and if he took Carbollic Acid as they say he did I honistly and Firmly do not think it was with the Intentions of Killing himself but rather to scare me into giving him Money he had given three different People his cheque and had no Money in the Bank and he knew he would get into trouble over it and I had told him that I would not help him eny more and Borrow Money for him

and he had borrowed all He could and so I presume he thought he would have to do something more Desperet than usual In Order to Scare me Into getting the Money for him And so tryed that way of doing it and took more than he Intended for there is no reason that I know of why he should want to Kill Himself We had not quarreled And always got along well together and there was nothing that trubbled him that I can find out outside of those cheques and surly Twelve Dollars the Amount of three cheques wasent worth killing onesself for and I know he did not Intend to do It for he always spoke and acted as if he had a horror of suicide. It is Nearly a year and two Months since he Died but the Foristers havent Paid me the Thousand Dollars the amount his Policy calls for and I should very much like to have it as he carried no other Insurance and it is all I have in the world and I have Myself to suport and It would be very nice to know I had something for a Rainey Day. Will you kindly present this to the supream council at there next Meeting and ask them to Please Pay Me and I will be sincerely grateful to You and Them.

(Signed) Mrs. Emma Courtemanche.

Counsel requested the court to charge:

"The letter written by plaintiff in this case, in which certain admissions are made by her in respect to quarrels and the issuing of checks fraudulently, and the possible desire on the part of her husband to do something more desperate than usual, was proper evidence in this case against the plaintiff, and you shall consider such admissions for what they are worth in arriving at the question as to whether the plaintiff's intestate did not, for these reasons, and with the motive therein stated, take the carbolice acid or drug in question, and for no legitimate purpose."

This was not all of the request, the remainder being as follows: "If you find that he did so take the drug, and that, contrary to his expectation, the dose was fatal, even though such thought was farthest from his mind, nevertheless death resulting from such act would be suicide, and the plaintiff cannot recover in this case save such amount as defendant has offered to pay in open court."

Having determined that the rule is not as stated in the last-quoted portion of the request, it is manifest that the court did not err in refusing a request of which it was a part. We think it unnecessary to discuss the other questions raised.

The judgment is affirmed.

The other Justices concur.
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J. Emmet SULLIVAN

v.

DETROIT, YPSILANTI, & ANN ARBOR
RAILWAY COMPANY, *Plff. in Err.*

(.....Mich.....)

1. An express agreement with the promoters of a corporation for compensation for services rendered for its benefit will not prevent reliance on an implied one to recover the value of the services from the corporation in case it accepts the benefit of the services but repudiates the agreement.
2. Employment for a year is a fulfillment of a contract to give an attorney permanent employment in consideration of services rendered in the formation of a corporation, since the contract is indefinite and terminable at the will of either party.

(Grant, J., dissents from proposition 1.)

(March 8, 1904.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover the value of services alleged to have been rendered by plaintiff to defendant. *Reversed.*

Statement by Grant, J.:

Some time in the summer or fall of 1897, three men, Messrs. Russell, Angus, and Liggett, entered into a scheme for the organization of an electric railway to run from Detroit to Ann Arbor. There already existed a street railway in Ypsilanti, another in Ann Arbor, and a third between those two cities. The scheme was to unite those three, and extend the road to Detroit. Plaintiff was an attorney at law in the city of Detroit, and had been engaged in practice for about eleven years, the first three and one half years of which he was a clerk in the law office of Hon. Don M. Dickinson, and after that engaged in practice by himself or in partnership with others. He was known to Mr. Russell, one of the promoters. It was deemed necessary to have legal advice and the services of an attorney in preparing and drawing papers. Plaintiff claims that the three original promoters agreed to employ him. The agreement rested in parol, and, as stated by plaintiff, is as follows: "Mr. John A. Russell came to me first, and told me of the enterprise they had on hand, which was to build a road between Detroit and

NOTE.—For other cases in this series as to contracts for permanent employment, see *Carrig v. Carr*, 35 L. R. A. 512, and *note*; *St. Louis, I. M. & S. R. Co. v. Mathews*, 39 L. R. A. 467; and *Rhoades v. Chesapeake & O. R. Co.* 55 L. R. A. 170.

Ann Arbor; and told me that Mr. Angus and Mr. Liggett were in with him, and wanted to know whether I could handle the law business,—what kind of an arrangement they could make. They said that they would have no bonds or stock for me, but wanted to know if I would take it on consideration of being made permanent attorney. After some consideration I said that I would, provided the expenses would be paid. Then I was introduced to Mr. Angus and Mr. Liggett by Mr. Russell, and I made an arrangement with them to the same effect,—that I was to go ahead and do all the legal business connected with the enterprise, help them to secure franchises, do anything on that line they called upon me to do until the enterprise would be a success, or in such condition it was sure of success. In the meantime I would be paid my expenses, and if it was not a success I was not to get any compensation; but if it was a success I was to be made permanent attorney of the road. . . . There was no different arrangement under which I performed these services."

Mr. Angus was introduced as a witness for the plaintiff, and testified that he did not recollect that there was any condition to the appointment of Mr. Sullivan. He further testified:

Q. What compensation was he to receive if the project was successful?

A. My connection with it was, Would I consent to his becoming attorney for the company?

Q. Permanent attorney, after the organization of the company?

A. I do not recollect any permanent.

Q. That he should be appointed attorney. You did not mean to terminate in a year?

A. No, I had not anything special in mind as to length of time. It did not occur to me at that time.

Q. He was to be the regular employed attorney; that was your understanding?

A. Yes, I think that I will put it that way. I think I will say it was. . . . The substance of what was said to him, to the best of my recollection, is that I would be favorable to his appointment as attorney for the company.

Mr. Liggett was produced by the defendant, and denied any such contract as is claimed by the plaintiff, but testified that his understanding from the talk with Mr. Russell was that plaintiff was doing the work for Mr. Russell. Mr. Russell was not produced as a witness. Plaintiff had no other talk with any stockholder or officer of the company in regard to his employment or this alleged contract. Under his own
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testimony the contract was made with these three promoters, and was never divulged to any other stockholder or officer of the corporation until after his employment under the resolution hereinafter referred to had terminated. In his conversation with Hawks at that time he only claimed that he had made the arrangement with Angus and Russell. Mr. Russell told Mr. Hawks that he had employed Mr. Sullivan, and that his (Sullivan's) services were a part of what he (Russell) was putting into the company,—“a part of his contribution to the enterprise.” Mr. Hawks received no information of any different arrangement until he received the letter of March 15, 1898, when Mr. Russell sold his stock in the company—980 shares—to Mr. Hawks. In the letter offering to sell he said: “Inasmuch as I have been active in securing the franchises and doing preliminary work for this company which has necessitated the making of promises of various natures in return for assistance rendered, I desire, as a further consideration that these promises made by me, which I will no longer be able to carry out, be composed along the following lines: (1) Mr. J. E. Sullivan, who did all the preliminary law work for the company gratuitously in consideration of permanent employment as attorney of the company for and after March 1st, to be guaranteed such employment for the period of one year at the rate of \$1,500 per year, payable monthly.”

On March 15, 1898, the board of directors, six in number, passed a resolution, reading as follows: “That J. Emmet Sullivan be employed as the attorney for the period of one year from and after March 1, 1898, at an annual salary of \$1,500, payable in monthly instalments; this payment to be in full settlement of services to date and for the coming year.” At the organization of the company, November 2, 1897, four other men became stockholders of the corporation, and signed the articles of incorporation, among whom was Mr. Hawks, who afterwards became president of the company. Mr. Russell became its secretary. There were at the time of the adoption of the above resolution six directors, three of whom were Hawks, Russell, and Angus. Of these six directors only two—Russell and Angus—had any knowledge of the arrangement made with the plaintiff. Mr. Sullivan was paid \$125 per month during the year. He afterwards attended to some suits, and did some other business, for which he received \$600. After the expiration of the year for which he was employed he made claim to Mr. Hawks for \$15,000 for services rendered to the company from November 2, 1897, to March 1, 1898. The company de-

nied liability, and thereupon plaintiff brought this suit upon the common counts in assumpsit. He rendered no bill of items to the defendant, and his bill of particulars filed in the suit recited the services in drawing the articles of association, bond and mortgage, and other papers, giving advice, attending meetings of the directors, and negotiating the purchase from the three companies, etc., for which he claimed the lump sum of \$15,000. He recovered a verdict and judgment for \$9,028.12.

Mr. Otto Kirchner, with Messrs. Corliss, Andrus, Leete, & Joslyn, for plaintiff in error:

The appointment of plaintiff by defendant as its attorney for one year at a salary of \$1,500, which has been fully paid, did, in law, operate as a complete accord and satisfaction of plaintiff's claim. Such an appointment was a permanent appointment within the true intent and meaning of the parties.

Louisville & N. R. Co. v. Offutt, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181; *Elderton v. Emmens*, 4 C. B. 479, 16 L. J. C. P. N. S. 209, 11 Jur. 612; *Perry v. Wheeler*, 12 Bush, 541; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126; *Roddy v. McGetrick*, 49 Ala. 159; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Carnig v. Carr*, 167 Mass. 544, 35 L. R. A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; *Royston v. McCulley* (Tenn. Ch. App.) 52 L. R. A. 899, 59 S. W. 725; *Thorpe v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497.

Messrs. Elliott G. Stevenson and Leo M. Butzel, with Messrs. Sullivan, Bland, Cook, & Van Syckle, for defendant in error.

Grant, J., delivered the opinion of the court:

The theory of the declaration and of the right of recovery in this case is that plaintiff had no express contract with the defendant, but that he rendered services for it under such circumstances that the law implies a contract, and presumes a promise by the defendant to pay for the services so rendered, and of which it has had the benefit. Plaintiff's own evidence conclusively establishes the fact that he had no contract, either express or implied, with the defendant, until the contract of employment of March 15th, but that he made an express contract with the three original promoters of the scheme to perform the services for which he now seeks to recover, upon their

agreement that they should make him the permanent attorney of the company. He had no other agreement, and at no time until more than a year after the services were rendered did he make any claim to any of its officers of the contract which he now asserts was made. These promoters could make no contract for the defendant, which was not then organized. That contract could not bind the corporation until it was known to and approved by it. The knowledge of Messrs. Russell and Angus, after they became directors, was not the knowledge of the corporation. The only knowledge possessed by Mr. Hawks, its president, was that plaintiff was the personal employee of Mr. Russell. This statement did not, of course, bind the plaintiff, but shows that Hawks had no knowledge of plaintiff's alleged contract. When, under plaintiff's version of the contract, did he begin to render services for the defendant? Certainly not until the corporation was organized. But his contract with these three promoters was that the scheme should be a success, not that the company should be organized. If the promoters had secured options for the purchase of the three companies then in existence and franchises from the townships along the proposed line before the organization of the company, and it had not been organized until all his services in carrying out his contract has been performed, would the corporation with new stockholders and new directors have been liable, either under the express contract or under an implied contract for his services, performed under the special contract? The promoters evidently thought it wise to organize the company early as one of the means to assist in carrying out the scheme. But plaintiff performed services no more for the corporation in one case than in the other. He made his contract with the promoters. He knew he could not enforce it against the corporation. If he chose to make a contract which he could not enforce against the promoters, under *Durgin v. Smith* (Mich.) 94 N. W. 1044, it is his misfortune. But whether he could enforce his contract with them is immaterial here. The circuit judge correctly instructed the jury that plaintiff could not recover in accordance with that agreement, but instructed them that, if the plaintiff was entitled to recover at all, he was entitled to recover what his services were reasonably worth. The fatal error of the charge and of the plaintiff's theory is that he had an express contract with the promoters which precludes any possibility of an implied contract with the corporation. Plaintiff, a lawyer, must have known that the contract could not bind the future corporation, un-

less, after it was formed, it knew of its existence and ratified it.

If we understand the argument of counsel correctly, it is that the defendant never ratified the contract made with the three promoters before the organization of the company, but, having received the benefit of his services rendered under that contract, the law implies a promise on its part to pay, not in accordance with the contract, but on a separate and distinct implied contract. If defendant had ratified the contract and appointed plaintiff its attorney in accordance therewith, and that was carried out for a year, and then broken by the defendant, the only remedy of plaintiff would be an action upon the contract for the breach thereof. If, as he contends, his employment was virtually for life, or for the life of the corporation, he could not, in the event of a subsequent violation of the contract by the defendant, recover upon the basis of an implied contract the value of his services previously rendered. After six years such claim would be barred by the statute of limitations. A contract will be implied only when no express contract exists. If A makes an express contract with B to perform services for C, C is not liable on an implied contract because he received the benefit. The two contracts cannot exist together, governing the same transaction. "As in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law interposes and raises a promise." *Walker v. Brown*, 28 Ill. 378, 383, 81 Am. Dec. 287. So, plaintiff could not have an express contract with these three promoters that they, in consideration for his services in assisting to successfully accomplish the scheme, would make him the permanent attorney of the company, and at the same time have an implied contract with the company to pay him for the same services. *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; *Royston v. McCulley* (Tenn. Ch. App.) 52 L. R. A. 899, 59 S. W. 725; *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497; *Boughton v. Boughton*, 111 Mich. 27, 69 N. W. 94. In *Walker v. Brown*, S., assuming to act for himself and for defendants, made a contract with plaintiff to perform certain work. The work was done, but S. had no authority to bind defendants. Thereupon plaintiff sought to recover from defendants upon an implied contract for the value of the work, which was beneficial to them. The court held that the express contract, executory in its

provisions, totally excluded any implication of an implied one. In *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.* the defendant received the benefit of certain lumber furnished under an arrangement between some of the directors of the two companies. The contract was a personal one between the directors. Plaintiff sought to recover from the defendant upon the ground that it had the benefit of the lumber furnished, and that the law implied a promise to pay. The court held that the express contract excluded any liability on the part of defendant. In *Thorp v. Bateman* the defendant made an express contract with Thorp by which Thorp's infant daughter was to live with Bateman until she became of age. Bateman's wife died, and Thorp then took his daughter away. Bateman sued Thorp upon an implied contract. It was held that, if Thorp violated the express contract, "its existence and the breach thereof cannot be the foundation for an implied assumpsit of a wholly different character." This is not the case of *Davis v. Strobbridge*, 44 Mich. 157, 6 N. W. 205, where the vendor in a parol land contract, which had become valid by part performance, repudiated it, and the vendee was allowed to recover as his damages that part of the purchase price which he had paid and the value of the improvements put upon the land.

It is manifest from the record that the verdict was rendered upon an entirely false basis. The late Edwin F. Conely, then living, and a witness for defendant, testified to the value of such services as the plaintiff rendered. He was permitted, on cross-examination by the plaintiff's counsel, to state what services such as these rendered by the plaintiff would be worth upon the contingency that he was to receive nothing if the scheme did not succeed. Witness replied, "Well, I should say \$7,500." This is the precise amount of the verdict, with interest added. The motion to strike this testimony out should have been granted. Plaintiff could not recover upon the contingent contract with plaintiff, and therefore all evidence of this contingency was incompetent, and should have been eliminated from the consideration of the jury.

If the above views are correct, there would be no occasion to discuss any other question. But my brethren do not agree with me in holding that the plaintiff, having made an express contract, cannot, under the circumstances, rely upon an implied one. It therefore becomes necessary to determine another question, which I proceed now to discuss.

The other important question raised is, Assuming that plaintiff had a contract as claimed, was it performed on the part of the defendants by his employment for a

year? When he entered upon his employment, and as well during the entire year, he believed that he was employed under his agreement with the three promoters; that the company had ratified that agreement, and that he was made the permanent attorney for the company.

Upon this point he testified as follows:

I received \$125 a month, and receipted for it each month. I understood that I was to receive \$1,500 a year, and did not stop to inquire whether any resolution to that effect had been passed at all. I considered that I had an agreement for permanent employment, and did not need a resolution, and did not stop to inquire.

Q. Did not inquire how the \$1,500 had been fixed?

A. I knew how that was fixed.

Q. When did you first know that?

A. The arrangement I had was to get \$1,200 a year and \$300. I was sworn on the last trial, and testified that \$1,200 had been mentioned, and office rent in the first year. The \$300 over \$1,200 was in lieu of office rent. That is the way I took it. I was content with that. I did not get any office rent from them.

Q. Don't you know, as a matter of fact, the salary was fixed at \$1,500 a year because your friend, Mr. Russell, had asked that you be employed one year at \$1,500?

A. I did not state what they say on the last trial—

Q. Did anybody confer with you as to fixing the salary at \$1,500 in lieu for your services and in lieu of your office rent?

A. No, sir; they did not.

Q. Simply began to pay at the rate of \$1,500 a year?

A. Yes, sir.

Q. Never questioned it?

A. Never questioned it. I thought they were carrying out their agreement with me.

Q. Never asked why it was done, or what resolution was passed?

A. I did not have to, because I had an agreement.

Q. Answer the question, Did you or did you not?

A. I did not.

He also testified that when, at the expiration of the year, he was informed by Mr. Hawks that his services were no longer required, he told Mr. Hawks, "I said my arrangement with you was that I was to be permanent attorney for the road, and he said, 'No such thing;' and I said there was; and I said, 'I made it to Mr. Angus and Russell.'" Mr. Russell was not called as a witness by plaintiff, though he had no connection whatever with the company. Mr. 64 L. R. A.

Russell placed his construction of his agreement with plaintiff in the letter written to Mr. Hawks March 15th, in which he said, in substance, in consideration of Mr. Sullivan's doing preliminary work he had agreed to give him permanent employment as attorney of the company, and requested that he be employed for one year at a salary of \$1,500 per year. On the same day the directors met, and passed the resolution of employment, in accordance with the terms of that letter. This was the first notification to the company of the plaintiff's alleged agreement. Whether, under these facts, the resolution amounted to ratification of the agreement of Mr. Russell with plaintiff, it is probably unnecessary to determine. If the agreement was ratified, plaintiff's only remedy, as above stated, would be upon the contract for a violation thereof. *Hobbs v. Brush Electric Co.* 75 Mich. 550, 42 N. W. 965.

Upon the assumption that plaintiff had a binding contract for permanent employment, and was employed for one year at a salary of \$1,500, which has been fully paid, counsel for defendant insist that this was a permanent employment within the true intent and meaning of the parties, and that it operated as a complete accord and satisfaction of his claim. Counsel for defendant cite in support of its contention *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181; *Perry v. Wheeler*, 12 Bush, 541; *Elderton v. Emmens*, 4 C. B. 479, 16 L. J. C. P. N. S. 209, 11 Jur. 612; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126; *Roddy v. McGetrick*, 49 Ala. 159. In *Elderton v. Emmens* the contract was identical with this, except that there was no contingency of success. It was urged that the word "permanent" implied an appointment, if not for life, at least for so long a time as the society should require the services of a solicitor and the plaintiff gave no cause for dismissal. The court took a contrary view, saying: "Whether the expression 'permanent attorney and solicitor' means an employment for life, or so long as the company shall exist, or what, we have no means of judging." The court held that it meant no other than a general employment, and said that, if it had been the intention of the parties to give to the word "permanent" the sense contended for by the plaintiff, the agreement would have contained a variety of stipulations that were not found in it. In *Roddy v. McGetrick* the plaintiff contracted for permanent employment as clerk for the defendant at a salary of \$75 per month. The court instructed the jury: "If the employment was not for a month, a reasonable construction would be for a year, in the absence of a construction by the parties." This instruction was sus-

tained. In *Perry v. Wheeler* a clergyman was elected permanently to the rectorship of a church. The contract was held to be for an indefinite period, and terminable at the will of either party. In *Lord v. Goldberg* it was "agreed by and between plaintiff and defendants that, in consideration of his entering into their employment as such solicitor, and using all his efforts to secure certain named persons as customers, and to extend their business, 'they would give him permanent employment so long as he should use his best efforts to extend their business, paying him at the rate of \$20 per week, and increase his salary as the business increased.'" It was held that such contract was for an indefinite time, and continued only until either of the parties should wish to sever the relation. It further appears in that case that plaintiff was in the employ of another party in the same business, and that he gave up that employment under his contract with the defendants. In *Louisville & N. R. Co. v. Offutt* the railroad company employed the plaintiff, agreeing to keep him in its service so long as he did faithful and honest work. The contract was held terminable by either party at any time. In *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846, the railway company entered into an agreement with the city of Marshall by which the city donated to the construction of the road \$300,000 and 66 acres of land in consideration that the railway company "agreed to permanently establish its eastern terminus and Texas offices at the city of Marshall, and to establish and construct at said city the main machine shops and carworks of said railroad company." The company carried out the contract by constructing its shops and establishing its offices at Marshall as provided. At the expiration of eight years Marshall ceased to be the eastern terminus of the road, and the company removed some of its shops. It was held that the contract for permanent establishment was complied with by the establishment of the terminus and the offices and shops contracted for with no intention at the time of removing or abandoning them. It was there said: "If, however, the city desired . . . to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them forever, such extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot or the

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car and machine shops, and thus have made the obligation perpetual." A permanent abode is a home, which a party may leave as interest or whim may dictate, but which he has no present intention to abandon. *Dale v. Irwin*, 78 Ill. 170. Permanent employment means "employment for an indefinite time, which may be severed by either party." Bouvier, Law. Dict. Such contracts, in the absence of special considerations, conditions, and circumstances, are not construed to continue indefinitely, but are terminable at any time by either party. 20 Am. & Eng. Enc. Law, 2d ed. p. 16. The term "permanent employment" has, under special circumstances and conditions, been construed to mean continuous or indefinite employment, not terminable at the will of either party.

Counsel for plaintiff cite and rely upon *Carnig v. Carr*, 167 Mass. 544, 35 L. R. A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; *Stearns v. Lake Shore & M. S. R. Co.* 112 Mich. 653, 71 N. W. 148; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536; *McMullan v. Dickinson Co.* 63 Minn. 405, 65 N. W. 661, 663. In *Carnig v. Carr* the contract was that if the plaintiff, an enameleer, would give up his business, and enter that of the defendant in the same occupation, he would furnish him permanent employment at stipulated wages. After employment for several months defendant discharged plaintiff, though he had plenty of work of that kind for him to do. The court said: "To ascertain what the parties intended by 'permanent employment,' it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood." Applying this rule of construction, the court found that the contract meant employment so long as the defendant was engaged in the business of enameling, and had work which the plaintiff could do and desired to do, and so long as plaintiff was able to do the work satisfactorily. It was held not to mean life employment. In *Stearns v. Lake Shore & M. S. R. Co.* plaintiff was seriously injured while in the employ of the defendant, and brought suit against the defendant for damages. The defendant settled with him by paying him \$175, and making an agreement to employ him in the capacity of baggage master during his entire life or his ability to do the work. The basis of liability in that case was the surrender and cancellation of a claim against the company. Such cases are *Harrington v. Kansas City Cable R. Co.* 60 Mo. App. 223; *Pennsyl-*

vania Co. v. Dolan, and *Carter White Lead Co. v. Kintin*. In *McMullan v. Dickinson Co.* the contract which the court sustained was in writing, and provided that the defendant should employ the plaintiff as an assistant manager; said employment to continue during the time of the business of said corporation, not exceeding the term and existence of said corporation, and so long as plaintiff should own and hold in his own name 50 shares of the capital stock, fully paid up, in said corporation. Counsel for plaintiff seek to bring this contract within the above cases cited by them for the reason that the plaintiff agreed to render some services for which he was not to be compensated unless the enterprise was a success; in other words, that he rendered services in consideration that he was to be made permanent attorney. Plaintiff gave up no occupation or business, as did plaintiff in *Carrig v. Carr*. On the contrary, he maintained his law business the same as usual, during the same time, at the same place, and in the same office. He gave up none of his other work. He released no claim and gave no past consideration for the contract, as was done in *Stearns v. Lake Shore & M. S. R. Co.* and similar cases. He did not agree to devote his entire time as a manager or assistant manager, nor agree to hold any stock in the corporation, as did plaintiff in *McMullan v. Dickinson Co.* He had no claims for damages or otherwise to release, as did the plaintiffs in the other cases cited. Immediately after his employment he drew the articles of association, and the defendant was duly organized. According to his own statement and theory of the contract, he then became the attorney for the defendant, with the understanding that, if the defendant secured the franchises contemplated, the company should make him its permanent attorney. This employment, under his theory, dated from the organization of the company. All the services to be rendered were services as the attorney for the company. All the services contemplated and provided for were current and future services. The life of the corporation was thirty years. Legal services would be required during the

term of its existence. It follows that this contract was either a contract binding for thirty years upon the defendant, or else it was terminable at the will of either party. The contract is unusual, and it certainly should be made to clearly appear that the parties intended to make it. If that was in fact their intention, they were singularly unfortunate in the use of language necessary to bind a corporation to employ a lawyer for thirty years. It is significant that neither of the three persons with whom plaintiff alleges he made the contract supposed they were making such a one as plaintiff now claims. If the clergyman in *Perry v. Wheeler* had agreed to preach four months upon trial, with the agreement that, if his preaching were found satisfactory, the church would employ him permanently, would that have changed the construction of the contract? If plaintiff in *Roddy v. McGettrick* had agreed to work as clerk for four months on trial, with an agreement for permanent employment if his work was satisfactory, would the holding have been different? If the lawyer in *Elderton v. Emmens* had agreed to do the legal work of the company for four months with the agreement that, if his legal services were satisfactory, the defendant would employ him as permanent attorney and solicitor for the society, would the court have given a different construction of the word "permanent?" I find it impossible to conclude that the parties who made this contract contemplated that the plaintiff was to be employed for thirty years, or as long as he was able to do the legal work of the defendant. I think the case falls clearly within the authorities first above cited, and that the employment under the above resolution was a full compliance with its terms.

The judgment is reversed, and, inasmuch as it is impossible for the plaintiff to make out any different case upon a new trial, I think none should be granted.

Hooker, Ch. J., and Montgomery and Moore, JJ., concur in the reversal of the case upon the last point stated in the opinion. **Carpenter, J.**, did not sit.

MISSOURI SUPREME COURT.

City of St. LOUIS, *Respt.*,
v.
John G. FISCHER, *Appt.*

(167 Mo. 654.)

1. Charter authority to a municipal

NOTE.—For other cases in this series as to ordinances to protect milk supply, see *State v. Dupaquier*, 26 L. R. A. 162; *Deems v. Baltimore*, 26 L. R. A. 541; *State v. Broadbelt*, 45 L. R. A. 64 L. R. A.

corporation to prohibit the erection of cow stables and dairies "within prescribed limits" includes power to prohibit them anywhere within the city limits.

2. An ordinance of a municipality having power to prohibit and regulate dairies within the city limits, forbidding a

433; *State v. Nelson*, 34 L. R. A. 318; *State v. Schlenker*, 51 L. R. A. 348; *State v. Crescent Creamery Co.* 54 L. R. A. 466; and *Norfolk v. Flynn*, 62 L. R. A. 771.

dairy within such limits unless permission for their maintenance is obtained from the city council, is not void as providing for special privileges.

3. A municipal ordinance prohibiting the maintenance of a dairy within the city limits neither deprives citizens of property without due process of law nor abridges their privileges or immunities.
4. An ordinance prohibiting the maintenance of dairies within the city limits is not rendered retroactive and void by being made applicable to premises on which a dairy once existed which has been abandoned, so as to entitle a subsequent occupant of them to re-establish the business notwithstanding the ordinance.

(*Sherwood, J., dissents.*)

(March 19, 1902.)

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction in plaintiff's favor in an action brought to recover a fine for violation of a city ordinance. *Affirmed.*

The facts are stated in the opinion of GANTT, J., delivered in division No. 2, which was as follows:

This is a civil action by the city of St. Louis to recover a fine of \$100 for the violation of § 5 of a city ordinance of said city, numbered 18,407, approved April 6, 1896, which said section is in these words: "No dairy or cow stable shall hereafter be erected, built, or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than \$100 nor more than \$500." The complaint charged that defendant, in the city of St. Louis and state of Missouri, on the 16th day of November, 1898, and on divers other days and times prior thereto, was the occupant of certain premises, known as 7208 and 7210 North Broadway, in said city, and did then and there erect, build, and establish on said premises a dairy and cow stable, without first having obtained permission so to do from the municipal assembly by proper ordinance, and furthermore did at said times and place maintain said dairy and cow stable without having obtained permission from said municipal assembly of said city by proper ordinance, and that said dairy and cow stable was not in operation at the time of the approval of said ordinance No. 64 L. R. A.

18,407, to wit, April 6, 1896, contrary to the said ordinance. The defendant was found guilty in the police court, and appealed to the court of criminal correction. In the last-mentioned court he moved to quash the complaint on nine grounds, as follows: "(1) Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis. (2) Because § 5 of said ordinance No. 18,407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law. (3) Because said § 5 is void as being unreasonable and oppressive to the citizen and the property owner. (4) Because said section is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same. (5) Because said section is retrospective in its nature and application, and therefore in violation of the rights of private property. (6) Because said § 5 is void, being a delegation of the powers of the municipal assembly. (7) Because said section is in violation of § 30, art. 2, of the Constitution of the state of Missouri. (8) Because said § 5 is in violation of § 4 of article 2 of the Constitution of Missouri. (9) Because said § 5 is void as being in violation of the 14th Amendment to the Constitution of the United States, in that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" The court of criminal correction overruled this motion, and thereupon entered his plea of not guilty, and the cause was submitted to that court upon an agreed statement of facts, without a jury; and the court found defendant guilty of a violation of said ordinance, and fined him \$100, from which he appeals to this court.

The agreed statement of facts is in these words: "It is hereby agreed and stipulated by and between the parties to the above-entitled cause, by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to wit: The plaintiff, the city of St. Louis, is a municipal corporation organized and existing under the laws of the state of Missouri; and defendant is, and was on the 16th day of November, 1898, the occupant of certain premises, known as 7208 and 7210 North Broadway, in the city of St. Louis, state of Missouri, upon which premises at said time stood a dwelling house and frame stable, which had been erected and built prior to the occupancy of said premises by

defendant. At the time of the approval of ordinance No. 18,407 of said city, said premises, buildings, and stable were occupied and in use by a certain party, other than this defendant, for the purpose of operating a dairy and maintaining a cow stable; and this defendant was at the same time operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and state. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only; and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows (about thirty in number) from premises No. 6305 Bulwer avenue, onto premises Nos. 7208 and 7210 North Broadway, said city, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment, and produce from said cows milk, and sell the same to his customers for profit, and was so doing on the said 16th day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by § 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896. It is hereby stipulated and agreed by the parties to this cause, by their respective attorneys, that the printed ordinance, marked 'exhibit A,' which is attached to and made a part of this agreed statement of facts, is a full, true, and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause."

The transcript in this case is somewhat difficult to understand. It is either all record proper, or all bill of exceptions. There is nothing in the nature of the record proper, showing a trial, the entry of judgment, the filing of any of the motions, or the action taken by the court thereon. There is nothing in the transcript showing any copy of the affidavit for appeal, the bond for appeal, or the order granting an appeal to this court. At the same time these matters are set forth as if in a bill of exceptions, signed by the judge of the trial court.

1. The city of St. Louis is a municipal corporation existing under a charter framed and adopted by the qualified voters therein on the 22d day of August, 1876, which took effect October 22, 1876 (*State ex rel. Boach v. Sutton*, 3 Mo. App. 388), pursuant to the provisions of §§ 20, 21, 22, 23, 24, and 25 of article 9 of the Constitution of Missouri of 1875, and has all the force and effect of a charter which emanates from the general assembly (*Kansas City v. Marsh Oil Co.* 64 L. R. A.

140 Mo. 458, 41 S. W. 943). By the 6th paragraph of § 26 of article 3 of the said charter the mayor and the municipal assembly of St. Louis are given power within the city, by ordinance not inconsistent with the Constitution or any law of this state or the charter itself, "to prohibit the erection of soap factories, stock yards, and slaughter houses, pig pens, cow stables and dairies, coal oil and vitriol factories, within prescribed limits, and to remove and regulate the same; and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health." On April 6, 1896, the mayor and municipal assembly passed the ordinance set out in the accompanying statement, making it a misdemeanor for any person thereafter to erect, build, or establish or maintain within the limits of said city any dairy or cow stable, without having first obtained permission so to do from the municipal assembly by a proper ordinance, and prescribing a penalty for a violation thereof. At the outset it will be observed that express power is conferred upon the mayor and municipal assembly to prohibit and to remove and regulate cow stables and dairies within prescribed limits. To the mayor and assembly is confided the power of fixing and prescribing the limits within which no dairy or cow stable shall be built or maintained in the city of St. Louis. As the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the state, and properly subjects it to rigid rules of regulation, and even absolute prohibition, in large and populous cities. Indeed, few occupations are so peculiarly liable to cause injury, by the sale of impure milk to people who purchase milk as a necessary article of food, or which are more generally regarded as nuisances, even under favorable circumstances. That the people of the state could delegate this power to the municipality is no longer open to dispute. It clearly falls within the proper function of municipal government. As the people of the state have conferred the power upon the city without restriction, it was entirely within the discretion of the mayor and assembly to prescribe the limits, and it was competent to fix the boundaries of the city as the prescribed limits, and this was done by ordinance No. 18,407. Counsel for defendant insists that the municipal assembly must have first designated certain districts within the city by metes and bounds, within which no dairy or cow house should be erected or maintained, but the charter does not so command. It nowhere limits the prohibited territory to less than the whole city. Counsel for de-

fendant cites *Re Linchan*, 72 Cal. 114, 13 Pac. 170, as sustaining his position. But reference to that case will show that the charter power was "to exclude from certain limits" the obnoxious occupations, and the city council had merely defined a district, bounded by certain streets, in which it should be unlawful for any person to keep more than two cows, and the supreme court upheld the ordinance. No question of the power of the city of San Francisco to make such an ordinance applicable to the whole of said city arose in that case, and nothing in the decision supports the proposition now advanced,—that the city of St. Louis must necessarily prescribe a district therein less than its municipal boundaries; and we have no doubt of the power, under the charter, to make the prescribed limits coextensive with the city limits, and this we construe this ordinance to have done. But learned counsel for defendant argues that because the city has not made the prohibition absolute, and prevented all persons from erecting or maintaining dairies and cow stables anywhere in the city, but has deemed it proper to say that no person should erect or maintain a dairy or cow stable without permission first obtained by a proper ordinance, this ordinance is void; that it provides for special privileges to one man, by special ordinance, which it might deny to another man, his next door neighbor. We think his position is entirely untenable. The charter confers, not only the power to prohibit, but to remove and regulate; and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose upon all persons desiring to erect or maintain a dairy or cow stable the duty to first obtain permission from the mayor and assembly by a duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions. *St. Louis & M. River R. Co. v. Kirkwood*, 159 Mo. 239, 53 L. R. A. 300, 60 S. W. 110. As was said in *St. Louis v. Howard*, 119 Mo. loc. cit. 46, 41 Am. St. Rep. 630, 24 S. W. 770: "Regulation means a rule or order prescribed for management or government. . . . So that paragraph 6 of § 26 of article 3 of the charter empowers the city (by ordinance, of course, for that is the only way the city can legislate) to prescribe rules whereby slaughter houses may be erected or operated, or whereby such erection or operation may be checked or restrained, either partially or *in toto*." But in that case the defendant was acquitted because, although the city had plenary powers in this regard, it had not seen fit to exercise them by an ordinance making it a misdemeanor to carry on or operate a slaughter house "without first having obtained permission so to do from the munic-

ipal assembly by proper ordinance." In this case the city has passed just such an ordinance, and made it coextensive with the boundaries of the city; and just such an ordinance met the approval of this court in *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772; the only difference being that in the last-mentioned case it was forbidden to erect a slaughter house within 300 feet of any dwelling house, whereas in this ordinance dairies are prohibited throughout the city unless the assembly shall first permit them by proper ordinances. We are asked to declare this ordinance void, in the face of the unrestricted power in the charter, because, forsooth, the assembly may at some time discriminate against one man and favor another. We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall, as was said in *St. Louis v. Howard*, 119 Mo. 50, 24 S. W. 772, assume that the municipal assembly, before granting permission, will inquire and determine whether the place and the neighborhood is a proper one in which to allow a dairy to be maintained, and will act impartially. "Such favorable presumptions are constantly indulged in regard to legislative action." *State ex rel. Atty. Gen. v. Mead*, 71 Mo. 272. It is at once apparent that no ironclad rule can fit every case. The assembly may well determine that the keeping of a dairy in the outskirts of a city, where the population is sparse and the areas large, would not be a nuisance; whereas to permit a dairy in the thickly populated portion of the city, or near a schoolhouse, church, or hospital, would seriously endanger the public health, and, in the exercise of its plenary powers, permit it in the one case, and prohibit it in the other, without being obnoxious to the criticism of partiality. Under the charter it is given legislative discretion in this matter. In our opinion, the ordinance prescribed the limits, and it was entirely proper and lawful to require every person desiring to erect or maintain a dairy to obtain permission by a proper ordinance, and such an ordinance is the only defense to an action like this. *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772. We can see no more objection to such an ordinance than could be urged against the granting of a franchise to run a street railroad on a particular street. A railroad laid in a street without authority is a nuisance, and yet it has never been held that an ordinance, to be valid, must permit everybody to maintain railways in all the streets. It is a matter within the authority of the assembly.

2. As to the objection that the ordinance violates the 14th Amendment to the Constitution of the United States, it is suffi-

cient to say that it does not contravene that amendment, because it operates upon all persons alike, and that every man holds his property subject to the maxim that he must so use it as not to injure his neighbor. Nothing in that amendment has shorn the states of their police power to prohibit or regulate unwholesome trades and occupations. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Tiedeman, State & Federal Control of Persons & Property*, p. 731; *Re Linehan*, 72 Cal. 114, 13 Pac. 170; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771; 2 Kent, Com. 340; *St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 18 L. R. A. 590, 21 S. W. 8. Nothing in the Constitution of the United States or of this state secures to any man the right to maintain a nuisance to the discomfort and peril of the health of his neighbor.

It is not deemed necessary to answer *seriatim* all the objections urged to the constitutionality of this ordinance. We have considered them all, and are satisfied they are not tenable or sound. There is nothing retrospective in the application of this ordinance to defendant. It was adopted in 1896. He began, without the permission of a proper ordinance, to carry on and maintain this dairy at the premises mentioned in the complaint in 1898,—long after the ordinance was in force.

The ordinance is leveled at the maintenance of a dairy,—the keeping of cows for the sale of milk; and the mere fact that the premises had once been so occupied prior to 1896, but subsequently abandoned for such a use, did not authorize defendant to start up a new dairy on said premises without the necessary condition precedent of a lawful ordinance. Accordingly we hold his conviction was proper, and the judgment is affirmed.

BURGESS, Ch. J., concurs in these views.

Mr. Louis A. Steber, for appellant:

We are dealing in this case with the right of property, and not with the question of nuisance.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *Flint v. Russell*, 5 Dill. 151, Fed. Cas. No. 4,876.

A dairy or cow stable has never been considered or treated as a nuisance *per se*, or *prima facie*. If complained of as a nuisance that question must be tried in a proper proceeding as a question of fact.

St. Louis v. Schnuckelberg, 7 Mo. App. 536.

Section 5 of the ordinance is in violation of the 14th Amendment to the Constitution of the United States.
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Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Re Quong Woo*, 13 Fed. 229; *Stockton Laundry Case*, 26 Fed. 611; *Ite Hong Wah*, 82 Fed. 623; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458.

Section 5 of the ordinance is in violation of art. 11, § 30, of the Constitution of Missouri.

St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861; *St. Louis v. Dorr*, 145 Mo. 466, 42 L. R. A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976.

The personal liberty of the citizen and his right to property cannot be thus invaded under the guise of a police regulation.

Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Dill. Mun. Corp.* 4th ed. § 374, pp. 447-449; *St. Louis v. Schnuckelberg*, 7 Mo. App. 536; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *State v. Julow*, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *United States v. Sweetney*, 95 Fed. 434; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 376, 39 L. R. A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Mere discretionary power has always been mere despotism.

Re County Auditors, 1 Woodw. Dec. 272; *First Municipality v. Blinneau*, 3 La. Ann. 689.

It is class legislation, purely arbitrary, a piece of legislative despotism.

State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *Curry v. District of Columbia*, 14 App. D. C. 423; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557, 66 N. W. 624.

The word "limit" most obviously and nor-

mally designates a bound, "a restraint, a circumscription, a boundary."

Cosler v. Connecticut Mut. L. Ins. Co. 22 N. Y. 429; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480.

A public trust cannot be delegated or assigned at will, or to the mere caprice or whim of action in any one particular case. The ordinance must be uniform, and apply alike to all who are to be affected by it.

St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Quong Woo*, 13 Fed. 229; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Cooley*, Const. Lim. 6th ed. pp. 137, 249; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026; *Barthet v. New Orleans*, 24 Fed. 564; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 404; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Tugman v. Chicago*, 78 Ill. 409; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, 3 So. 144; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Los Angeles v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

Anything in the nature of an offense or misdemeanor can have no existence, "except as the result of the violation of some plainly imposed duty or rule of action prescribed by a competent law-making power."

Kansas v. Corrigan, 86 Mo. 67; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State ex rel. Crow v. Bland*, 144 Mo. 534, 41 L. R. A. 297, 46 S. W. 440; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Ex parte Bell*, 32 Tex. Crim. Rep. 308, 40 Am. St. Rep. 778, 22 S. W. 1040; *First Municipality v. Blineau*, 3 La. Ann. 689; *McCutchen v. Blanton*, 59 Miss. 116.

Ordinances must be uniform in their operation, and apply to all persons alike.

Tugman v. Chicago, 78 Ill. 405; *Hibbard v. Chicago*, 173 Ill. 91, 40 L. R. A. 621, 50 N. E. 256; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721, 22 S. W. 470; *State v. Walsh*, 136 Mo. 400, 35 L. R. A. 231, 37 S. W. 1112; *Cooley*, Const. Lim. 6th ed. p. 137, note 1, 481, 483; *Shreveport v. Robinson*, 51 La. Ann. 1314, 26 So. 277; *Crowley v. West*, 52 La. Ann. 526, 47 L. R. A. 652, 78 Am. St. Rep. 355, 27 So. 53.

The corporate authorities of a town can-

not, by an arbitrary ordinance, destroy private property by force, or compel the owner to have it removed, or forbid him to use it, unless it was, in fact, a nuisance.

Pieri v. Sheldaboro, 42 Miss. 493; *Stockton Laundry Case*, 26 Fed. 611; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; 2 Wood, Nuisances, 3d ed. § 742, p. 971; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L. R. A. 551, 64 Am. St. Rep. 516, 42 S. W. 954.

The legislature cannot, constitutionally, declare a given use of a particular property as harmful or as a nuisance.

Quintini v. Bay St. Louis, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625; *Tiedeman*, Pol. Power, § 122a, p. 426; *Wood*, Nuisances, 3d ed. § 744, p. 976; *Hudson v. Thorne*, 7 Paige, 261; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *First Municipality v. Blineau*, 3 La. Ann. 689; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

The municipal assembly cannot limit the use of this building, and force the owner to convert it to other uses to which it was unfit, and, to that extent, deprive the owner of his property and the use of it, without due process of law.

Stockton Laundry Case, 26 Fed. 611; *Hutton v. Camden*, 39 N. J. L. 130, 23 Am. Rep. 203.

Messrs. B. Schnurmacher and Bass & Brook, for respondent:

The ordinance in question is a valid municipal enactment.

St. Louis v. Howard, 119 Mo. 47, 24 S. W. 772.

It is a valid exercise of the police power to "prohibit the erection of cow stables and dairies, and to remove and regulate the same."

Tiedeman, State & Federal Control of Persons & Property, p. 731; 2 Kent, Com. 340; *Parker & W. Public Health & Safety*, p. 291; *St. Louis v. Weber*, 44 Mo. 547; *Re Linahan*, 72 Cal. 114, 13 Pac. 170; *State v. Broadbelt*, 89 Md. 565, 45 L. R. A. 433, 73 Am. St. Rep. 201, 43 Atl. 771.

And is valid under the "general welfare clause" of the charter.

Ferrenbach v. Turner, 86 Mo. 416, 56 Am. Rep. 437; *Tarkio v. Cook*, 120 Mo. 1, 42 Am. St. Rep. 678, 25 S. W. 202; *State v. Fisher*, 52 Mo. 174; *State v. Bizman*, 162 Mo. 1, 62 S. W. 828; *Eichenlaub v. St. Joseph*, 113 Mo. 395, 18 L. R. A. 590, 21 S. W. 8; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Sohier v. Trinity Church*, 109 Mass. 1.

No legislative enactment will be declared unconstitutional unless clearly so; and every presumption is in favor of its validity.

State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S. W. 524; *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S. W. 1093; *State ex rel. Garth v. Sutzler*, 143 Mo. 287, 40 L. R. A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *State ex rel. Donham v. Yancy*, 123 Mo. 391, 27 S. W. 380; *Ewing v. Hoblitzelle*, 85 Mo. 64; *St. Louis County Ct. v. Griswold*, 58 Mo. 192; *State v. Able*, 65 Mo. 357; *Lamar v. Weidman*, 57 Mo. App. 507.

The city has express authority, under its charter, to "prohibit" cow stables and dairies, and to "remove and regulate" the same. Having such power by express grant, the mere passage of an ordinance makes out

a prima facie case that it is reasonable, and the courts will not review the question as they will where the power is merely incidental or implied.

Skinker v. Heman, 148 Mo. 349, 49 S. W. 1028; *St. Louis v. Green*, 70 Mo. 562.

Per Curiam:

Upon a rehearing by the court in banc, the foregoing opinion of **Gantt, J.**, in division No. 2, is adopted by the court in banc. **Burgess, Ch. J.**, and **Robinson, Brace, Marshall**, and **Valliant, JJ.**, concur therein. **Sherwood, J.**, dissents.

Affirmed By Supreme Court of United States May 16, 1904.

PENNSYLVANIA SUPREME COURT.

Samuel B. MARKLEY

v.

Philip SNOW *et al.*, *Appts.*

(207 Pa. 447.)

1. **Employees of a mining partnership, who are charged with the care and management of its property,** do not act within the scope of their employment in causing, long after the commission of the crime, the arrest, for the purpose of vindicating the law, of one who is suspected of having set fire to a building belonging to the partnership, so as to render the partnership liable for malicious prosecution in case the arrest proves to have been without justification.
2. **The whole question of the existence of probable cause is not submitted to the jury in an action for malicious prosecution by a modification of an instruction directing them that, if defendant had knowledge of certain facts, he had probable cause, by adding the qualification "unless the jury find" that other facts existed which ought to have convinced defendant, as a reasonably prudent man, that he could not honestly rely on the facts enumerated.**
3. **A verdict cannot be directed for defendant in an action for malicious prosecution if his good faith is called in question by testimony, notwithstanding the existence of facts which might constitute probable cause.**

(January 4, 1904.)

A PPEAL by defendants from a judgment of the Court of Common Pleas for Washington County in favor of plaintiff in an action brought to recover damages for alleged malicious prosecution. *Reversed.*

The point which became the basis of the second assignment of error, together with the modification thereof, was as follows:

If the jury believe from the evidence that the defendant Miller had reasonable ground for believing the fire was of incendiary origin; that the plaintiff had been discharged by him; that subsequent to his discharge he had made threats against the defendants, or any of them, and had said he would do the worst dirt to them he could; that he requested Fred Konitz to inform him in case he found out anything the defendants had against him, in order that he might skip out of the state, all of which was communicated to Miller shortly after the fire; that he was reported to the defendant Miller as having been seen at Ellsworth the day before the barn was burned; that Bert Mathers told the defendant Miller that the plaintiff had offered him (Mathers) \$100 to burn the barn, and upon his refusal to do so had said he knew a man whom he could get to do it; that subsequent to the arrest of the plaintiff, and prior to the hearing, while he and Mathers were in the lockup at Charleroi, plaintiff advised Mathers to say at the

NOTE.—For other cases in this series as to liability for false arrest, imprisonment, or malicious prosecution by servant, see *Mulligan v. New York & R. B. R. Co.* 14 L. R. A. 791, and note; *Gillingham v. Ohio River R. Co.* 14 L. R. A. 798; *Palmer v. Manhattan R. Co.* 16 L. R. A. 136; *Stables v. Schmid*, 19 L. R. A. 824; 64 L. R. A.

A'Hern v. Iowa State Agric. Soc. 24 L. R. A. 655; *Central R. Co. v. Brewer*, 27 L. R. A. 63; *Atchison, T. & S. F. R. Co. v. Henry*, 29 L. R. A. 465; *Elchengreen v. Louisville & N. R. Co.* 31 L. R. A. 702; *Little Rock Traction & Electric Co. v. Walker*, 40 L. R. A. 473; and *Palmer v. Maine C. R. Co.* 44 L. R. A. 673.

hearing that, if he had said anything which tended to incriminate himself or the plaintiff while at Ellsworth, he was drunk, stating that the evidence of a drunken man would not be regarded,—then the defendant Miller had such reasonable grounds to believe the plaintiff guilty as would justify him in his actions, and no verdict should be rendered against him. Answer: Affirmed. Unless the jury find that there have been other facts satisfactorily proved in this case which ought to have convinced Miller, as a reasonably prudent man, that he could not honestly rely on the facts enumerated in this point.”

Messrs. R. W. Irwin and A. M. Todd, for appellants:

The mere fact that one is superintendent and another a paymaster of a company will not, of itself, give them the authority to institute a criminal proceeding so as to make the company liable for their action.

Brennan v. Merchant & Co. 205 Pa. 258, 54 Atl. 891; *Guinney v. Hand*, 153 Pa. 404, 26 Atl. 20; *Towanda Coal Co. v. Heeman*, 86 Pa. 418; *Gowaski v. Downey*, 100 Mich. 429, 59 N. W. 167.

The defendants had a right to present a point embodying the facts of which they claim to have had knowledge at the time the prosecution was instituted, and ask the court to say to the jury whether or not those facts, if found to exist by the jury, would constitute probable cause. It was the province of the jury to determine whether or not those facts were proved, and it was the duty of the court to say whether or not the facts embodied in the point, if proved, would constitute probable cause.

The facts embodied in the point, if proved in the case, constituted probable cause for the prosecution; and consequently the proof of those facts made an absolute defense against the plaintiff's action.

Beihof v. Loeffert, 159 Pa. 365, 28 Atl. 217; *McCarthy v. DeArmit*, 99 Pa. 63; *Leahey v. March*, 155 Pa. 458, 26 Atl. 701; *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Schofield v. Ferrers*, 47 Pa. 194, 86 Am. Dec. 532; *Dietz v. Langfitt*, 63 Pa. 234; *Fisher v. Forrester*, 33 Pa. 501; *McCarthy v. De Armit*, 99 Pa. 63.

The facts which are substantially undisputed in this case, which were known to the defendants, are much stronger than the facts in *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93; *Bernar v. Dunlap*, 94 Pa. 329; *McCarthy v. DeArmit*, 99 Pa. 63; and *Fisher v. Forrester*, 33 Pa. 501,—in each of which cases this court held, as a matter of law, that there was probable cause for the prosecution.

Mr. James A. Wiley also for appellants. 64 L. R. A.

Messrs. W. S. Parker and Winfield Mollvaine for appellee.

Fell, J., delivered the opinion of the court:

The plaintiff was arrested for setting fire to the barn of J. W. Ellsworth & Co., a partnership engaged in selling and mining coal. After his discharge on the entering of a *nolle prosequi* by the commonwealth, he brought this action for malicious prosecution, and obtained a verdict against the police officer who made the information on which the warrant was issued, the superintendent of the business and the paymaster at whose instance the arrest was made, and against the partnership. It did not appear from the testimony that any member of the partnership had assented to or authorized the prosecution, or had any knowledge of it. The arrest was not made until three months after the barn had been burned, and whatever the superintendent and paymaster did in relation thereto was wholly at their own instance. If the partnership is liable in this action, it is because of an act of its agents, done in the course of their employment. The instruction on this branch of the case is the subject of the first assignment of error. It was, in substance, that if the care and management of the property—especially of the barn and its contents, which were burned—were committed to the superintendent and paymaster, it was their right on behalf of the company, when the barn was burned, to engage actively in ferreting out the perpetrator of the crime, and to make an information; and if, in so acting as representatives of the company, they instituted an unfounded prosecution, their principal would be liable. The superintendent and paymaster, while called officers of the company, were in fact employees or agents of the partnership, charged, doubtless, with the management and care of its property at the mine, and the question raised by the assignment is whether the arrest of the plaintiff, three months after the barn had been burned, by their procurement, was an act within their implied power, done in the course of their employment.

Undoubtedly a principal may be held liable for the act of his agent in instituting a malicious prosecution. But the act of the agent becomes that of the principal only when expressly authorized, or when his authority to act may fairly be inferred from the nature and scope of the employment. Generally, the duty of superintendence does not carry with it the duty to arrest or prosecute. The inference of authority to do either does not arise from the mere fact of the agency. The authority may be implied when the arrest is made by the agent in the

absence of the principal for the protection of property that is in danger, and in some cases it has been inferred when the arrest was to recover the property back, or where the crime was at the time being perpetrated. But where the act is done for the punishment of the supposed criminal, or for the vindication of the law, it is not the act of the principal, and does not subject him to liability. This principle has been uniformly recognized in the decisions on the subject, and whatever lack of harmony there is in the cases has resulted from the difficulty of applying it to the particular facts. Railroad companies have been held liable for the unlawful arrest of passengers by conductors for nonpayment of fare (*Krulevitz v. Eastern R. Co.* 140 Mass. 573, 5 N. E. 500; *Kelly v. Durham Traction Co.* 132 N. C. 368, 43 S. E. 923); and for arrest for breach of the peace (*Ruth v. St. Louis Transit Co.* 98 Mo. App. 1, 71 S. W. 1055); and the employer for the arrest by a superintendent for shoplifting, detected, it was supposed, in the act (*Staples v. Schmid*, 18 R. 1. 224, 10 L. R. A. 824, 26 Atl. 193); and by a floor walker (*Mallach v. Ridley*, 43 Hun, 336); for the arrest by a manager of a labor agent for passing through a mill and persuading men to quit work (*Smith v. Munch*, 65 Minn. 256, 68 N. W. 19); for the arrest by a ticket agent of a traveler on the charge of passing counterfeit money (*Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; *Eichengreen v. Louisville & N. R. Co.* 96 Tenn. 229, 31 L. R. A. 702, 54 Am. St. Rep. 833, 34 S. W. 219); for an arrest by a ticket seller on the charge of causing disorder in a theater (*Dickson v. Waldron*, 135 Ind. 507, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1); and in similar cases where arrests were made by watchmen, roadmasters, and others charged with like duties.

On the other hand, the trend of decision is against holding the principal liable when the arrest has been made after the supposed crime had been committed, and not for the protection of his property or interests. In such cases the agent has been presumed to have acted on his own account, for the vindication of justice. There has been no direct ruling on the subject by this court, but the recent case of *Croasdale v. Von Boyneburgk*, 206 Pa. 15, 55 Atl. 770, in which it was held that the managing owner of a vessel has no implied authority to institute criminal prosecution for embezzlements, is within the principle stated. There are numerous decisions on the question in other jurisdictions. In *Pressley v. Mobile & G. R.* 64 L. R. A.

Co. 4 Woods, 569, 15 Fed. 199, the company's land agent, who was vested with extensive powers of sale, lease, and collection of income, caused the arrest of the plaintiff on the charge of spoliation of timber lands. It was held that in so doing he was not acting within the scope of his agency, and the company was not liable. In *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791, 26 Am. St. Rep. 539, 29 N. E. 952, a ticket agent had been notified by the police to watch out for certain counterfeiters, and caused the arrest of a person whom he thought had tendered him a counterfeit note. In referring to this case it was said in *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001: "We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interests, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons engaged in the commission of a crime." In *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 445, 39 L. J. C. P. N. S. 241, 22 L. T. N. S. 656, 18 Week. Rep. 834, it was decided that a railroad company was not liable for the action of a porter who had temporary charge of its yard in arresting a teamster whom he suspected of stealing lumber. Similar rulings were made in *Larson v. Fidelity Mut. Life Assn.* 71 Minn. 101, 73 N. W. 711; *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 313, 8 L. R. A. 846, 20 Atl. 188; *Travis v. Standard Life & Acci. Ins. Co.* 86 Mich. 288, 49 N. W. 140; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; and *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311. In *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65, 40 L. J. Q. B. N. S. 55, 23 L. T. N. S. 612, 19 Week. Rep. 127, 11 Cox C. C. 621, it was said by Blackburn, J.: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice." The liability of the prin-

principal for the act of his agent in instituting an unfounded prosecution is governed by the general principles of agency, and where there is no express authority, and there has been no subsequent ratification of the act, the ultimate test is whether the agent acted within the scope of his implied authority. In determining this, each case must stand on its own facts, and in some the question will be one of serious difficulty and doubt. But in this case it may safely be said that there was no presumption of authority, from the mere fact of the agency, to make an arrest three months after the supposed crime had been committed, and when there had been the fullest opportunity in the meantime for the agents to confer with their principal.

The second assignment of error is to the answer to the defendants' seventh point. The court was asked to instruct the jury that if, at the time the prosecution was instituted, Miller, one of the defendants, and the superintendent, had knowledge of the facts set forth in the point, he had probable cause for instituting the prosecution. The answer given was: "Affirmed, unless the jury find that there were other facts satisfactorily proved in this case which ought to have convinced Miller, as a reasonably prudent man, that he could not honestly rely upon the facts enumerated in the point." If, as is argued, the effect of this answer was to submit the whole question of probable cause to the jury, it was error, as it always is for the court to say whether a given state of facts constitutes probable cause. But this was not its effect. The jury were not permitted to find whether other

facts in connection with those enumerated made out a defense of probable cause, but whether there were other facts that should have convinced Miller that he could not rely on the facts stated. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a prudent man in believing the accused guilty. It is not determined by the existence of facts alone, but by the prosecutor's belief in them, and the reasonableness of his belief. If he knows that statements tending to implicate the accused are untrue, or if they are impeached by other facts within his knowledge, or are discredited because of the source from which they come, they furnish no ground of defense, because as to the prosecutor they were not a ground of belief. "The prosecutor must himself believe, and the belief must be upon reasonable grounds." Note to *Munns v. Dupont*, 1 Am. Lead. Cas. (Hare & W.) 265. There were other facts, and the plaintiff's contention at the trial was that they so modified the facts relied on to establish probable cause that no reasonable belief could be based on them.

The third assignment to the refusal of the court to direct a verdict for the defendants cannot be sustained, since the good faith of the prosecution, notwithstanding the facts relied on as indicating guilt, was called in question by the testimony.

We reverse the judgment on the first assignment of error, and judgment is now entered in favor of J. W. Ellsworth & Co. As to the other defendants against whom a verdict was rendered we grant a *venire facias de novo*.

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UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Joseph P. WHITWELL, *Plff. in Err.*,
v.
CONTINENTAL TOBACCO COMPANY *et al.*

(125 Fed. 454.)

- *1. Every contract, combination, or conspiracy, the necessary effect of which is to stifle, or to directly and substantially restrict, competition in commerce among the states, is in restraint of interstate commerce, and violates § 1 of the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200).
2. Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in

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commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of § 1 of the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200).

3. The anti-trust act should have a reasonable construction,—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled.
4. Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle, or to directly and substantially restrict, competition in commerce among the states, violates § 2 of the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200).
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IV.—continued.

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I. *Introductory; scope of note.*

The subject considered in this note is restricted to the consideration of statutes, both Federal and state, which are commonly spoken of as anti-trust acts. The common-law rules with reference to contracts in restraint of trade and monopolies will not be gone into to any extent whatever, except as they may incidentally have been referred to by analogy in some of the decisions which appear herein. As is well known, contracts in restraint of trade were not, by the rules of the common law, held to be illegal in the fullest sense of that term; but the true doctrine in respect thereto was that, as such a contract was deemed to be opposed to public policy, courts, both of law and equity, would decline to aid either party to the contract seeking to enforce it against the other. The anti-trust acts, so called, however, make contracts in restraint of trade illegal, and by the Federal acts and most of the state statutes they are constituted crimes.

It will be seen that several of the states have provisions in their Constitutions which either prohibit monopolies, or inhibit the legislature from permitting them by law.

II. *Constitutionality of statute.*a. *Under Federal Constitution.*

The act of Congress approved July 2, 1890, usually known as the "anti-trust law," is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof. *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, Reversing 76 Fed. 895.

The constitutional guaranty of the liberty of the individual to enter into private contracts does not limit the power of Congress, so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

mote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not, made illegal or punishable by § 2 of the anti-trust act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 8200), because such attempts are indispensable to the existence of any competition in commerce among the states.

6. A manufacturer, a corporation, and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the anti-trust act.
7. The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable because they are not the result of any breach of duty or of contract by the owner.

(November 12, 1903.)

ERROR to the Circuit Court of the United States for the District of Minnesota

The power of Congress to regulate interstate or foreign commerce includes the power to legislate upon the subject of private contracts in respect to such commerce. *Ibid*.

See *Northern Securities Co. v. United States*, 198 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, Affirming 120 Fed. 721, *infra*, III. 1.

A discrimination in favor of agricultural products or live stock in the hands of the producer or raiser, made by the Illinois trust act of June 20, 1893, exempting them from the provisions which prohibit a recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act, renders the act repugnant to the provisions of the 14th Amendment of the United States Constitution, in respect to equal protection of the laws. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

And, as an elimination of the unconstitutional portion of the Illinois trust act of June 20, 1893, which exempts agriculturalists and live-stock dealers from the provisions which prohibit combinations in restraint of trade, cannot be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, there- 64 L. R. A.

to review a judgment in favor of defendants in an action brought to recover damages for alleged violation of the anti-trust act. *Affirmed*.

The facts are stated in the opinion.

Argued before *Sanborn, Thayer, and Van Devanter*, Circuit Judges.

Messrs. Lawler & Arnold, for plaintiff in error:

The defendants were alleged to be a corporation, and its employee and agent did not take them out of the operation of the statute.

Re Greene, 52 Fed. 104.

The Continental Tobacco Company has established practically a monopoly of plug tobaccos through the instrumentality of the general scheme described in the complaint. It would seem absurd to hold that such agreement is not in contravention of the act, but that the act simply contemplates the original and chief combination in the form of trust or otherwise.

Gibbs v. McNeeley, 102 Fed. 594; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Lowry v. Tile, Mantel, & Grate Assn.* 98 Fed. 817, 106 Fed. 40; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed.

fore the entire act must be held invalid. *Ibid*.

The right to combine, to form partnerships and joint-stock associations; the right to agree as to prices and productions; the right to fix prices, to raise and lower them as business men may require,—is not oppressive to the public, nor unjust to the individual, nor contrary to public policy. It is an essential right, as part of the liberty of the citizen, of which no legislature can deprive him. This is what is made criminal by the anti-trust law of Texas of March 30, 1889, and, because it does so, it is repugnant to that part of the 14th Amendment of the Constitution of the United States, because it deprives citizens of the right to make contracts which are necessary and valid in order to conduct their business as they properly may, inasmuch as the same statute exempts 80 per cent of the whole population from the pains and penalties of the act. It is class legislation, and is also under the inhibition of the same amendment to the Federal Constitution, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Re Grice*, 79 Fed. 627.

The act of the general assembly of Georgia, approved December 23, 1896 (Acts of 1896, p. 68), commonly known as the "anti-trust act."

294; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *United States v. Northern Securities Co.* 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Mr. Junius Parker, with Messrs. C. A. Severance, F. B. Kellogg, and R. E. Olds, for defendants in error:

There was no contract, combination, or conspiracy in restraint of interstate trade or commerce within the meaning of the act. 2 Eddy, Combinations, § 813.

The Sherman law is applicable only to combinations and conspiracies, so-called, between or among independent competing concerns.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *United States v. Trans-Missouri Freight Asso.* 186 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 294; *E. Bennett & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *United States v. Nelson*, 52 Fed. 646; *Re Greene*, 52 Fed. 104; *Dueser Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *United States v. Coal Dealers' Asso.* 85 Fed. 252; *Lowry v. Tile, Mantel, & Grate Asso.* 98 Fed. 817, 106 Fed. 40; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed.

610; *W. W. Montague & Co. v. Lowry*, 52 C. C. A. 621, 115 Fed. 29; *United States v. Northern Securities Co.* 120 Fed. 721.

There was no attempt to monopolize, nor any combination or conspiracy to monopolize, any part of the trade or commerce among the several states, within the meaning of the act. This is not the first time that competition has been mistaken for monopoly.

Mogul S. S. Co. v. McGregor, L. R. 21 Q. B. Div. 544.

An agreement between competitors with reference to prices is valid.

Dueser Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co. 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

We may well doubt the power of Congress to enact any law which shall declare that an individual may not sell what he owns for whatever price he pleases if any other person is willing to buy upon such terms.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58; *Brown v. Jacobs Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Welch v. Phelps & B. Wind Mill Co.* 89 Tex. 653, 36 S. W. 71; *Com. v. Grinstead*, 111 Ky. 203, 56 L. R. A. 709, 63 S. W. 427; *Walsh v. Dwight*, 40 App. Div. 513, 58 N.

because it exempts from its operation "agricultural products or live stock while in the possession of the producer or raiser," is repugnant to the provisions of the 14th Amendment of the Constitution of the United States, under the decision of the Supreme Court of the United States in the cases of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, and *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553.

The acts of the legislature of Illinois of June 11, 1891, against trusts and combines, and June 20, 1893, defining trusts and conspiracies against trade, declaring contracts in violation of the provisions of the act void, and making certain acts in violation thereof misdemeanors, and prescribing the punishment therefor, do not infringe the rights and powers of the Federal government under the provisions of the Constitution and the laws of Congress regarding commerce, but are valid under the police powers inherent in and reserved to the states. *People ex rel. Atty. Gen. v. American Tobacco Co.* 2 Chicago L. J. Weekly, 24.

Although the statute of Illinois known as the anti-trust act of 1891, in providing that certain officers of each unincorporated company 64 L. R. A.

in the state shall annually subscribe and swear to an affidavit containing certain facts and statements which are broad enough to include trusts, pools, and combines formed with parties outside the state of Illinois, the provision is not unconstitutional and void as relating to interstate commerce, but should be construed by the courts as relating only to trusts, pools, combines, etc., formed within the state. *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349.

And so an action may be maintained against a corporation for a penalty for failure on its part to comply with the provisions requiring such affidavit. *Ibid.*

The act of the legislature of Ohio of April 19, 1898 (93 Ohio Laws, 143), prohibiting combinations of capital, skill, or acts in restraint of trade or commerce, limiting or reducing the production, or increasing or reducing the price of merchandise or any commodity; preventing competition in manufacturing, making, transportation, sale, or purchase of merchandise, products, or any commodity; fixing at any standard or figure whereby its price to the public or consumer shall be controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale,

Y. Supp. 91; *Brown v. Rounsavell*, 78 Ill. 589.

Sanborn, Circuit Judge, delivered the opinion of the court:

This is an action by the plaintiff, Joseph P. Whitwell, to recover treble damages from the Continental Tobacco Company, a corporation, and from one of its employees, George E. McHie, under the anti-trust act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200), on the sole ground that the defendants refused to sell the manufactured products of the tobacco company to him at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling, or handling plug chewing tobacco made by independent manufacturers who were competing with the tobacco company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, May one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employees a "contract, combination, or conspiracy in restraint of trade" or an "attempt to monopolize any part of trade," within the meaning of the act of July 2, 1890 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200)?

An analysis of the averments of the complaint to which the court below sustained a general demurrer will demonstrate the fact that the crucial question in this case has been correctly stated. The material facts which those averments disclose are these: The plaintiff is a jobber of tobacco, and of the products of tobacco, at St. Paul, Minnesota. The tobacco company is a manufacturer and merchant, and McHie is its agent and employee. The tobacco company owns and controls most of the valuable and leading brands of plug and chewing tobacco in the United States, and fixes the market prices thereof. The company and its agent, McHie, had long been, and on May 1, 1902, still were, in the practice of selling its goods to jobbers in this way: They allotted to an intending purchaser an amount of its goods which he was required to buy during each succeeding period of four months. This allotment was much in excess of the amount which he would be able to sell during that time. They fixed the prices of the goods comprising the allotment so high that if the purchaser paid the prices thus fixed, he could not make any profit by buying and selling the commodities. They required each purchaser to refrain from dealing in plug chewing tobaccos made by independent and competing manufacturers. If the purchaser complied with this requirement, they invariably reduced his allotment to the amount he was able to sell, and paid back to him such a percentage of the aggregate price of the goods he bought that the han-

etc.—is not a violation of the Constitution of the United States. *State ex rel. Monnett v. Buckeye Pipe Line Co.* 61 Ohio St. 520, 56 N. E. 464.

Sections 4, 5, 6, and 7 of the act of April 19, 1898 (93 Ohio Laws, 143), which create criminal offenses, prescribe proceedings thereunder, and provide penalties for the violation of any of the provisions of the 1st section of the act by a combination of capital, skill, or acts, by two or more persons, firms, partnerships, corporations, or associations of persons, or any two or more of them, to create or carry out restrictions in trade or commerce, are in violation of the Constitution of the United States, being without regard to whether such combination deprives individuals or the public of any legal right. *Gage v. State*, 24 Ohio C. C. 724.

Article 5313 of Sayles's Anno. Civ. Stat., forbidding contracts in restraint of trade, or to prevent competition in the sale of various commodities, is not forbidden by the 14th Amendment of the Constitution of the United States, which declares that no person shall be deprived of life, liberty, or property without due process of law, and also provides that no state shall deny to any person the equal protection of the laws. *Texas Brewing Co. v. Durrum* (Tex. Civ. App.) 46 S. W. 880.

In *State v. Shippers' Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 58, the court, after saying that in *Houck v. Anheuser-Busch Brew-* 64 L. R. A.

ing Asso. 88 Tex. 189, 30 S. W. 869, it had held the anti-trust law of 1889 to be constitutional; and that there was no such difference between that law and the act of 1895 as would affect that question; and that it believed that its decision was correct; and that the law was not in contravention of the Constitution of the state or of the United States,—further said that in the case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, the United States Supreme Court held that a statute of the state of Illinois, in all essential particulars the same as the act of 1895, was in conflict with the 14th Amendment of the Constitution of the United States, because it excepted "agricultural products and live stock while in the hands of the producer or raiser;" and that, recognizing the superior authority of the Supreme Court of the United States upon the question, and in obedience to its decision, it should hold that, in so far as the law of 1895 comes within the terms of the *Connolly* Case, it is invalid, and will not support an action by the state to recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the anti-trust law; but that, to the extent that the statute of the state is not embraced in the decision of the Supreme Court of the United States, it should adhere to its former decision, that it is constitutional and valid, and, therefore, en-

dling of these commodities was, by reason of this repayment alone, made profitable to him. If the purchaser refused to comply with this requirement, they refused to reduce the amount of his allotment or the prices of his goods, so that the business was unprofitable to him. The plaintiff had long participated in this method of transacting business, had been handling the products of the tobacco company in accordance with it, and had an established business in the purchase of tobacco and its products, and in the sale of them throughout the states of Minnesota, North Dakota, and South Dakota, when on May 1, 1902, the defendants made an allotment to him for the succeeding four months, and offered to furnish their commodities to him in accordance with their established practice. He, however, refused to refrain from handling the goods of independent manufacturers who were competing with the defendants. Thereupon the latter refused to reduce the allotment which they had made to him, or the prices thereof, so that the handling of the goods of the tobacco company would be profitable to the plaintiff, and he did not purchase, or agree to purchase, their goods. He was unable to procure them elsewhere, and sustained damages in the sum of \$280.

No other facts are stated in the complaint. There are, however, allegations that the defendants combined and conspired to regulate and to raise the prices of their goods, and to control the output thereof, with the intent to monopolize trade and

commerce among the states of Minnesota and North Dakota and South Dakota; that they combined to arbitrarily fix the prices of their goods, independently of their natural market value, and to refuse to sell them on equal terms to all intending purchasers; and that they did all these things in restraint of trade and commerce among the states. But the only way in which the plaintiff avers that these defendants restrained or attempted to monopolize interstate trade, or disclosed their intent to do so, was by restricting the sale of their own goods to customers who refrained from handling the wares of their competitors by making their sales on the terms which have been stated. The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action. The only facts thus stated are that the tobacco company and its employee refused to make sales of its products to the plaintiff, or to others who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of its competitors. Was this act, or the course of dealing which it illustrates, a violation

forceable by the state. The court said, further, that in the case of *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, the Supreme Court of the United States had held that the state, under the law of 1889, might revoke a license to do business in the state, and affirmed the judgment of a state court to that effect, which it could not have done except by holding the statute to be constitutional in so far as it reserved the right to the state to revoke the license because of the violation of the anti-trust law; and that there was no difference between that case and the present. The court, however, affirmed the judgment below against the state for the reason that the acts of the defendant were not a violation of the anti-trust act.

In *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, which was an action by the state to cancel the permit of the defendant to do business in the state on account of an alleged violation of the laws against trusts by the company, its agents, and employees, the court held that a contract between an oil company organized under the laws of another state and parties dealing in, buying, and selling oils, whereby the company agreed to sell oil only to such parties in their respective districts, and the parties respectively agreed to sell only the oil of that particular company, was void as in violation of the acts of May 30, 1889, and April 30, 1895, which inhibit contracts in restraint of trade.

64 L. R. A.

A writ of error was taken to the Supreme Court of the United States, where the Supreme Court, in affirming the judgment, decided that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, except with respect to business of a Federal nature. That a forfeiture of the permission to a foreign corporation to do business in the state for a violation of the provisions of the Texas act of 1889, under which the permit was given, and which provides for the forfeiture, does not violate any contract obligation, as the provision for the forfeiture was a part of the obligation. And that a repeal of the Texas act of 1889, permitting foreign corporations to do business in the state, does not result from the provision of the Texas act of 1895, exempting labor organizations, on the ground that this provision is unconstitutional, since, if it were so, the entire act would be void, and could not operate as a repeal of the former act; and the judgment of the state court forfeiting the right of the corporation to do business in Texas was affirmed. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

In *National Cotton Oil Co. v. State* (Tex. Civ. App.) 72 S. W. 615, the court said that, while it had been correctly held that certain provisions of the anti-trust statutes were unconstitutional, the supreme court, in the case of *State v. Shippers' Compress & Warehouse Co.*

of the anti-trust law of 1890? That law provides:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, . . . shall be deemed guilty of a misdemeanor. . . ."

Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person. Act July 2, 1890, chap. 647, §§ 1, 8 (26 Stat. at L. 209, 210, U. S. Comp. Stat. 1901, pp. 3200, 3202). Hence the real question in every case which arises under this law is whether or not the contract, combination, or conspiracy challenged is in restraint of trade among the states. It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was

inspired by this purpose is its direct and necessary effect upon competition in commerce among the states. If its necessary effect is to stifle, or to directly and substantially restrict, free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 339, 340, 342, 41 L. ed. 1007, 1027, 1028, 17 Sup. Ct. Rep. 540; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; *United States v. Joint Traffic Assn.* 171 U. S. 505, 576, 577, 43 L. ed. 259, 290, 19 Sup. Ct. Rep. 25; *United States v. Northern Securities Co.* 120 Fed. 721, 725; *United States v. Jellico Mountain Coal & Coke Co.* 12 L. R. A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; *Lourry v. Tile, Mantel, & Grate Assn.* 98 Fed. 817, 826, 106 Fed. 40, 45; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 163, 54 U. S. App. 723, 85 Fed. 271, 294; *United States v. Coal Dealers' Assn.* 85 Fed. 252; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 265, 115 Fed. 610, 619; *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120; *Brown v. Jacobs Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

If, on the other hand, it promotes, or but incidentally or indirectly restricts, competi-

95 Tex. 603, 69 S. W. 61, relying upon the case of *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, held that so much of these statutes as authorizes the canceling and forfeiture of a charter or permit to do business within the state of Texas is valid, and is not in violation of the Constitution.

b. Under state Constitution.

The competition, the defeating or lessening of which ¶ 4, § 2, art. 4, of the Constitution of Georgia (Civ. Code, § 5800), so far as applicable to railroad companies, was designed to prevent, was competition between lines of railroad, viewed with reference to their general business in and through the territory traversed by them, and not competition which might incidentally exist at mere points or particular places. A combination of railroad lines, whatever the form adopted for bringing it about, is not violative of this paragraph of the Constitution, even though it might lessen or defeat competition at some point or points, if, as a general result of the combination, the public at large, as distinguished from the people of special or particular communities, was, in consequence, benefited. *State v. Central R. Co.* 109 Ga. 716, 48 L. R. A. 351, 35 S. E. 37.

Under a provision of the Constitution of the state of Georgia reciting that "the general assembly of this state shall have no power to au-

thorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such agreements and contracts shall be illegal and void,"—a purchase by a railway company in Georgia of the contract to construct the line of a competitive company, and of the securities of such competitive company, with a view to prevent the construction of such competing line, is illegal and void, although accomplished indirectly, and constitutes all concerned in such illegal transaction trustees as to assets resulting therefrom for the benefit of persons whose rights have been invaded. *Langdon v. Central R. & Bkg. Co.* 2 L. R. A. 120, 37 Fed. 449; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 412.

The provision of the Constitution of Georgia, ¶ 4, § 2, art. 4 (Civ. Code, § 5800), that "the general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void," is

tion, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Assn.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. 946; *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78; *Schwalm v. Holmes*, 49 Cal. 665; *Re Greene*, 52 Fed. 104, 115-117; *Re Grice*, 79 Fed. 627, 644; *Aligeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285, 286; *People v. Gillson*, 109 N. Y. 389, 398, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' Union S. H. & L. S. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 755, 28 L. ed. 585, 590, 4 Sup. Ct. Rep. 652; *Welch v. Phelps & B. Wind Mill Co.* 89 Tex. 653, 36 S. W. 71; *Com. v. Grinstead*, 111 Ky. 203, 56 L. R. A. 709, 63 S. W. 427; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589;

Noyes, Incorporate Relations, § 388, p. 563.

In *Hopkins v. United States*, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 45, the Supreme Court said: "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. . . . To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And at page 600, 171 U. S. page 299, 43 L. ed., and page 48, 19 Sup. Ct. Rep., said: "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers, or was intended to cover, such kinds of agreements."

In *Anderson v. United States*, 171 U. S. 616, 43 L. ed. 306, 19 Sup. Ct. Rep. 54, the court quoted this sentence from the opinion in *Smith v. Alabama*, 124 U. S. 465, 473, 31 L. ed. 508, 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, 566, "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to

not absolute in its terms, but was designed only to prevent the general assembly from authorizing one corporation to purchase shares or stock in another when doing so may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly. *Trust Co. v. State*, 109 Ga. 736, 48 L. R. A. 521, 35 S. E. 323.

And so, under its charter, the trust company of Georgia has authority to buy the shares or stock of any other corporation, provided that in so doing it does not violate the provisions of the Constitution; and a purchase by that corporation of the stock of two street railroad companies for the purpose of permitting them to interchange business and transfer passengers from the lines of one of the roads to those of the other, and, for that purpose, to make any physical connections with the railroads of each other, and to enter into any traffic arrangement, which may be necessary to enable each of said companies to grant transfers or interchangeable tickets over the lines of the other,—is not obnoxious to the provisions of the Constitution, ¶ 4, § 2, art. 4 (Civ. Code, § 5800), although the consolidation defeats competition at some point on their lines, or tends to defeat such competition or lessen it. *Ibid.*

The statute of Illinois prohibiting a trust or combination, and relieving third persons from liability to pay for goods purchased from such combination, approved June 11, 1891, in force 64 L. R. A.

July 1, 1891, is not in contravention of § 14, art. 2, of the Constitution of the state. *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651.

The question of the constitutionality of the original act of 1891 is not new, but is one which was passed upon in the case of *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; and the decision in that case has been referred to with approval in the case of *HARDING v. AMERICAN GLUCOSE Co.*, and the act was there held to be constitutional. *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 286, 66 N. E. 349.

The act of the legislature of Ohio of April 19, 1898 (93 Ohio Laws, 143), prohibiting combinations of capital, skill, or acts in restraint of trade or commerce, limiting or reducing the production, or increasing or reducing the price, of merchandise or any commodity; preventing competition in manufacturing, making, transportation, sale, or purchase of merchandise, products, or any commodity; fixing at any standard or figure whereby its price to the public or consumer shall be controlled or established any article or commodity of merchandise, produce, or commerce intended for sale, etc.,—is not a violation of the Constitution of the state of Ohio. *State ex rel. Monnett v. Buckeye Pipe Line Co.* 61 Ohio St. 520, 56 N. E. 464; *State v. Jacobs*, 7 Ohio N. P. 261.

An agreement between several railroad companies, some of which own and control com-

operate as commercial regulations," and then said: "The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

In *United States v. Joint Traffic Asso.* 171 U. S. 568, 43 L. ed. 259, 19 Sup. Ct. Rep. 31, the Supreme Court, after reviewing and affirming the case of *Hopkins v. United States*, and the rule which has been quoted from that case, declared: "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. . . . To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations, however indis-

pensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Hence agreements of competing railroad companies to intrust their power to fix rates of transportation to the same man or body of men (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States v. Northern Securities Co.* 120 Fed. 721), and contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, or the customers to whom he shall dispose of them, and either to fix these prices, terms, and customers by the agreement of the competitors, or to intrust the power to dictate them to the same man or body of men (*United States v. Jellico Mountain Coal & Coke Co.* 12 L. R. R. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; *United States v. Coal Dealers' Asso.* 85 Fed. 252;

peting lines, for the appointment of a common governing committee, or an association (composed of one member from each company) to fix the rates for which freights should be carried to and from points within the state of Texas, is illegal because contrary to art. 10, § 5, of the Constitution of Texas, which provides that "no railroad, . . . or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, . . . or in any way control, any railroad corporation owning or having under its control a parallel or competing line," as the language of this provision of the Constitution of Texas evinces that control in any manner and to any extent was intended to be prohibited,—provided it is such as is calculated to enable one railroad, by means of a contract or agreement for interference in the other's affairs, to keep down competition between them. *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 13 Am. St. Rep. 815, 10 S. W. 81.

The provision of § 5 of art. 10 of the Constitution of Texas which prohibits railroad companies of parallel and competing lines from consolidating or purchasing each the other's property, has no application to street railways, as by the term "railroad" in said section is meant a railroad over which freight and passengers are transported from one town or city to another, and not a road on which passengers are transported over the streets of a town or city. 64 L. R. A.

Scott v. Farmers' & M. Nat. Bank (Tex.) 75 S. W. 7.

Article 5313, Sayles's Anno. Civ. Stat., forbidding contracts in restraint of trade, or to prevent competition in the sale of various commodities, is not forbidden by Bill of Rights, § 19, which declares that no citizen of the state shall be deprived of "property, privileges, or immunities," except by the due course of law. *Texas Brewing Co. v. Durrum (Tex. Civ. App.)* 46 S. W. 880.

Ohio act of April 19, 1898 (93 Ohio Laws, 143), which makes it criminal for two or more persons, firms, partnerships, etc., to enter into any combination in restraint of trade or to regulate prices, and provides penalties for a violation of any of the provisions of the act, without regard to whether such combination deprives individuals or the public of any legal right, is in violation of the Constitution of the state of Ohio. *Gage v. State*, 24 Ohio C. C. 724.

The act of 1899, chap. 146, p. 246, known as the "anti-trust law," is not unconstitutional. *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951.

Where one of two terminal railway companies operating distinct lines of railroad which centered at a union depot, whereby the business of trunk lines of railroads entering the city of St. Louis was connected with such union depot, and by switches and sidings with manufacturing and other shipping establishments in such city,

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120; *Lowry v. Tile, Mantel, & Granite Asso.* 98 Fed. 817, 106 Fed. 40), necessarily have the effect, either to stifle competition entirely, or to directly and substantially restrict it, because such contracts deprive the rivals in trade of their best means of instituting and maintaining competition between themselves.

In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law, unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between

them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers.

The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. *Re Greene*, 52 Fed. 104, 115; *Re Grice*, 79 Fed. 627, 644; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; *Com. v. Grinstead*, 111 Ky. 203, 56 L. R. A. 709, 63 S. W. 427; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427. There is nothing in the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200), which deprived any of these competitors of these rights. If there had

each of such terminal railroad companies owning a bridge across the Mississippi river by which they transported freight and passengers to railroad lines on the other side of the river in the state of Illinois, leased the whole railroad and business of the other of said terminal companies, and thereafter operated both of said terminal railroads, such lease and operation are not a violation of § 17, art. 12, of the Constitution of Missouri, which provides that "no railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line," etc. *State ex rel. Atty. Gen. v. Terminal Asso. (Mo.)* 81 S. W. 895. The decision was adopted by a bare majority, three of the seven judges uniting in a vigorous dissent. The theory of the prevailing opinion was that at the time of the adoption of the provision of the Constitution referred to, and when the convention which framed it was in session, there were in the state corporations engaged in carrying over their railroads freight and passengers from one city to another, and other corporations engaged in transferring the cars brought by a railroad to its terminus in a city to some other point in the same city, or to a common terminus of all railroad traffic in that city; that the char-

acters of the business of the two kinds of corporations were essentially different, although both related to railroad traffic; that the one was railroad business in its ordinary meaning, the other, railroad business of a special character; and that the law might naturally be designed with reference to the one without being intended to affect the other; that at the time the constitutional convention was in session there was a law expressly permitting railroad companies to consolidate their property and interests to this extent, and there was, in fact, according to the averment in the information, such a consolidation of interests by railroad companies in operation in St. Louis. And so, before the court could say that the promoters of the Constitution intended the section referred to, to apply to corporations engaged in strictly terminal business, or to railroad companies uniting in a common terminal system, it must have said that they intended to forbid the formation of a union terminal system as the statute had expressly authorized; and then proceeded to argue that to hold that the language of the section did so would be a forced construction of the same. The view taken by the opinion which expressed the judgment of the dissenting judges was that both of said terminal companies were railroad corporations and within the spirit and letter of the Constitution; that they were in fact competing companies, as competition is just as beneficial between terminal companies as it is be-

been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

The acts of the defendants which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employee fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employee had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

tween other railroads; that, as the terminal company last organized was to engage in the same kind and character of business as that of the original terminal company, it did not need any argument to demonstrate that the incorporators of both companies would not have invested millions of dollars in those enterprises if they had not felt that the business of St. Louis would justify them in so doing, nor that they intended to enter the field as a competitor for some of the business which it is alleged up to that time was practically monopolized by the one company. The judge delivering the dissenting opinion proceeded to say further: "When it is considered that these two railroad corporations each owned or controlled a railroad bridge across the Mississippi river connecting the union station in St. Louis, in which all the railroads from the west concentrated, and each connecting with the railroads running into East St. Louis from the north, east and south, and that each had its switches and connections with the various manufacturing plants of the city of St. Louis; and bearing in mind always that, under our Missouri statutes, each was compelled, if required, to connect with other railroads or suffer them to connect with them, and each to carry and accept for shipments all cars in bulk tendered to it for forwarding,—it is impossible to reject the conclusion that, in the sense of the Constitution and our statutes, they were competing lines, and that they came within the purview of the 64 L. R. A.

The tobacco company and its employee sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors

statute forbidding them to consolidate with each other by outright sale or by the lease and contract alleged in the information. We cannot accept the reasoning that they are not such competing lines as are forbidden by the Constitution to consolidate."

III. *Effect and construction of Federal anti-trust law.*

a. General purpose.

By the act of Congress of July 2, 1890, combinations are condemned, not only when they take the form of trusts, but in whatever form found, if they be in restraint of trade. That is the effect of the words "or otherwise." While it may be that those words should be deemed to include only forms of like character,—that is to say, some form of contract as distinguished from tort, yet, if that be so, it only emphasizes and makes imperative the inference which otherwise would be sufficiently clear, that the word "conspiracy" should be interpreted independently of the preceding words. The words "or otherwise" were used for the purpose of giving full scope to the antecedent words "contract" and "combination," and then "conspiracy" added merely for the same purpose. Construed literally, the terms used in the body of the act forbid all purposes of or combinations in restraint of trade or commerce; but that construction is controlled by the title, which shows that only unlawful restraints were in-

of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated § 2 of the anti-trust act, because it was an "attempt to monopolize . . . part of the trade or commerce among the several states." It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by § 2 of the act of July 2, 1890, chap. 647 (26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200)? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases,—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for them-

selves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the act of July 2, 1890, was, however to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore be the true meaning of the 2d section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (*Hopkins v. United States*, 171 U. S. 578, 600, 43 L. ed. 290, 299, 19 Sup. Ct. Rep. 40; *United States v. Joint Traffic Assn.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25), have a reasonable construction. The purpose of the 2d section is the same as that of the first,—to prevent the restriction of competition,—and the two sections ought to receive similar interpretations. The Supreme Court has declared that the true construction of the 1st section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reason-

tended. But what constitutes an unlawful restraint is not defined; and, under the familiar rule that such Federal enactments will be interpreted by the light of the common law, the statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a contractual character, should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. A conspiracy is in itself unlawful, and, in so far as the statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of, contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 724.

Under the decisions of the Supreme Court of the United States, the consideration of the statute known as the Sherman anti-trust act is no longer an open question. In the exercise of the power to regulate commerce between the states and with foreign nations, Congress may prevent interference by the states with the freedom of interstate commerce, and may, likewise, prohibit individuals, by contract or otherwise, from impeding the free and untrammelled flow of such trade by the act in question. Congress has seen fit, in the exercise of this right, to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce under the states. *Cheapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610, Affirming 105 Fed. 93.

The test of the validity of a contract, combination, or conspiracy challenged under the Federal anti-trust act is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or directly and substantially to restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within

ing, the correct interpretation of the 2d section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the 2d section of this law to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the 2d section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the 2d section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to

be made, and was not made, illegal by the 2d section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price,—much less, at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants, and *the judgment below is affirmed.*

the meaning of that law, and is not obnoxious to its provisions. It is not the purpose of the act to prohibit, or to render illegal, the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Phillips v. Iola Portland Cement Co.* 125 Fed. 593.

Where a contract made in the territory of Utah was a violation of the Federal anti-trust act of July 2, 1890, an indictment for a violation thereof which consisted of a combination or contract which was a violation of said statute, while it was in its territorial condition, was dismissed after the territory became a state, the contract being one which was to be altogether performed within the original territory. *Moore v. United States*, 29 C. C. A. 200, 56 U. S. App. 471, 85 Fed. 463.

The specification by a municipal council, in its resolutions and ordinances for street improvements, that Trinidad lake asphalt shall be the material used, does not constitute such a direct interference with interstate commerce as to be repugnant either to the commerce clause of the Federal Constitution, or to the Sherman anti-trust act of July 2, 1890, because this particular kind of asphalt is a product

of a foreign country and there are deposits in several of the United States from which suitable asphalt can be had. *Fied v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784.

b. What is interstate commerce under this statute?

The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, *Affirming* 24 L. R. A. 428, 9 C. C. A. 297, 17 U. S. App. 466, 60 Fed. 934.

In the above case it appeared that the American Sugar Refining Company, by the purchase of the stock of four other refineries with shares of its own stock, acquired nearly complete control of the manufacture of refined sugar within the United States; that the contracts under which this purchase of stock was made constituted combinations in restraint of trade; and that, in entering into them, the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations, contrary to the act. The evidence in the case, as stated by the judge before whom the case

NEW YORK COURT OF APPEALS.

Isidore STRAUS *et al.*, *Respts.*,
v.
AMERICAN PUBLISHERS' ASSOCIA-
TION *et al.*, *Appts.*

(177 N. Y. 473.)

An agreement between publishers of and dealers in books, whereby they agree not to sell books of any kind to dealers who shall be suspected of selling copyrighted books at less than the net price fixed by the publishers, or who shall supply books to dealers who are suspected of making such sales, violates a statutory provision that every contract whereby a monopoly in the sale of any commodity of common use is or may be created, or whereby competition in the supply or price of any such article is restrained or prevented, or whereby, for the purpose of establishing or maintaining a monopoly, the free prosecution of any lawful business is or may be restricted,—is against public policy and void.

(Gray and Bartlett, *JJ.*, dissent.)

(February 23, 1904.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County which sustained a demurrer to the complaint in an action brought to enjoin the enforcement of an agreement alleged to be

void as against the rights of complainant. *Affirmed.*

The facts are stated in the opinions.

Mr. Stephen H. Olin, for appellants:

The demurrer should have been sustained under the authority of *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578, 68 N. E. 136, 54 App. Div. 223, 66 N. Y. Supp. 615.

Even if the defendants should refuse to deal in any way whatever with the plaintiffs as long as they persist in cutting rates, the defendants' conduct would not be wrongful since they would be acting with the lawful object of protecting their trade.

Mogul S. S. Co. v. McGregor [1892] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 288.

If the combination at bar is valid by the common law, as it existed prior to the statute against monopolies, it is also valid under that statute, which is declaratory of the common law.

Dwarris, Stat. 562; *Re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 92, 41 L. ed. 1069, 22 Sup. Ct. Rep. 747; *Moore v. Albany*, 98 N. Y. 410.

was tried, showed that only 10 per cent of the sugar refined and sold in the United States was refined in other refineries than those controlled, after such purchase, by the American Sugar Refining Company.

The act of Congress approved July 2, 1890, does not authorize the restraint or prevention of contracts which relate exclusively to the acquisition of sugar refineries and the business of sugar refining in a state, the object of which is private gain in the manufacture, which bear no direct relation to commerce between the states, or with foreign nations; and the fact that trade or commerce might be indirectly affected by such contracts does not bring them within the purview of that statute. *Ibid.*

The business of buying and selling live stock at stock yards in a city, by members of a stock exchange as commission merchants, is not interstate commerce, although most of the purchases and sales are of live stock sent from other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for the market. *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

And so a combination of commission merchants at stock yards, by which they refuse to do business with those who are not members 64 L. R. A.

of their association, even if it is illegal, is not subject to the act of Congress of July 2, 1890, since their business is not interstate commerce. *Ibid.*

A rule of a live-stock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange. *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

And so an agreement among persons engaged in the common business, as yard traders, of buying at a city stock yard cattle which come from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, or buy cattle from those who also sell to yard traders who are not members of the association, is not a violation of the act of July 2, 1890. *Ibid.*

In *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, and *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, the defendants were members of the same live-stock exchange, but

The agreement between each of the publishers and each of the jobbers that copy-right books should be sold at retail only at such prices as the owner of the copyright saw fit to fix was lawful.

Victor Talking Mach. Co. v. The Fair, 123 Fed. 424; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 41 L. ed. 1058, 22 Sup. Ct. Rep. 747.

Unlawful acts give no private right of action to a person who is, or but for his willful act would be, benefited by them.

Hutchins v. Hutchins, 7 Hill, 104; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175, 24 N. E. 24.

The several agreements between the publishers and the jobbers in the case at bar are lawful, even without taking into account the monopoly given by the copyright law.

Whitwell v. Continental Tobacco Co. ante, 689, 60 C. C. A. 290, 125 Fed. 454; *Phillips v. Iola Portland Cement Co.* 125 Fed. 593; *Tanenbaum v. New York F. Ins. Exchange*, 33 Misc. 134, 68 N. Y. Supp. 342.

Messrs. Kenmeson, Crain, Emley, & Rubino, also for appellants:

Nothing in the statute makes such acts civil torts, much less civil torts against the state; and, in conferring jurisdiction upon courts of equity, the act furnishes an instance of a statute which confers upon them jurisdiction to restrain and prevent the commission of crimes merely as crimes, and not because they also violate the civil rights of persons, either natural or artificial.

Re Debs, 158 U. S. 564, 593, 39 L. ed.

1092, 1105, 15 Sup. Ct. Rep. 900; *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 362; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373.

Contracts of combination to raise or maintain prices, or to prevent competition, were not enforced by the courts. But they were never held to be criminal. Nor were they held to be violations of the legal rights of other individuals.

Stickney, State Control of Trade & Commerce, 49; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Tanenbaum v. New York F. Ins. Exchange*, 33 Misc. 134, 68 N. Y. Supp. 342; *Re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118.

The monopoly aimed at in the statute is a monopoly created, established, or maintained by means of a contract, agreement, arrangement, or combination.

The essence of a monopoly is to be found in the right which someone has to exclude other persons from some branch of trade or industry that he carries on.

Re Greene, 52 Fed. 105; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Wire Cloth Case*, 19 N. Y. Supp. 413, note; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171.

The contracts, agreements, arrangements, or combinations in restraint of trade, which are declared by § 1, chap. 690, Laws 1899, to be against public policy, illegal, and void, are the contracts, agreements, arrangements,

in the Hopkins Case the defendants were commission merchants who sold the cattle upon a commission as a compensation for their services, while in the Anderson Case the defendants were themselves the purchasers of cattle on the market; but all were members of the same live-stock exchange.

A complaint which alleges that the defendants, who are firms and corporations, had mutually agreed together, each for himself with all the others, that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by the plaintiff, and that, in pursuance thereof, the defendants refused to sell their goods to purchasers of and dealers in plaintiff's goods who had offered to buy defendants' goods, stating as the reason for their refusal that said dealers also bought, sold, and dealt in plaintiff's goods; notifying such purchasers and dealers that, if they would promise not to deal in plaintiff's goods, then, and so long as they kept such promise they might purchase the goods of the defendants, or either of them, otherwise not; and that the defendants had fixed upon and maintained an arbitrary price for all the goods manufactured by them,—is demurrable, as the facts alleged are not objectionable to the provisions of the Federal statute known as the anti-trust act. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 64 L. R. A.

16, 66 Fed. 637. In this case the demurrer had been sustained in the circuit court, and, on the appeal here, two judges were in favor of affirming the judgment of the court below sustaining the demurrer,—one for the reason that the agreement and conduct of the combined defendants set forth in the complaint did not constitute a violation of the 1st or 2d section of the act of July 2, 1890; the other judge in favor of affirmance stated that he was not prepared to adopt this reason for his conclusion, but that his reason for regarding the complaint as demurrable was the more technical one, and that the allegations in regard to the facts which are charged to have existed did not show that the defendants restrained any interstate commerce, or monopolized any part of such contract or commerce. The third judge dissented, and was in favor of reversal.

The reason for sustaining the demurrer in the circuit court was that the complaint failed to show that the plaintiff was engaged in interstate commerce, the allegation of the complaint that the plaintiff was engaged in manufacturing watch cases throughout all the states of the United States and in foreign countries being insufficient for the purpose; and there being no allegation that the defendants were engaged in interstate trade, or that the articles made by them were used in such trade, or that the rights of the general public had been invaded, or interstate commerce injuriously affected by any of the acts of the defendants as

or combinations with which the common law had to deal. They are all contracts, agreements, arrangements, or combinations by which some person, a party thereto, has, by means of the contract, agreement, arrangement, or combination, imposed upon himself a voluntary restraint.

Mitchel v. Reynolds, 1 P. Wms. 181.

The rule in the class of cases in restraint of trade typified in *Mitchel v. Reynolds* has since been modified. The test to-day of the validity of such a contract is not whether the restraint thereby imposed be general or partial, but whether it be reasonable or unreasonable.

Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Tode v. Gross*, 127 N. Y. 480; 13 L. R. A. 652, 24 Am. St. Rep. 475, 28 N. E. 469; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489.

The restriction or prevention of the free pursuit of business contemplated by the statute is one brought about by means of a contract, agreement, arrangement, or combination, and, therefore, voluntary in its nature; and it is for the purpose of creating a monopoly.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Hopkins v. United States*, 171

U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 615, 617, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 235, 44 L. ed. 136, 145, 20 Sup. Ct. Rep. 96; *United States v. Joint Traffic Assn.* 171 U. S. 503, 566-568, 43 L. ed. 259, 286, 287, 19 Sup. Ct. Rep. 25; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L. R. A. 639, 49 Am. St. Rep. 784, 28 Atl. 973.

Contracts, agreements, arrangements, or combinations made between persons, natural or artificial, who, after the making thereof, continue to carry on business separately for their own benefit, but who, by means of the contract, agreement, arrangement, or combination, voluntarily impose upon themselves restraints as to the manner in which they will carry on their businesses, are the kind condemned by the common law as against public policy, and which are now condemned by the statute under discussion.

People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501; *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. 168; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 395; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep.

described in the complaint. *Dueber Watch Case Mfg. Co. v. E. Howard Watch & Clock Co.* 55 Fed. 851.

Where a board of trade, having a property right in its quotations, contracted with different telegraph companies for their transmission and distribution by the latter; such transmission and distribution to be confined to persons who would sign an application embodying an agreement to the effect that the quotation should not be used in the conduct of an unlawful business, to wit, a bucket shop,—such arrangement is not violative of the provisions of the Sherman anti-trust act. *Board of Trade v. Christie Grain & Stock Co.* 121 Fed. 808.

A combination between the owners of brick manufactories, whereby they all agreed to sell and convey their plant to a corporation to be organized under the laws of a state which would have its principal place of business at a place within the state, and whereby they mutually agreed not thereafter to engage in the brick-making business, or in any lines that might be manufactured thereafter at any of the several plants to be operated by the corporation whose creation was there contemplated, or to furnish means, aid, or advice to others seeking to do so in such a way as to come in competition with the said corporation within a territory which may be described as within a radius of 50 miles of the principal place of business of the corporation, within a period of ten years from and after the signing of the 64 L. R. A.

agreement, was not within the condemnation of the Sherman anti-trust act, as it related entirely to the business of manufacturing within a state. *Robinson v. Suburban Brick Co.* 127 Fed. 804.

Where all the lumber manufacturers of a city entered into a combination to monopolize the local lumber market and advance the price of lumber sold for use within the city, and there were a number of outside mills, including two mills in an adjoining state, convenient to the market of the city mentioned, and capable of supplying that market with rough lumber, but without adequate facilities for supplying finished and kiln-dried lumber, the lumber manufacturers forming such combination are not liable in an action, under the provisions of § 7 of the Sherman anti-trust act, for refusing to sell to a person, who had purchased rough lumber at the mills in the adjoining state, finished and dried lumber, unless he would agree to buy thereafter all the lumber required by him for use in the city named, of them, and pay, in addition to their usual prices, the difference between the prices at which he purchased rough lumber at the mills in the adjoining state and the prices charged for that kind of lumber by the members of the combination; as the combination in this case was to advance the price of lumber to the consumers of the city, and had no reference to the trade in lumber with the place in the adjoining state. *Ellis v. Inman, P. & Co.* 124 Fed. 956.

690, 34 N. E. 785; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 293, 59 N. E. 906; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

Mr. John G. Carlisle, with *Messrs. Spiegelberg & Wise*, for respondents:

The contracts, agreements, or combinations alleged in the complaint are prohibited by statute (chap. 690, Laws 1899), and were entered into for the purpose of restraining or preventing competition in this state in the supply and price of an article or commodity of common use, and were intended to restrict or prevent the free pursuit in this state of the lawful business of selling books at retail to the injury of the plaintiffs.

Re Davies, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906; *Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *People v. Milk Exchange*, 145 N. Y.

267, 27 L. R. A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728, 11 Am. St. Rep. 667, 21 N. E. 707; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *People v. Trequier*, 1 Wheeler C. C. 142; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *King v. Journeymen-Tailors*, 8 Mod. 11; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46, 23 N. E. 530; *Drake v. Siebold*, 81 Hun, 178, 30 N. Y. Supp. 697; *Curran v. Galen*, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496, 46 N. E. 297; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211-244, 44 L. ed. 136-148, 20 Sup. Ct. Rep. 96; *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; *People ex rel. McIlhany v. Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 62 Am. St. Rep. 404, 48 N. E. 1062; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State v. Nebraska Distilling Co.* 29 Neb.

In *Phillips v. Iola Portland Cement Co.* 125 Fed. 593, the defendant was a member of a copartnership consisting of merchants engaged in business in Galveston, in the state of Texas. The firm of which defendant was a member made a contract with the cement company whereby it agreed to purchase of the cement company during the year 50,000 barrels of cement to be delivered free on board the cars at Iola, in the state of Kansas, and to pay therefor \$1.20 per barrel. It further agreed not to sell said cement, ship same, or allow same to be shipped, outside of the state of Texas. Under the contract it accepted and paid for nearly one half of the amount sold, and refused to accept or pay for the remainder. In an action for the balance due on the contract for the remainder of the cement it was held that the contract was not in violation of the Sherman anti-trust act, as the cement company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with the defendant's firm had no direct or substantial effect upon competition in trade among the states.

A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust act of Congress, although the 64 L. R. A.

contract may be awarded to some party outside the state as the lowest bidder. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

On the trial of an indictment for conspiracy, among other things charging the combining and conspiring to restrain trade and commerce between the states of the Union and with foreign countries; which indictment and trial grew out of the great railway strike which occurred in June and July, 1894,—the court, in charging the jury, stated that commerce among the states consisted of intercourse and traffic between their citizens, and included the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities; and that the primary object of the statute of July 2, 1890, was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities; but that these provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another. *United States v. Cassidy*, 67 Fed. 698.

Where both the plaintiff and the defendant were corporations organized under state laws and existing in the state, and the goods in question were sold in the state, the sale was

700; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Hawarden v. Youghiogheny & L. Coal Co.* 111 Wis. 545; *Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

The public welfare is best subserved by the encouragement of competition.

People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 133, 43 L. R. A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *People v. Mara*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

The owners of a number of different patents, or of different trademarks, have not the right to combine together to enforce each other's terms; and a combination of the owners of similar patents to limit the price and create a monopoly cannot be sustained.

National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; *National Harrow Co. v. Hench*, 76 Fed. 667; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep.

747; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581.

The plaintiffs have suffered an actionable wrong because defendants have refused to deal with anyone who dealt with them, and have threatened, and in fact done, injury to such persons.

Temperton v. Russell [1893] 1 Q. B. 715, 62 L. J. Q. B. N. S. 412, 4 Reports, 376, 69 L. T. N. S. 78, 41 Week. Rep. 565, 57 J. P. 676; *Quinn v. Leatham* [1901] A. C. 495, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708; *Dueber Watchcase Mfg. Co. v. E. Howard Watch & Clock Co.* 3 Misc. 582, 24 N. Y. Supp. 647; *People v. Duke*, 19 Misc. 292, 44 N. Y. Supp. 336.

Even if patents, during their existence, create a monopoly of the articles patented, a combination of patentees of similar articles to limit the price and create a monopoly could not be sustained, it being against public policy.

National Harrow Co. v. E. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; *National Harrow Co. v. Hench*, 76 Fed. 667; *Strait v. National Harrow Co.* 18 N. Y. Supp. 224; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 157-166, 77 Fed. 288; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 50, 22 L. R. A. 673, 39 Am. St. Rep. 458, 35 N. E. 98; *Berlin Mach. Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236, 38 N. W. 82; *National*

not a transaction of interstate commerce, and is not within the act of Congress of July 2, 1890, and for that reason, no matter what its conditions, could not be said to violate that statute. *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864.

For decisions on this subject as affecting the operation of state statutes, see *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097, *infra*, IV. g; *S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.) 51 S. W. 855, *infra*, IV. v. 1.

c. What are unlawful restraints and monopolies under this statute?

The right of a railroad company to charge reasonable rates does not include the right to enter into a combination with competing roads to maintain reasonable rates. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, Reversing 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58.

The words "unlawful restraints and monopolies," in the title of the act of Congress of July 2, 1890, do not show that the purpose of the act was to include only contracts which were unlawful at the common law, but refer to and include those restraints and monopolies

which are made unlawful in the body of the act. *Ibid.*

An action by the United States for the dissolution of an unlawful combination of carriers under an agreement between them for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, and for an injunction for continuing such a combination, can be maintained without proof of the allegations that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable; as the necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it. *Ibid.* In the opinion in this case the court said: "Assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the interstate commerce act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act."

In *United States v. Coal Dealers' Assn.* 85 Fed. 252, the court, in approving and following the principle laid down in *United States v.* 45

Phonograph Co. v. Schlegel, 117 Fed. 624; *Denamore v. Scofield*, 102 U. S. 375, 376, 26 L. ed. 214, 215; *Scribner v. Straus*, U. S. C. C. Dec. 14, 1903.

Parker, Ch. J., delivered the opinion of the court:

Chief Justice Marshall said long ago, in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. ed. 376, 384: "To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. . . . It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for fourteen years

is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged."

That case and many others were considered recently by the United States Supreme Court in *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state,—of which *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, is an illustration,—he says (186 U. S. 91, 46 L. ed. 1068, 22 Sup. Ct. Rep. 755): "Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was, perhaps, the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *John D. Park & Sons Co. Case*,

Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, Reversing 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, said: "It is, therefore, no defense of a contract or combination, alleged to be in violation of the act, to say that, in view of all the circumstances and conditions, the contract or combination imposes only a fair and reasonable restraint upon trade and commerce. The question is, Does it impose any restraint whatever? If it does, no matter how little or reasonable it may be, it is within the prohibition. This interpretation is in harmony with the other provisions of the statute, which make it unlawful to monopolize, or attempt to monopolize, any part of the trade or commerce among the several states or with foreign nations. The contract under consideration in the *Freight Asso. Case* related to traffic rates for the transportation of persons and property by competing common carriers by railroad; but the doctrine of the case applies as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself; and the clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the Federal government shall be absolutely free and no contract or combination will be tolerated that impedes or restricts their natural flow and volume."

Congress has power to forbid any agreement or combination among or between competing

railroad companies for interstate commerce, by means of which competition is prevented. *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, Reversing 78 Fed. 895.

And so Congress has power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain interstate rates and fares for the transportation of freight and passengers on any of the railroads, parties to the contract or combination, even though the rates and fares thus established are reasonable. *Ibid.*

The constitutional freedom of contract in the use and management of property does not include the right of railroad companies to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable. *Ibid.*

And an agreement of railroad companies which directly and effectually prevents competition is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads, and give the survivor power to raise rates. *Ibid.*

Restraint of trade within the meaning and intent of the Sherman anti-trust act is not dependent upon any consideration of reasonable-

175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578, 67 N. E. 136, upon which defendants apparently rest their claim that the judgment of the appellate division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the Federal government permits them to enjoy for the reasons stated by Chief Justice Marshall, *supra*, it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525), or to envelopes (*Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 292, 59 N. E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, What may be done under the agreement?

Reference to the complaint makes it clear that the association has undertaken to pro-

vide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association. And it appears from the complaint that the practical construction given to this agreement by those operating together under it is that if a dealer is suspected of selling copyrighted books at less than the arbitrary net price it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description.

The fifteenth paragraph of the complaint alleges "that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally, and contrary to the public policy and the

ness or unreasonableness in the combination averred; nor is it to be tested by the prices which result from the combination. Combination that leads directly to lower prices to the consumer may, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition is, within the meaning of the act as now interpreted, restraint of trade. *United States v. Swift & Co.* 122 Fed. 520.

A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

And so an agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the act of Congress approved July 2, 1890, 64 L. R. A.

known as the anti-trust act, so far as it applies to sales for delivery beyond the state in which the sale was made. *Ibid.*

Where manufacturers and wholesale dealers of red-cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states, who have not entered into any combination or contract with residents of other states, have combined and conspired together to fix an arbitrary price to wholesale and retail dealers for an article of merchandise manufactured by them and used in interstate commerce, below which no one is permitted to buy or to sell; and the price so fixed marks a distinct increase of the market price as it had stood theretofore; and the association assumed and exercised, and it is conceded that it will continue to exercise, the power to shut down all mills within the state at will, and for so long a time as it may deem necessary,—such a combination is in restraint of interstate commerce, such as is denounced by the act of Congress approved July 2, 1890, known as the anti-trust act. *Gibbs v. McNeeley*, 60 L. R. A. 152, 55 C. C. A. 70, 118 Fed. 120.

The court said that the act contemplated that the combination therein made unlawful need not be one which should, by its terms, refer to interstate commerce; but that it was enough if its purpose and effect were necessarily to restrain interstate trade. That what was said in *United States v. E. C. Knight Co.* 156 U. S. 1,

establishing, or maintaining a monopoly within this state of the manufacture, production, or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade, or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal, and void."

The order should be affirmed, with costs.

Haight, Martin, Vann, and Werner, J.J., concur.

Gray, J., dissenting:

This case, as it comes before us, presents a complaint alleging that the plaintiffs have suffered injury and damage as the result of unlawful combinations and associations entered into by the defendants, either in the form of the American Publishers' Association, or in the form of the American Booksellers' Association, which were intended to establish and to maintain the retail net prices fixed on copyrighted books by their publishers. A demurrer interposed by the defendants to the complaint was sustained by the court at special term; but it has been overruled by the appellate division, and that court has certified to us this question: "Are the facts stated in the complaint in this action sufficient to constitute a cause of action?" In determining this question we must regard as admitted all the material facts alleged by the plaintiffs. Though their complaint is stated at considerable length, much of it is matter of description or the statement of

legal conclusions. The plaintiffs conduct a department store in the city of New York, under the name of R. H. Macy & Co., and among the departments is one for the sale of books and publications in general. They have a large capital invested in their general business, and their book department is one of the largest in the country, which latter fact is alleged to be due to the cheaper price placed upon the books and publications under a system of sales for cash only. It appears that publishers who sold at retail, and other booksellers, had not adhered to the "list prices" at which books were advertised or offered for sale at retail, but were accustomed to give large and liberal discounts to those familiar with trade customs, and the purchasing public, discovering that fact, was giving its custom to such dealers as the plaintiffs, who had placed fixed prices upon their books. In 1900, to meet a condition from which the publishing business was suffering, about 95 per cent, in number and in extent of business, of the publishers of all kinds of books and magazines, formed the American Publishers' Association, which upon its organization, and in order "to prevent the cutting or reducing of prices on copyright books published by the members of the said association," adopted a resolution, and, with its members, entered into an agreement "by which each of the members of the association agreed that all copyrighted books published by any of them after May 1, 1901, should be published and sold at retail at net prices,—that is, the pub-

conspiracy to accomplish such object, if the railroad is engaged in interstate commerce it will be a violation of the law of Congress commonly known as the anti-trust act. *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 724.

A contract between railroad companies which contemplates the institution of a system of interchange of freight and passengers by a railroad corporation to and with four other corporations, and to cease, from and after the execution of that contract or a subsequent date, the further interchange of freight and passengers on through bills, and by through tickets, with another corporation, is not a violation of the Federal anti-trust act. The court said there was no principle of common law which forbids an individual railroad corporation, or two, or three, or more corporations, from selecting which one of two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk; and that there was nothing in the interstate commerce act to warrant the conclusion that the law had been changed in that particular. The court said, further, that it had reached the conclusion that it was not a contract in unlawful restraint of trade within the meaning of the act of July 2, 64 L. R. A.

1890, for the reason that it was not so at common law, was not made so by the interstate commerce statute, and that the act of 1890, as indicated in the *Deuber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637, and in *United States v. Trans-Missouri Freight Assn.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, citing that case in the circuit court of appeals, is directed solely against contracts which would have been unlawful before the passage of the act. *Prescott & A. C. B. Co. v. Atchison, T. & S. F. R. Co.* 73 Fed. 438.

As has been seen, the *Trans-Missouri Case* was appealed and reversed, the opposite view being given as one of the reasons for such reversal. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, *supra*.

An agreement between fourteen distinct coal producers of a district, whose aggregate production is 5,000 tons of coal a day, which, without making a partnership, undertakes to control the entire output of the several mines for shipment into different states by a leading route, the said fourteen producers having before the making of said agreement been independent operators competing in the open market for the trade which was the subject of the contract, and which were, after the making thereof, prevented from any independent action in fixing prices,

fished price thereof,—and not be subject to any discounts.” They further agreed, as the complaint states it, “that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such net prices.” Thereafter the Publishers’ Association caused to be organized the American Booksellers’ Association, to co-operate, as it is alleged, in the “unlawful purpose of maintaining the price of copyright books and preventing competition in the sale thereof, and in the supply of all books, whether copyrighted or not.” In the effectuation of this purpose the two associations have co-operated, and, because of their agreement, neither of them, nor any of their members, it is alleged, “will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers’ Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination; nor will the said associations nor any of their members sell or supply any books

whatever to anyone who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price.”

In these statements, taken from the complaint, may be found the gist of this suit, and all that is necessary to be considered, in my opinion, in the determination of the question whether, by such combinations and agreements, the defendants have violated the law. Other allegations relate to the refusal of the plaintiffs to join in such combinations; to the methods adopted by the defendants to prevent others from selling books to the plaintiffs, by “blacklisting” them in the book business, and by the use of coercive and intimidating measures; to the establishment by the defendants of a system of espionage, in order to secure information as to the sources of plaintiffs’ supplies of books; and that, as the result of these agreements and of the methods adopted to make them effectual, publishers of books and book dealers have refused to sell books at any price to the plaintiffs, to their damage. The relief asked is, in substance, the adjudication of the unlawfulness of the combination and of the nullity of the agreement alleged, and that an injunction issue restraining action by the defendants under their agreement, of any nature which may make it effectual against the plaintiffs; and, as incidental to such equitable relief, an award of damages is asked.

Whatever else is in this complaint is but subsidiary to, and in demonstration of, the

but obliged to sell at a price fixed by the executive committee named in the contract, or not to sell at all, is in violation of the act of Congress of July 2, 1890. *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610, Affirming 105 Fed. 93.

Where seven corporations, one copartnership, and twenty-three other persons engaged in a combination and conspiracy in directing and requiring their purchasing agents at the markets where live stock was customarily purchased to refrain from bidding against each other when making such purchases; in bidding up, through their agents, the prices of live stock for a few days at a time, to induce large shipments, and then ceasing from bids, to obtain live stock thus shipped at prices much less than it would bring in the general way; in agreeing at meetings between them upon prices to be adopted by all, and restrictions upon the quantity of meats shipped; in directing and requiring their agents throughout the United States to impose union charges for cartage for delivery, thereby increasing to dealers and consumers the charges for such meats; and in making agreements with the transportation companies for rebate and other discriminative rates,—such combination and conspiracy were a violation of the Sherman anti-trust act. *United States v. Swift & Co.* 122 Fed. 529.

A state statute which declares in the state a monopoly in the purchase and sale of alcoholic

liquors, and which protects this monopoly in the state in every way possible and by the most drastic methods; with the direction and enforcement of which the governor, secretary of state, and comptroller general are officially charged, is in no sense within the provisions of the act of Congress of July 2, 1890, as such a statute evidently does not create in, nor give to, any individual the monopoly. It gives it wholly and entirely to the state. *Lowenstein v. Evans*, 69 Fed. 908.

An agreement by which each party thereto agrees to pay to the other percentages on freights so long as either shall carry cattle to a certain port, where there is no provision in the contract as to maintaining rates or preventing competition, and prices are not fixed, nor the dealings confined to a combination of persons, and nothing tends toward a monopoly, is not under the ban of the Federal anti-trust act of July 2, 1890. *Ceballos v. Munson S. S. Line*, 87 N. Y. Supp. 811.

d. Agreement not to engage in business.

Where a corporation sold and transferred its property, business, and good will, a covenant on the part of the stockholders to the effect that they would not, during the next ten years, in the territory, or the immediate vicinity of the territory, dealt in by their company, or operated in by themselves or the agents or employees of the company, engage or in any manner be in-

establishing, or maintaining a monopoly within this state of the manufacture, production, or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade, or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal, and void."

The order should be affirmed, with costs.

Haight, Martin, Vann, and Werner,
J.J., concur.

Gray, J., dissenting:

This case, as it comes before us, presents a complaint alleging that the plaintiffs have suffered injury and damage as the result of unlawful combinations and associations entered into by the defendants, either in the form of the American Publishers' Association, or in the form of the American Booksellers' Association, which were intended to establish and to maintain the retail net prices fixed on copyrighted books by their publishers. A demurrer interposed by the defendants to the complaint was sustained by the court at special term; but it has been overruled by the appellate division, and that court has certified to us this question: "Are the facts stated in the complaint in this action sufficient to constitute a cause of action?" In determining this question we must regard as admitted all the material facts alleged by the plaintiffs. Though their complaint is stated at considerable length, much of it is matter of description or the statement of

legal conclusions. The plaintiffs conduct a department store in the city of New York, under the name of R. H. Macy & Co., and among the departments is one for the sale of books and publications in general. They have a large capital invested in their general business, and their book department is one of the largest in the country, which latter fact is alleged to be due to the cheaper price placed upon the books and publications under a system of sales for cash only. It appears that publishers who sold at retail, and other booksellers, had not adhered to the "list prices" at which books were advertised or offered for sale at retail, but were accustomed to give large and liberal discounts to those familiar with trade customs, and the purchasing public, discovering that fact, was giving its custom to such dealers as the plaintiffs, who had placed fixed prices upon their books. In 1900, to meet a condition from which the publishing business was suffering, about 95 per cent, in number and in extent of business, of the publishers of all kinds of books and magazines, formed the American Publishers' Association, which upon its organization, and in order "to prevent the cutting or reducing of prices on copyright books published by the members of the said association," adopted a resolution, and, with its members, entered into an agreement "by which each of the members of the association agreed that all copyrighted books published by any of them after May 1, 1901, should be published and sold at retail at net prices,—that is, the pub-

conspiracy to accomplish such object, if the railroad is engaged in interstate commerce it will be a violation of the law of Congress commonly known as the anti-trust act. *United States v. Debs*, 5 Inters. Com. Rep. 163, 64 Fed. 724.

A contract between railroad companies which contemplates the institution of a system of interchange of freight and passengers by a railroad corporation to and with four other corporations, and to cease, from and after the execution of that contract or a subsequent date, the further interchange of freight and passengers on through bills, and by through tickets, with another corporation, is not a violation of the Federal anti-trust act. The court said there was no principle of common law which forbids an individual railroad corporation, or two, or three, or more corporations, from selecting which one of two or more corporations they will employ, as auxiliary to their own lines, as the agency by which they will send freight beyond their own lines, or as their agent to receive freight on the auxiliary line to be transmitted to their own line upon through bills, and without breaking bulk; and that there was nothing in the interstate commerce act to warrant the conclusion that the law had been changed in that particular. The court said, further, that it had reached the conclusion that it was not a contract in unlawful restraint of trade within the meaning of the act of July 2, 64 L. R. A.

1890, for the reason that it was not so at common law, was not made so by the interstate commerce statute, and that the act of 1890, as indicated in the *Deuber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637, and in *United States v. Trans-Missouri Freight Assn.* 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58, citing that case in the circuit court of appeals, is directed solely against contracts which would have been unlawful before the passage of the act. *Prescott & A. C. B. Co. v. Atchison, T. & S. F. R. Co.* 73 Fed. 438.

As has been seen, the *Trans-Missouri Case* was appealed and reversed, the opposite view being given as one of the reasons for such reversal. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, *supra*.

An agreement between fourteen distinct coal producers of a district, whose aggregate production is 5,000 tons of coal a day, which, without making a partnership, undertakes to control the entire output of the several mines for shipment into different states by a leading route, the said fourteen producers having before the making of said agreement been independent operators competing in the open market for the trade which was the subject of the contract, and which were, after the making thereof, prevented from any independent action in fixing prices,

fished price thereof,—and not be subject to any discounts." They further agreed, as the complaint states it, "that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such net prices." Thereafter the Publishers' Association caused to be organized the American Booksellers' Association, to co-operate, as it is alleged, in the "unlawful purpose of maintaining the price of copyrighted books and preventing competition in the sale thereof, and in the supply of all books, whether copyrighted or not." In the effectuation of this purpose the two associations have co-operated, and, because of their agreement, neither of them, nor any of their members, it is alleged, "will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination; nor will the said associations nor any of their members sell or supply any books

whatever to anyone who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price."

In these statements, taken from the complaint, may be found the gist of this suit, and all that is necessary to be considered, in my opinion, in the determination of the question whether, by such combinations and agreements, the defendants have violated the law. Other allegations relate to the refusal of the plaintiffs to join in such combinations; to the methods adopted by the defendants to prevent others from selling books to the plaintiffs, by "blacklisting" them in the book business, and by the use of coercive and intimidating measures; to the establishment by the defendants of a system of espionage, in order to secure information as to the sources of plaintiffs' supplies of books; and that, as the result of these agreements and of the methods adopted to make them effectual, publishers of books and book dealers have refused to sell books at any price to the plaintiffs, to their damage. The relief asked is, in substance, the adjudication of the unlawfulness of the combination and of the nullity of the agreement alleged, and that an injunction issue restraining action by the defendants under their agreement, of any nature which may make it effectual against the plaintiffs; and, as incidental to such equitable relief, an award of damages is asked.

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d. Agreement not to engage in business.

Where a corporation sold and transferred its property, business, and good will, a covenant on the part of the stockholders to the effect that they would not, during the next ten years, in the territory, or the immediate vicinity of the territory, dealt in by their company, or operated in by themselves or the agents or employees of the company, engage or in any manner be in-

real cause of grievance, which is that, in order to maintain the retail net price of a copyrighted book as fixed by its publisher, the defendants had entered into a combination, and had agreed with each other that they would only sell to those in the trade who would agree to maintain, and to assist in maintaining, the net retail price, and that they would not deal at all with those who refused strict co-operation in such respect, whether that was shown in the conduct of their own sales, or in the selling to others known by them to be "cutting" the net price. That I regard as the gravamen of this suit.

At the time of the doing of the things alleged in the complaint to have been unlawful, there was upon the statute books of this state an act which had for its object the prevention of monopolies and the prohibition of restraints upon trade and commerce. Chapter 690, p. 1514, Laws 1899. This statute, commonly called the "anti-trust law," contains three sections. The 1st section has a threefold purpose,—in declaring to be against public policy, illegal, and void every contract or combination whereby a monopoly in the manufacture, production, or sale in this state of "any article or commodity of common use" may be created or "whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented," or whereby the free pursuit of any lawful business may be restricted or prevented. I am unable to see how that

any but the second provision of this section can bear upon the present controversy, because the owner of the copyright has a monopoly under Federal laws, and because the agreement complained of does not restrict the pursuit of the book business to localities or to persons, or otherwise than for the purpose of preventing the cutting by anyone of the price of a copyrighted book, through the threatened withdrawal of all business relations with such person. Section 2 of the act makes it a misdemeanor, punishable by fine and imprisonment, for any person or corporation to enter into any such contract or combination. The 3d section provides that the attorney general may bring an action, in behalf of the people, against any person or corporate agency, to restrain the doing in this state of any act in consummation of any contract or combination therein prohibited.

The argument in behalf of the plaintiffs is largely, if not wholly, based upon this statute. I regard its prohibitory provisions, however, as but the declaration of a state policy, which is, to use the language of the opinion in *Re Davies*, 168 N. Y. 89, 101, 56 L. R. A. 855, 61 N. E. 118, 120, "little more than a codification of the common law upon the subject." The contracts, agreements, arrangements, and combinations prohibited by this statute were condemned at common law; but they did not, as this statute does, subject those who entered into them to criminal punishment, or make them amenable to restraint at the suit of the people. It

interested in, either directly or indirectly, for themselves or for others, the same or like kind or character of business as that theretofore conducted, etc.; stating that the meaning of the agreement was that the purchaser was buying and paying for the good will of the business in the largest and fullest scope of the term, and that they would not do anything to interfere with or injure the said business,—an injunction will be granted against one who violates his said agreement by entering into the employ of a rival concern, as such agreement violates neither the Sherman anti-trust act, so called, nor the statute of Michigan of 1899. Such an injunction will also be issued to restrain another company dealing in the same product from aiding such stockholder to violate his contract with the purchaser by employing him in its business. *A. Booth & Co. v. Davis*, 127 Fed. 875.

And so where a number of persons, stockholders of a corporation engaged in the business of catching, salting, and selling fish, agreed, in consideration of the purchase of their business by another, not to enter into competition with him in the fish business for a certain period of time, such contract is not within the condemnation of the Sherman anti-trust act. *Ibid.*

A contract whereby a party sold all his interest and good will in the business of freighting vessels for a certain port, and, for a certain term therein mentioned, agreed not to solicit freights, nor do any business with that port in 64 L. R. A.

or from any place or places in the United States east of the Mississippi river, with certain exceptions, is not invalid under the Federal anti-trust act. *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573.

As to effect of state anti-trust statutes on contract not to engage in business, see *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, *infra*, IV. 1; *Downing v. Lewis*, 56 Neb. 388, 76 N. W. 900, *infra*, IV. n; and cases in *infra*, IV. v, 3.

e. Effect on collateral contracts.

The violation of the act of Congress approved July 2, 1890, by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

And so a recovery of the treble damages authorized by the act of Congress approved July 2, 1890, in case of injury sustained by violation of the act, can be had only by the direct action, and not by way of set-off, in an action brought for the price of goods, by a company illegally formed in violation of the act,—especially when the state practice does not permit the set-off of unliquidated damages. *Ibid.*

The owner and claimant of a vessel which has

might possibly be well said of this statute that, introducing no new rule of law, it now makes the contracts or combinations mentioned, which before were unenforceable, unlawful and criminal offenses, and the subject of preventive judgments, at the instance of the law officer of the state.

If, then, the statute makes the position of the complainants no stronger at law than it was before its passage, it seems to me that the decision of this case should be controlled by our decision in *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578, 67 N. E. 136. Indeed, the decision of that case was made after the passage of chapter 383, p. 310, of the Laws of 1897, of which the act in question is but the continuation and re-enactment, and the existence of the law upon the statute books was not ignored; for it was expressly referred to by Judge Martin, in his dissenting opinion, as a declaration of the policy of the state with reference to combinations of the nature of those described. It was, in my opinion, quite as authoritative upon the question of the lawfulness of the existing combination aimed at in the *Park Case*; for, being a continuing arrangement, it could not be exempt from the operation of the act. The action of the plaintiffs in the *Park Case* was to have declared illegal the course adopted for conducting the business of the sale of proprietary medicines, as devised and carried on by the defendants through their association, under the title of the National

Druggists' Association. The plaintiff was a corporation engaged in the business of manufacturing proprietary or patent medicines and of dealing in the sale of such goods. The association was composed of wholesale and jobbing druggists, and of proprietors and manufacturers, who manufactured and sold their own proprietary articles, or chemical preparations. Its active membership controlled more than 90 per cent of the wholesale and jobbing trade. The plan which the association had adopted and was acting under was to require the manufacturers to compel the purchasers of their goods to contract, as selling agents, to maintain fixed selling prices, in consideration of receiving a certain fixed discount or rebate. In order to maintain a uniform jobbing price for fixed quantities, and also a retail selling price by the druggists, which they were to agree to maintain, it was agreed on the part of the manufacturers, at the instance of the wholesale and jobbing druggists, that they would confine their sales to persons named on a list furnished, as being those who would faithfully observe the prices and conditions named by the manufacturers. The plaintiff in that case refused to unite with the defendants, insisted upon its right to sell proprietary goods at such prices as it saw fit, and sought, by its action, to restrain the defendants from continuing their efforts to prevent it from purchasing, and the manufacturers from selling to it, their goods, by way of threats and by methods of intimidation not materially un-

been libeled in the United States district court, by the owner of a tug, for moneys earned by the tug in towing such vessel, cannot be permitted to repudiate his just debts to the owner of the tug upon an allegation and proof that such owner was, with the owners of other tugs, a member and party to a contract, combination, or association which was illegal under the Federal anti-trust act. The *Charles E. Wise-wall*, 74 Fed. 802, Affirmed in 42 L. R. A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 671.

The defense that a contract is in violation of the act of Congress of July 2, 1890, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action, as the act makes illegal every contract violative of its provisions. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

One of several railroad companies, which was a member of a combination known as the Trunk Line Association, composed of the men of the railroads which operated in different states with a view to avoid and stifle competition upon an agreed division of receipts, is precluded from bringing an action in equity to restrain ticket brokers or scalpers from selling the return tickets of such railroad by a fraudulent connivance with the persons of whom they bought them and those to whom they sell them; which action it could have maintained but for the fact that the combination mentioned is 64 L. R. A.

in violation of the act of Congress of July 2, 1890, known as the Federal anti-trust act. *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689.

As to effect of state anti-trust statutes on collateral contracts, see *Lafayette Bridge Co. v. Streator*, 105 Fed. 729, *infra*, IV. d; *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883; *Crystal Ice Co. v. Wylie*, 65 Kan. 104, 68 Pac. 1086,—*infra*, IV. g; *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 247, *infra*, IV. l.

1. Effect on pre-existing contracts.

Retroactive effect is not given to a statute making combinations in restraint of trade illegal, by applying the statute to a continuation, after its passage, of a pre-existing contract. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, Reversing 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 58.

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g. Effect in regard to patents.

An agreement by the licensor of a patent for improvements relating to harrows not to license

like those complained of in the present case. In that case the object of the combination was to establish uniform jobbing prices and retail selling prices for proprietary goods, and the plan was to enforce compliance through the threatened refusal of the proprietors and manufacturers to sell to dealers who would not maintain the retail price. Between the two cases there are differences in details of the methods availed of; but, while the self-defensive or preventive arrangements may have been more stringent and radical in the one than in the other case, the legal principle is not affected. The effort in each case was to make effective an agreement with respect to the fixing and maintenance of the retail price of an article as much proprietary in the one as in the other case, and the differences in the plan adopted, in sum, are rather of degree; that is, in the present case the defendants have agreed to refuse to have any business dealings with those booksellers who would not co-operate to the fullest extent in maintaining sales of copyrighted books at the retail price fixed by their publishers. It was held in the *Park Case* that the proprietors of the goods

therein in question had the right to adopt such a plan with respect to the disposal thereof as they saw fit, and that no one could complain. The plan was not in restraint of trade; for while, as it was said by Judge Haight, "it is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; and upon the question of prices we must bear in mind that the goods are covered by patent rights and trademarks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified." This plan was not against public policy, it was held, because public policy "commends the conduct of business in such a way as to serve all consumers alike," and "one of the cardinal and chief principles of the plan adopted is the establishing of a uniform price by proprietors, which necessitates the service of all persons alike throughout the United States." Chief Judge Parker also,

any other persons than the licensee to manufacture or sell any harrows of the peculiar style and construction then used, or sold, by such licensee, does not violate the act of Congress of July 2, 1890. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

The agreement of the licensee of a patent for improvements relating to float spring-tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patent before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce, forbidden by the act of Congress of July 2, 1890, since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows. *Ibid.*

In an action in equity to enjoin the defendant from infringing a patent the fact that the complainant was one of a combination which violated the Sherman anti-trust act is no defense to the action. *General Electric Co. v. Wise*, 119 Fed. 922.

Where the owners of different patents engaged in the raisin-seeding business, after litigation among themselves, entered into a combination by which all of the patents were assigned to one under an agreement that such assignee should become the licensor of the patents, that the others of the combination should take licenses from such licensor to use the patents, that the licensor should prosecute all infringements, and that the licenses should be limited to such licensees as should be agreed on, and that each license should contain a covenant on the part of the licensee as to the use and owner-
64 L. R. A.

ship of the patented machines and an agreement not to use any other,—such combination and agreement are not a violation of the Sherman anti-trust act; and, in an action by the licensor against one of the licensees for a balance of license fees, a defense, under which it was claimed that it was such a violation, was held insufficient, the court holding that the contract in question was not obnoxious to the performance of the Sherman anti-trust act. *United States Consol. Seeded Raisin Co. v. Griffin & S. Co.* 126 Fed. 364.

As to effect of state anti-trust statute in regard to patents, see *Columbia Wire Co. v. Freeman Wire Co.* 71 Fed. 302, *infra*, IV. d, and cases in *infra*, IV. v. 4.

b. Remedies

1. Criminal prosecution.

An indictment under § 2 of the anti-trust act, which charges that the defendants had done certain things with intent to monopolize the traffic in distilled spirits among the several states, but which does not contain a distinct averment in the words of the statute, or in unequivocal language, that, by means of the acts charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several states or with foreign nations; and which does not charge that the defendants entered into any unlawful combination or conspiracy, nor contain any averment that they had monopolized trade or commerce among the several states or with foreign nations; but which merely avers that, by means of the acts alleged, they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several states or with foreign nations,—is insufficient, and will be quashed on motion therefor. *United States v. Greenhut*, 50

speaking for the majority of the court in the *Park Case*, was of the opinion, with reference to the charge in the complaint that the wholesale dealers could be proceeded against because they compelled some or all of the manufacturers, against their will and inclination, to refuse to sell their goods to plaintiff, by threats, intimidation, and black-listing, as evidenced by the agreements and written plans of the association and the declared purpose of the members to carry them out to the letter, that the defendants were not doing anything except what they had a right to do. In that case the court divided in opinion upon the sole question whether the agreement alleged was vicious, as operating in restraint of trade and in prevention of competition. It is difficult for me to see wherein the decision in the *Park Case* is not controlling. The logical and consistent application of its doctrine must result in sustaining the demurrer here.

I can discover nothing in the purpose of these defendants which is morally wrong, or which would deserve condemnation at common law. There is no combination to restrain competition among themselves, but

simply an agreement among themselves to bring about more healthful conditions in a certain branch of the general bookselling trade by the maintenance of a uniform fixed retail price on a copyrighted book; that is to say, they agree that publishers of copyrighted books shall fix the net price at which such books shall be sold at retail, and that those prices must be observed by all dealers, at the peril to them, if they undersell, of having business relations wholly severed. That the publisher of a copyrighted book may fix its price cannot very well be denied; and if, by reason of a large number of publishers combining in a plan to compel the net retail price to be universally adhered to in sales, competition may be restrained, that is but an incident of the execution of a lawful plan. How can it be said that the statute in question is operative in such a case, where the copyright constitutes a monopoly which the Federal government has granted to the publisher? The subject of these protective agreements—the very kernel, as we may say, of the combination—was the resolve of publishers to maintain throughout the trade, and everywhere,

Fed. 469; *Re Corning*, 51 Fed. 205; *Re Greene*, 52 Fed. 104.

In the last case the court said: "It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or state corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as to enable the owner or owners to control the traffic therein, or any part thereof, among the states, a criminal offense was committed by such owner or owners."

An indictment under the 2d section of the anti-trust act should state all the facts and circumstances which go to make up the offense charged with sufficient particularity to bring it within the meaning of the statute, and an indictment which simply follows the language of the statute is insufficient. *United States v. Nelson*, 52 Fed. 646.

In order to support an indictment under the act of Congress of July 2, 1890, known as the anti-trust act, it is not sufficient to declare in the words of the enactment, as such an indictment does not set out all the elements of a crime. A contract or combination in restraint of trade may be, not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. Ordinarily a case cannot be made under the statute unless the means are shown to be illegal,—and so it is necessary to declare the means by which it is intended to engross or monopolize the market. And it is not sufficient to allege the means in general language; but, if it is claimed that the means used are illegal, enough must be set out to enable the court to see that they are so, and to enable the defense properly to prepare to meet the charge
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made against it. *United States v. Patterson*, 4 Inters. Com. Rep. 775, 55 Fed. 605.

See *Com. v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471, *infra*, IV. h.

And so, in order to render an indictment for making a contract in restraint of trade or commerce among the several states or with foreign nations under the Federal anti-trust act, there must be alleged in the indictment that there was a purpose to restrain trade as implied in the common-law expression, "contract in restraint of trade," analogous to the word "monopolies" in the 2d section. *Ibid*.

And it must also appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market; and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise. *Ibid*.

Where counts in an indictment for making a contract to restrain trade or commerce among the states or with foreign countries under the Federal anti-trust act allege a purpose of engrossing, monopolizing, or grasping the trade in question, acts of violence and intimidation may be alleged as a means to accomplish the general purpose, as such acts, instead of lying outside of the statute, may aggravate the offense, as they are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief intended to be cured by the statute as negotiations, contracts, or purchases, the former being often used to compel the latter. *United States v. Patterson*, 4 Inters. Com. Rep. 775, 55 Fed. 605.

2. Injunction.

A remedy by injunction for the protection of interstate commerce may be provided by Congress as more efficient than any other civil rem-

a net retail price for copyrighted books, and that was to be enforced to the extent of refusing to have any business dealings with those sellers of books—whether in treaty with the defendants or not—who refused, or connived at the refusal of others, to sell at the price fixed. How was this unlawful? Doubtless, this resolution was of a stringent and wholesale nature; but is it inharmonious with the exclusive or monopolistic nature of the Federal grant of letters of copyright? I do not think so. When, in innovation of the common law, the Congress of the United States exercised its constitutional power to enact copyright and patent laws, it was the purpose that authors and inventors should have monopolies in the ownership and disposition of the subject of the patent or copyright. It does not seem to me, therefore, that any plan, however radical, which is adopted for the protection of the enjoyment of the monopoly, and especially one which simply results in producing absolute uniformity of price rates, can be said to be within the operation of the state law against combinations and

agreements for the creation of monopolies or for the prevention of competition.

The United States Supreme Court, in its consideration of the act of Congress known, commonly, as the "Sherman anti-trust act" (passed July 2, 1890, 26 Stat. at L. 209, chap. 647 [U. S. Comp. Stat. 1901, p. 3200]), which declared that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce, among the states," etc., was illegal, has interpreted it as aiming only at a contract or combination which has for its direct purpose the restraint of interstate trade or commerce, and as not comprehending a case where the restraint was an incidental result. *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50. In that case, by the by-laws of an association its members were forbidden to buy or sell cattle from or to traders not members of the exchange, or to buy from commission men who bought from, or sold to, nonmembers. The United States sought to dissolve the association, and to enjoin the members from carrying out their exclusive rules, upon the theory that they

edy. *United States v. Trans-Missouri Freight Asso.* 186 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, Reversing 24 L. R. A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 38, 58 Fed. 58.

Congress had full power to authorize such civil proceeding in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction and destruction of interstate commerce and trade before it is accomplished. It was just as competent for Congress to provide this civil remedy of prevention as it was to provide for punishment in a criminal proceeding for the unlawful conspiracy entered upon or consummated. *United States v. Elliott*, 5 Inters. Com. Rep. 148, 64 Fed. 27.

The only remedy which a private individual or corporation has for injury by reason of a violation of the Federal anti-trust act is an action at law for the triple damages therein provided, and such private party cannot maintain an action in equity. *Southern Indiana Exp. Co. v. United States Exp. Co.* 88 Fed. 659, Affirmed in 35 C. C. A. 172, 92 Fed. 1022.

The act of July 2, 1890, commonly known as the anti-trust act, makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation; but it gives no new right to bring a suit in equity; and a careful study of the act shows that suits in equity, or injunction suits, by any other than the government of the United States, are not authorized by it. *Blindell v. Hagan*, 54 Fed. 40; *Pidcock v. Harrington*, 64 Fed. 821; *Greer, M. & Co. v. Stoller*, 77 Fed. 1; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Southern Indiana Exp. Co. v. United States Exp. Co.* 88 Fed. 659, Affirmed in 35 C. C. A. 172, 92 Fed. 1022; *Metcalf v. American School Furniture Co.* 122 Fed. 115; *Post v. Southern R. Co.* 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 301. 64 L. R. A.

3. Action for triple damages.

An association of wholesale dealers in tiles, mantles, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fire-place fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to nonmembers for less than list prices, which are more than 50 per cent higher than prices to members; while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership,—is an agreement or combination in restraint of trade within the meaning of the anti-trust act of July 2, 1890. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, Affirming 63 L. R. A. 58, 52 C. C. A. 621, 115 Fed. 27.

Lowry v. Tile, Mantel, & Grate Asso. 98 Fed. 817, 106 Fed. 38, was an action to recover triple damages of the defendants for a violation of the Federal anti-trust act under the provisions of § 7 of the act, and the contract or agreement which was complained of as being in violation of the act was the same contract as the one mentioned in *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, Affirming 63 L. R. A. 58, 52 C. C. A. 621, 115 Fed. 27.

The case in 98 Fed. 817, was the overruling of the demurrer to the complaint, and, in making its decision, the court said that the doctrine of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, was applicable here; that the allegations charging conspiracy and combination to raise the price of the commodities in question, and an agreement by the members of the combination to sell these commodities at such prices as should be arbitrarily fixed by the combination, together with the further allegation that the combination had been made with intent to mo-

were engaged in interstate commerce. But the Federal Supreme Court held, if that were so, that, nevertheless, the combination was not within the purview of the statute, and that the agreement did "not restrict competition among the defendants for the class of cattle dealt in by them."

At common law those combinations were condemned, wherein the persons in combination had agreed between themselves to restrict the production and the supply of some article of prime necessity, for the reason that, as constituting an immediate restraint upon trade and upon competition, it was a detriment to the public, and hence contrary to public policy. They were not condemned by legislation as illegal and criminal, but the courts refused to enforce the agreement. What the law of this state aims at, in undertaking to stamp any of the described combinations and contracts as an unlawful and criminal act, is to prevent an agreement being carried out between persons which looks to the restraint of competition between themselves in, and to the controlling of the production and price of, articles of common use. It was, upon a reasonable

reading, intended to operate upon contracts whose direct effect was to restrain trade, or to prevent competition between its parties, within this state; and its operation should not be extended to cases where the effect was an incident of some plan not itself unlawful. And, as I have before suggested, the monopolies aimed at were those which the contract of the combination might create, and clearly not those which were created by the law of the land.

But this contract of the combination, analyze it how you may, had no other reason or purpose than to protect, in as drastic ways as the parties could devise, the trading business of publishers of copyrighted books. There was no "pooling" in the arrangement; nor was there any restraint imposed upon the parties to it as to competition in the production and sale of some article, which all were engaged in producing and which all were free to supply. The contract did not extend to uncopyrighted books, other than by way of penalty, as the refusal to deal in them might be incidental to the refusal to deal with booksellers who would not live up to, or who would not

monopolize the trade and commerce between the state where it existed and other states, were sufficient, under the authorities, to bring the case within the operation of the provisions of the Sherman act.

The report in 106 Fed. 38, is of the trial of the case, in which the same judge who overruled the demurrer charged the jury that the agreement was a combination in restraint of trade and commerce among the states, because it imposed a tax on a person, or firm, or corporation, desiring to become a member of the association, and also because the members of the association had, in violation of law, entered into a contract and combination by which they attempted to monopolize, and had monopolized, a part of the trade and commerce between the manufacturers in the east and the dealers in San Francisco in the articles of tiles.

There were several defendants in the case, and, from the judgment of \$500 in favor of the plaintiff, the defendants W. W. Montague & Co. appealed, and under that name the judgment was affirmed in 63 L. R. A. 58, 52 C. C. A. 621, 115 Fed. 27, and thereafter, on appeal, by the Supreme Court of the United States as stated.

A declaration which alleges that the plaintiff was engaged in the manufacture of fruit butter, jellies, preserves, etc., and, at the instance of others engaged in the same business, entered into an agreement with them for the formation of a trust or combination for the purpose of advancing and maintaining the prices of such goods; and that he had transferred his property to the trust or combination, after which differences arose between himself and the managers of said trust, and the said trust brought a suit in replevin and took possession of the property, plant, books, etc., which plaintiff had used in the management of his business in connection with said trust, and also brought a suit at law against plaintiff for damages, both of which were yet undecided, it be-
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ing clear from the allegations in the declaration that the plaintiff had attempted to bring the suit under the provisions of the anti-trust act,—is insufficient, as the injuries complained of are not such as give a right of action under that statute. *Bishop v. American Preservers' Co.* 51 Fed. 272.

See also *Southern Indiana Exp. Co. v. United States Exp. Co.* 88 Fed. 659, Affirmed in 35 C. C. A. 172, 92 Fed. 1022, *supra*, III. h, 2.

1. *Case of the Northern Securities Company.*

A recent case arising under the act of Congress approved July 2, 1890, is that of *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, Affirming 120 Fed. 721, and it is one of the greatest importance, not only to those interested in railroad matters, but also to shippers by railroad, and indirectly to all the people generally. Two railroads were in a measure trans-continental, their lines running parallel and not measured by their proximity to other trans-continentals, not far distant from each other, the one chartered by the state of Wisconsin and the other by the state of Minnesota, one almost entirely under the control of one well-known railroad financier, and the other under the control of another equally well known. The stockholders of either road, evidently for the purpose of placing the two roads substantially under one control, permitted and procured the organization of a third corporation known as the *Northern Securities Company* under the laws of the state of New Jersey. The *Northern Securities* association was organized with a capital stock of \$400,000,000, which happened to be just the sum required to purchase the stock of the two railroad companies under an arrangement hereinafter mentioned. The actual cash invested in the incorporation of the *Northern Securities Company* was \$30,000, expended in effecting that organi-

co-operate in, an agreement to maintain the net retail price of a copyrighted book. It is not unlawful for a person to refuse to deal with others, as his judgment or fancy may impel him. His business is his own, and the only limitation upon his pursuit of it is that he shall not interfere with the legal rights of others. It seems to me that what he may lawfully do himself he may unite with others in doing, if of some common advantage. See *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Macaulay v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119. Combinations for the prevention of competition have been commonly understood to be made between those who themselves have been competitors in the particular business, and who enter into an agreement with each other to regulate the price of the particular article of necessity traded in. The agreement alleged here is

not of that nature. If the law is violated by this agreement, it is not because competition between the parties is to be suppressed, for their object is solely to maintain the net retail prices which they, as publishers, have rightfully fixed on the copyrighted books they are selling. What competition is prevented must be, plainly, that incidentally occurring between booksellers who, for some advantage to be gained in their business, would sell such books under the retail price fixed by their publisher. But if that is the test to be applied to the legality of the combination or of the agreement attacked, it appears to me to be an extraordinarily inaccurate one, and quite beyond the intent of the statute supposed to incorporate the common-law rule.

To summarize, as it has been well done in the argument of the appellant's counsel: The purpose of the parties to this contract, to maintain one price for the same book to all retail buyers, was limited to copyrighted books published by members of the American Publishers' Association, and did not extend to uncopyrighted books, whether published by such members or by others. Nor

zation. Thereafter the Northern Securities Company, as it might legally do under its New Jersey charter and the laws of that state, purchased the shares of the stockholders of the two railroad companies to an amount more than sufficient to give it a controlling interest in both of them, paying to such stockholders the market value of their shares in its own certificates of stock at their par value. The action was brought in the United States circuit court to enjoin the Northern Securities Company from exercising any control over the operations of the railroad companies, and the latter from submission to any such control, and a decree substantially to that effect was made in the circuit court. On appeal to the supreme court it was held that the combination by the stockholders to form the stockholding corporation which acquired, in exchange for its own capital stock, a controlling interest in the capital stock of both railway companies, violated the anti-trust act of July 2, 1890, which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce, or any part of it. That Congress did not exceed its powers under the commerce clause of the Federal Constitution in enacting the anti-trust act declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stockholding corporation which shall acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies. That enforcement of the provisions of the anti-trust act of July 2, 1890, by a Federal-court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the

purpose of acquiring a controlling interest in the capital stock of such companies from exercising the power acquired by such corporation by virtue of its acquisition of such stock does not amount to an invasion by the Federal government of the reserved rights of the states creating the several corporations. That the constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of the anti-trust act of July 2, 1890, by a Federal-court decree enjoining a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from acquiring any further stock therein, from voting such stock as it then holds or may subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings; and may restrain the railway companies from permitting or suffering any such action on the part of a stockholding corporation, and from paying any dividends on account of the stock held by it.

In the above case Mr. Justice Brewer concurred in the result only because the facts in the case showed that there was an unreasonable combination in restraint of interstate commerce, and within the letter and spirit of the statute and the power of Congress, and, in doing so, said that, while he was with the majority of the court in the decision in *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed.

was any party restrained from selling uncopyrighted books, and uncopyrighted books only, to any person, provided such person does not buy or sell copyrighted books published by the members of that association. It is only to dealers who themselves insist upon selling at retail the copyrighted books of the members of the association at prices less than the net prices fixed by the publishers, or who insist upon reselling at wholesale such copyrighted books to such dealers, that the parties to the combination are restrained from selling.

I am led to the conclusion, after a careful consideration of the question presented, upon principle as upon the authority of the *Park Case*, that the question certified should be answered in the negative, and therefore I think that the order of the appellate division should be reversed, and that the order of the special term should be affirmed.

Bartlett, J., dissenting:

I agree with the opinion of Judge Gray. The agreement attacked has for its sole object the protection of copyrighted books.

1007, 17 Sup. Ct. Rep. 540, followed by the cases of *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, *Reversing* 76 Fed. 895; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 138, 20 Sup. Ct. Rep. 96; and *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, *Affirming* 63 L. R. A. 58, 52 C. C. A. 621, 115 Fed. 27, he thought that in some respects the reasons given for the judgments could not be sustained, and that, instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the statute; that the act, as appears from its title, was leveled at only "unlawful restraints and monopolies;" that Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld; and that the purpose, rather, was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. The Chief Justice and Justices White, Peckham, and Holmes dissented for two reasons, and all concurred in the dissent for both reasons, Mr. Justice Holmes writing an opinion in which he claimed to show that there was a distinction between restraint of trade and competition. He assumed that the only purpose of the purchase of the stock was to suppress competition between the two roads, and that the union of two interests, corporation or otherwise, whereby competition between them alone might be ended, was not a combination in restraint of trade under the statute, although, if they singly or together united in contract with a stranger by which their several or joint

I consider the construction given to it by Judge Gray is logical, conducive to the best interests of trade, and consistent with the latest utterance of this court on the subject,—*John D. Park & Sons v. National Wholesale Druggists' Assn.* 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578, 67 N. E. 136. It cannot be reasonably said that a publisher of books protected by copyright, and a dealer in books generally, may not say to his customers in the trade that if they cut the prices of his copyrighted books he will sever business relations absolutely. If this be so,—and I do not understand it can be successfully questioned,—why may not any number of men similarly situated agree to adopt that policy?

There is a phase of this case that has not been specially discussed, but which may be considered by way of argument. The refusal to maintain trade relations with a given individual is an inherent right which every person in business may exercise, for reasons he deems sufficient, or for no reason whatever. It is a part of that liberty of action which the Constitutions, state and Federal, guarantee to the citizen. This case

freedom in trade between the states should be cut down, it might be. Mr. Justice White, in his dissenting opinion, claimed that, if Congress had attempted to render penal and provide for the restraint of such contracts as the one under consideration, it would have exceeded its powers under the Constitution, but agreed with Mr. Justice Holmes that it had not done so, and that the act did not apply to contracts or transactions of this character. As said before, all four justices who dissented agreed to both of the propositions considered respectively by Justices Holmes and White.

See *Minnesota v. Northern Securities Co.* 123 Fed. 692, *infra*, IV. 1.

IV. Effect and construction of state anti-trust laws.

a. Arkansas.

In an action against an insurance company to recover a penalty for violation of the anti-trust law of Arkansas (Act 1899, p. 50), where the complaint alleges that the defendant, while engaged in business in this state, became and was "a member of a pool, trust, agreement, combination, confederation, or understanding with the corporations engaged in similar business to regulate or fix the price or terms for insuring property" (the language quoted being the language of the act),—a demurrer on the ground that the complaint is insufficient in failing to aver that the pool, trust, agreement, etc., was formed for the purpose, or had the effect, of fixing the company's business in the state will not be sustained. *State v. Etta F. Ins. Co.* 66 Ark. 480, 51 S. W. 638.

A foreign insurance company doing business in Arkansas, which enters into an agreement with other insurance companies formed outside the statute for the purpose of fixing the rates of insurance in foreign countries, not intended to affect, and which does not affect, persons, prop-

discloses one of the saddest phases of our modern business life. It is a well-known fact that the great department stores of the country have encroached upon many lines of trade entirely distinct from the main and legitimate business in which they are engaged. As an illustration, a dry goods establishment, engaged in selling a vast number of articles legitimately related to its business, concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries, and numerous other articles that need not be mentioned, at cut prices, representing only the cost of production, and oftentimes far below it. The inevitable effect of this policy is to draw a large number of people to these establishments, and in the final result the dealer makes good his losses in the outside trade by the prices he obtains in his legitimate business. It may be fairly assumed that the general business is conducted at a profit. The result is that a large number of the re-

tail dealers in the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling. It also results in great damage to manufacturers, producers, and wholesale dealers in loss of customers who have been driven into insolvency. It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or, indeed, may donate them to their customers. It is, however equally true that the manufacturers, producers, and wholesale dealers may say to the men whose policy is thus carrying ruin and destruction to their business and that of their customers that, "if you persist in this disastrous cutting of rates we will sever all business relations absolutely." These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men.

erty, or prices of insurance in the state, does not thereby subject itself to the penalty imposed by the act of March 6, 1899, upon any corporation transacting any kind of business in the state which becomes a party to any pool or combination to fix or limit rates of insurance. *State v. Lancashire F. Ins. Co.* 66 Ark. 466, 45 L. R. A. 348, 51 S. W. 633.

b. California.

A contract by one selling stock in a corporation organized for the posting of bills, not to engage in that business in competition with the corporation, is void as in restraint of trade, under Cal. Civil Code, § 1673. *Merchants' Ad. Sign Co. v. Sterling*, 124 Cal. 429, 46 L. R. A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

c. Georgia.

See *supra*, II. b.

d. Illinois.

Under a statute of Illinois (1897) making criminal a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, for either, any, or all of the following purposes: First, to create or carry out restrictions in trade; second, to increase the price of merchandise or commodities; and third, to prevent competition in the sale or purchase of merchandise or commodities,—a corporation engaged in the manufacture and sale of brick may maintain an action for an injunction against other corporations and individual manufacturers and dealers in brick, and a corporation or association of masons and builders, restraining them from carrying out an agreement, combination, or conspiracy arbitrarily to increase the price of brick over and above the prices for which they had been selling, a portion of which increased price to be paid into a fund or pool, which should be held by the four conspiring brick dealers, to be divided by them *pro rata*; and the remainder to be paid to the said corporation of masons and builders, for and in consideration of the fraudulent agree-

ment on the part of the said masons' and builders' association, to buy or use, or permit to be used, no brick at any price whatever, except those which should be sold by said four conspiring brick dealers, or some one of them. *Union Pressed Brick Co. v. Chicago Hydraulic Pressed Brick Co.* 31 Chicago Legal News, 428, 4 Chicago L. J. Weekly, 346.

A corporation and its members in their control over it may constitute a trust or combination to fix the price of merchandise or limit the amount sold, within the meaning of a statute prohibiting such trust or combinations, and relieving third persons from liability to pay for goods purchased from such combination, and such combination may be made illegal by subsequent legislation; and so, a statute relieving purchasers from a trust or combination to raise the price of food products from liability to pay for their purchases will apply to purchases made after its passage, under a continuing contract previously executed, which guarantees payment on a certain day of each month for goods furnished during the prior month. *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651.

See *United States v. Trans-Missouri Freight Asso.* 168 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, *supra*, III. f; *Sterling Remedy Co. v. Wyckoff, S. & B.* 154 Ind. 437, 56 N. E. 911, *infra*, IV. e.

In an action for an injunction to restrain the defendant from making and using certain machines for the manufacture of barbed wire in infringement of complainant's patent, the fact that complainant, a corporation organized under the laws of the state of Illinois for the purpose of acquiring patents and granting licenses thereunder, had become possessed of many, if not all, of the valuable patents for the manufacture of barbed wire and the machines for so doing, and had granted a large number of licenses to persons and corporations under its said patents, is no defense to the action, or to a motion for a preliminary injunction on the ground that it exists in violation of the anti-trust laws of the state of Illinois, as the entire theory and purpose of our patent laws are to

UNITED STATES CIRCUIT COURT OF APPEALS.

City of ATLANTA, *Plff. in Err.*,

v.

CHATTANOOGA FOUNDRY & PIPE-
WORKS *et al.*

(127 Fed. 23.)

1. A municipal corporation engaged in the business of supplying water to its inhabitants for profit, which is injured in the purchase of necessary supplies by a combination among producers which is invalid under the anti-trust act, is entitled to maintain an action for redress under the provisions of that act.
2. Members of a combination to enhance the price of a commodity, which is void under the anti-trust act, who share in the profits secured by the combination, cannot claim exemption from suit on the part of a consumer under the provisions of the statute, on the ground that no direct purchase was made from them, nor complain

that all the members of the combination were not made parties to the action.

3. That a consumer injured in the purchase of supplies by a combination, illegal under the anti-trust act, is not engaged in an interstate business, does not deprive it of a right of action under the provisions of that act.
4. The action provided by the 7th section of the act of 1890, in favor of a consumer injured by an illegal combination, is not penal so as to be governed by the provisions of the Federal statute prescribing the limitation period for the commencement of such actions.
5. An action by one injured by being compelled to pay an excessive price for supplies because of a combination in violation of the anti-trust act, to recover three times the amount of the loss as authorized by the statute, is not governed by a statute limiting the time of bringing actions for injuries to personal or real property and actions for the detention or con-

create a limited monopoly. *Columbia Wire Co. v. Freeman Wire Co.* 71 Fed. 302.

See cases in *supra*, III. g, and *infra*, IV. v, 4.

In an action by a corporation against a city to recover the price of a bridge built by the plaintiff for the defendant, the fact that the plaintiff is a trust or combination within the Illinois trust act of 1891 cannot be interposed as a defense, as that fact must be determined in a direct proceeding, as the statute is silent as to the method to be pursued in determining whether a corporation seeking to enforce a claim comes within the prohibition of the act, and there has been no long established usage in the premises. *Lafayette Bridge Co. v. Streater*, 105 Fed. 729.

In an action by a corporation originally formed for the purpose of manufacturing strawboards, upon a lease made by it to a company organized ostensibly for the manufacture, purchase, and sale of strawboards, but which really had no such object, but was formed for the purpose of reducing the production and raising the price of that commodity, such lease being guaranteed by another company, which controlled a large number of strawboard manufacturing establishments throughout the country, and afterwards assigned by the lessee to its guarantor, the whole transaction being in effect an arrangement between the company named as lessor in the lease and the corporation, which was the guarantor and assignee thereof, whereby the corporation leasing its premises and manufacturing plant agreed in that form to cease operating its plant for the purpose of reducing the production, and thereby enabling the corporation, which was the guarantor and assignee of the lease, to raise the price of strawboards,—it was held that such transaction was a mere shift or device gotten up for the purpose of limiting the production of strawboards, and fixing its price, in violation of the law of the state known as the anti-trust act, and the lease was, therefore, void, and no recovery could be had thereon. *American Strawboard Co. v. Peoria Strawboard Co.* 65 Ill. App. 502.

A contract whereby one party thereto agrees to keep on hand and sell at retail during the 64 L. R. A.

life of the contract certain patterns furnished him by the other party, and not to sell or deal in, directly or indirectly, other patterns than those manufactured by the other party, and to sell them at a fixed price only, is not a violation of the statute of Illinois relating to trusts and combinations, as the statute does not apply to a contract whereby an agent is created to sell specific articles; and by the terms of the statute the limitations put upon an agent in the sale of his principal's goods are not affected. *Welboldt v. Standard Fashion Co.* 80 Ill. App. 67.

a. Indiana.

The anti-trust law of Indiana of 1897 was prospective, and not retrospective; it was not intended to, and did not, affect contracts previously made, nor their enforcement, and has no application whatever to such contracts; and so, where a contract sued upon was entered into and performed by the plaintiff, and the amount thereof was due and payable by defendant nearly two years before that law took effect, the fact that the plaintiff had entered into an agreement, contract, and combination in violation of the act of 1897 is no defense to the action. *Sterling Remedy Co. v. Wyckoff, S. & B.* 154 Ind. 437, 56 N. E. 911.

See *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, *supra*, III. f; *Ford v. Chicago Milk Shippers' Asso.* 135 Ill. 166, 27 L. R. A. 298, 39 N. E. 651, *supra*, IV. d.

f. Iowa.

The act of the 22d General Assembly of Iowa, chap. 84, § 1 (McClain's Code, 5454), inhibiting any pool, trust, agreement, or combination or confederation to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever, covers a compact between local insurance agents to fix rates upon all risks of insurance within a certain locality, as insurance is a commodity. *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428.

version of personal property, but is governed by the provision limiting the time for bringing actions on a statutory liability.

(December 8, 1908.)

ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in favor of defendants in an action brought to recover the amount provided by the anti-trust act for injuries caused by an illegal combination. *Reversed.*

Statement by Lorton, Circuit Judge:

This was an action to recover damages under the 7th section of the act of Congress of July 2, 1890, chap. 647 (26 Stat. at L. 210 [U. S. Comp. Stat. 1901, p. 3202]), known as the "anti-trust act." The plaintiff is a municipal corporation of the state of Georgia. The defendants are two manufacturing corporations of the state of Tennessee,

engaged in the business of making and selling cast-iron pipe and fittings.

The declaration averred that on or about the 28th of December, 1894, the said two companies entered into an unlawful combination for the purpose of restraining interstate trade and commerce with four other corporations engaged in the same line of manufacture, to wit, the Anniston Pipe & Foundry Company, and the Howard-Harrison Iron Company, both corporations of the state of Alabama, and conducting business in that state; the Dennis, Long, & Co., a corporation of the state of Kentucky, and carrying on its business in said state; and the Addyston Pipe & Steel Company, a corporation of the state of Ohio, engaged in business at Cincinnati in that state. The illegal trust agreement complained of is the identical trust which was dissolved by decree of this court in the case reported as *United States v. Addyston Pipe & Steel Co.*

See *Aetna Ins. Co. v. Com.* 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624, *infra*, IV. h; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 307, *infra*, IV. v. 1.

Where one firm contracted with another firm to the effect that all corn and oats purchased at a certain place should be on joint account, the provision of the Code of Iowa, § 5060, that any partnership or individual creating any trust, pool, or combination with any other corporation, partnership, or individual to regulate or fix the price of any article of merchandise or commodity shall be guilty of a conspiracy is not a defense to an action by the members of one firm against the other for a partnership accounting and payment of the amount claimed to be due by the plaintiff from the defendants on such accounting, as such a contract is not illegal under the provision of the Code mentioned. *Willson v. Morse*, 117 Iowa, 581, 91 N. W. 823.

g. Kansas.

Foreign insurance companies doing business in Kansas, that combine to control and increase the rates of insurance on property within a city in that state violate the provision of chap. 257 of the Laws of 1889, being "an act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor;" and their local agents, who attempt to, and do, enforce such combined rates, are subject to prosecution under the provisions of said act. *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, 34 Am. St. Rep. 152, 31 Pac. 1097.

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Where a boiler company sold two large boilers to a person, and took in part payment therefor his two promissory notes, and the contract was made and signed by the maker and indorser of the notes, by which it was agreed that the

boiler company should retain as security for the payment of the notes the ownership and title of the boilers, and that, if the debt was not paid when due, the possession of the boilers might be taken by the boiler company; and the notes and contract were thereafter assigned to one who brought an action of replevin against the maker and indorser of the notes to recover the possession of the boilers, and, after the commencement of the action, assigned the contracts securing their payment to the plaintiff herein, who had been substituted as such,—an answer that the plaintiff was a member of a trust created by a combination of two similar companies, which had combined to destroy the quantity of salt to be produced, the proportion of the salt business which should be done by each corporation, and the price at which it should be sold to consumers, is no defense to the action, as, although the language of the anti-trust act is general, it is manifest that the legislature, in aiming to prevent the enforcement of the illegal arrangement or contracts prohibited by the act, evidently did not intend to deprive persons of any civil rights, or place them outside the protection of the law, or to inflict penalties or punishments without a trial conducted under the safeguards which the Constitution provides; and the provision invoked was intended to apply where the unlawful arrangement, contract, or interest was sought to be enforced, or some step taken designed to promote the operation of the unlawful trust, combination, or conspiracy. *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883.

In an action against an ice company for breach of contract for failure to deliver ice the plaintiff cannot enhance his damages by alleging and proving that the failure of the defendant corporation to deliver the ice was in consequence of its having sold all its ice to another corporation under a combination or conspiracy in violation of the anti-trust laws, as the motive which actuated the defendants in violating their contract was an immaterial consideration. *Crystal Ice Co. v. Wylie*, 65 Kan. 104, 68 Pac. 1086.

An agreement between all the grain buyers of a town among themselves to defeat the grain

46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271 and affirmed by the Supreme Court in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. Reference may be made to the opinions in those cases for the nature and methods of the trust out of which has arisen the present action.

The declaration, in substance, charges that the plaintiff was engaged in conducting a system of waterworks, and that it derived a large revenue from the sale of water to private consumers, the income going into the city treasury; that, for the purposes and uses of its said waterworks business, it bought during the operations of said unlawful trust a large supply of iron water pipe, and that the contract for its supply of such pipe was given to the Anniston Pipe & Foundry Company as the lowest bidder. It is then averred that, by reason of the said unlawful agreement between the said producers of said pipe, all competition was

suppressed, and that the said Anniston company obtained the contract through an arrangement by which it was to be allowed to obtain same at a price agreed upon between said conspirators, without any competition, and that for this privilege it agreed to pay, and did pay, to the said association a large sum, called a "bonus," which was to be divided between the parties to said arrangement in agreed proportions. It is, in effect, charged that the "bonus" constituted the difference between the fair and reasonable value of the pipe so bought by plaintiff, and the price which it was compelled to pay, and that this large and unreasonable price was extorted from plaintiff through the unlawful suppression of competition, and by the instrumentality of fictitious bids put in by other parties to said association, so arranged as to create the semblance of competition, and yet secure the contract for the Anniston company at

trade at that place, which permitted any one of them to buy as much grain as he chose and to pay for it such price as he chose, nevertheless, providing that, if he purchased more than his allotted share he should pay to the others 3 cents per bushel for the excess bought; which agreement was entered into for the express purpose of preventing competition among the buyers, and had that effect; and for the further purpose of pooling the profits of the grain trade and the formation of a grain trust among the buyers, and it had that effect,—is such an agreement as would have been void and nonenforceable at common law, and falls within the condemnation of the anti-trust act of 1897; as, in enacting that law, it was competent for the legislature to make penal the doing of that which the courts themselves recognized as hurtful to the body politic, and for that purpose refused to countenance; and, in passing the act mentioned, the legislature did no more; and a conviction for violation of the act was affirmed. *State v. Smiley*, 65 Kan. 240, 69 Pac. 199.

In a prosecution for a conspiracy in restraint of trade the information should allege the names of all those parties to the conspiracy known to the prosecuting officer; but it is not incumbent upon the prosecution jointly to charge all those alleged to have participated in the unlawful undertaking. *State v. Dreany*, 65 Kan. 292, 69 Pac. 182.

Members of an association, against whom a penalty or fine has been imposed for an infraction of the by-laws or rules of the association, cannot maintain an action against the association or its officers to enjoin them from suspending the plaintiffs from membership in said association, and to compel the defendants to retain the plaintiff in their membership therein, on the ground that the association is a combination or conspiracy in violation of the anti-trust law (Laws 1891, chap. 158). *Greer v. Payne*, 4 Kan. App. 153, 46 Pac. 190.

See *Froelich v. Musicians' Mut. Ben. Asso.* 98 Mo. App. 383, *infra*, IV. 1.

The word "trade," in chap. 257 of the Laws of 1889, entitled, "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties There-

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As to what is interstate commerce under the Federal anti-trust act, see cases in *supra*, III. b.

b. Kentucky.

In *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301, in holding that a combination of funeral directors by which they agreed not to furnish any essentials for a funeral to one who was indebted to a member of the combination, under a penalty for violating the agreement, did not furnish the ground of an action in favor of one who was indebted to the combination, against any of the members thereof, the court said: "This association may be guilty (which we do not decide, as the question does not arise here) of the violation of this chapter of the Kentucky statutes [the anti-trust act], and yet the plaintiff would not have a cause of action against the members thereof. Although the association might control and fix the price of property, merchandise, etc., and, in so doing, be guilty of a violation of the statute, yet, if they refused to sell such merchandise or property, it does not follow that one could maintain an action for damages because of their refusal to sell to him."

An agreement with a manufacturer not to resell the goods furnished by him at less than a specified price is not within Ky. Stat. § 3915, for the suppression of conspiracy and trusts. *Ibid.*

See *Ferd Helm Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691, *infra*, IV. 1.

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the price set by the combination as the ostensible lowest bidder. The plaintiff avers that, by reason of the formation of said illegal combination, interstate commerce in cast-iron pipe was restrained, and plaintiff compelled to deal only with the said Anniston company, and to pay a price agreed upon by the members of the combination, which was unreasonable; that the bonus so paid out of the price paid by plaintiff was paid into a common pocket, and divided among the conspirators in an agreed way; and that the two Tennessee corporations here sued received their due proportion of said bonus according to the terms and plans of the scheme. By all of which the plaintiff avers that it was compelled to pay for the cast-iron pipe so bought and used in its said waterworks \$15,000 more than would have been paid but for the said unlawful trust between the producers of such pipe, and it lays the damage to its business and

property at triple the said excess price so paid and reasonable attorneys' fees.

The defendants plead the general issue of not guilty, and the Tennessee statutes of limitations of one and three years.

Upon the conclusion of all of the evidence, the court instructed the jury to find for the defendants. This has been assigned as error, and this writ sued out by the plaintiff below.

Argued before *Lurton, Severens, and Richards*, Circuit Judges.

Messrs. George Westmoreland and E. F. Goree for plaintiff in error.

Mr. Frank Spurlock for defendants in error.

Lurton, Circuit Judge, delivered the opinion of the court:

The plaintiff's action is to recover damages incurred in its "business or property"

Com. 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624.

See *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428, *supra*, IV. f; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, 34 Am. St. Rep. 152, 31 Pac. 1097, *supra*, IV. g; *Fire Ins. Cos. v. State*, 75 Miss. 24, 22 So. 99, *infra*, IV. k; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595, *infra*, IV. l.

Ky. Stat. §§ 3915, 3917, prohibiting any combination to regulate or fix prices, and any combination to limit production, was not repealed by § 198 of the Constitution, as the requirement of that section is not a grant of power, and does not impliedly prohibit the legislature from going beyond the duty enjoined; and the statute is not void for uncertainty. *Com. v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471; *Com. v. Bavarian Brewing Co.* 112 Ky. 925, 66 S. W. 1016.

Under Ky. Stat. §§ 3915, 3917, an indictment which follows the language of the statute, the words of which are descriptive of the offense, is complete and sufficient, even though the acts charged against the accused are not particularly stated, or the means by which the conspiracy was committed and carried out, set out in the indictment. *Com. v. Grinstead*, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471.

See *United States v. Nelson*, 52 Fed. 646; *United States v. Patterson*, 4 Inters. Com. Rep. 775, 55 Fed. 605, *supra*, III. h, 1.

An association of wholesale grocers, which holds meetings to consider the state of the business, and through its officers obtains from the manufacturers the market changes that occur from time to time, and obtains from the various carriers the freight rates to different points, which are published in a rate book for the benefit of members of the association and others, is not an unlawful combination under Ky. Stat. § 3915, called the conspiracy or trust statute. *Com. v. Grinstead*, 111 Ky. 203, 58 L. R. A. 709, 63 S. W. 427.

1. Michigan.

While there may be some doubt as to the 84 L. R. A.

validity of the act declaring certain contracts, agreements, undertakings, and combinations unlawful, and to provide punishment for those who shall enter into the same, or do any act in performance thereof (8 How. Anno. Stat. [Mich.] 9354), its invalidity is not so clear and free from doubt that a court of first instance would be justified in declaring it void. *Mers Capsule Co. v. United States Capsule Co.* 67 Fed. 414.

Where several corporations engaged in the same business make a contract, each with the other, to transfer their entire property and business to a new corporation to be organized for the purpose of controlling the prices of the article manufactured by all of the contracting corporations, and each of the latter abandons its business as a proprietor thereof, and becomes practically a mere employee of the new corporation and subject to its dominion and control, such combination is unlawful and void under the provisions of the Michigan statute of 1889, which declares certain contracts and combinations unlawful. And where the new company thus organized attempts to hold one of the contracting corporations to such agreement against its will, and to take possession of its plant and business, an injunction against its doing so will be sustained. *Ibid.*

Where a corporation agreed to sell its whole output of salt, and its president, by whom the agreement to that effect was made, knew that the defendant corporation controlled the market, and its character of business, which was unlawful, and to which similar contracts were necessary, and to the furthering of which they were adapted; and there was abundant evidence that the officers of the first-named corporation understood this, and were willing to lend themselves to the furtherance of the scheme,—the company first mentioned cannot maintain an action against the other for a fulfillment of the contract, the same being void under § 11,377. Comp. Laws, which declares illegal all contracts, agreements, understandings, and combinations entered into, or knowingly assented to, the purpose, object, or intent of which shall be to limit, control, or in any manner to restrict or regulate, the amount of production, or the quan-

by reason of a combination forbidden by the act of July 2, 1890, chap. 647 (26 Stat. at L. 209 [U. S. Comp. Stat. 1901, p. 3200]), known as the "anti-trust act," and its right to recovery depends wholly upon the 7th section of that law.

It is true that plaintiff is a municipal corporation. Nevertheless it was maintaining a system of waterworks, and furnished water to consumers, charging for same precisely as would a private corporation engaged in a like business. That a municipal corporation may be empowered to engage in the business of furnishing water or gas, or in the operation of street railways, as well as many other quasi public occupations, must be conceded. That the profit resulting inures to the public does not alter the fact that when thus engaged it is *pro hoc vice* a business corporation. If its "business" as a corporation engaged in the occupation of supplying water for a consider-

ation has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation. That it was not engaged in an interstate water business is true. But if it has no standing to recover damages for an injury to its "business," it is not easy to see how it has any better standing to recover for an injury to its "property." That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance. The Alabama company and the two Tennessee companies which are sued were members of an association which in-

tity of any article to be raised, or to enhance, control, or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article. *Detroit Salt Co. v. National Salt Co.* (Mich.) 10 Det. L. N. 366, 96 N. W. 1.

A contract by which one party sells to another lambs at a certain price per pound when delivered, and the other party agrees to buy the same, and, in consideration of selling at the price named, further agrees not to buy, or offer to buy, any lambs of the kind sold in certain counties at any time before a certain day, is invalid and not enforceable under the Michigan statute (§ 9354, 3 How. Anno. Stat.), as, by the terms of the contract, the purchasers were restrained from purchasing lambs in the two counties therein mentioned, and the contract had the effect thus to restrict free competition in those counties, and falls within the very terms of the statute. *Bingham v. Brands*, 119 Mich. 255, 77 N. W. 940.

Where a person engaged in the coal and fish business, doing business at one of two docks owned by him, sold the other dock to another person engaged in the lumber business, under a contract whereby the dealer in lumber agreed not to engage in the coal and fish business, such contract was not void under the Michigan act No. 225, Session Laws 1889. *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779.

See cases in *supra*, III. d; *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900, *infra*, IV. n; and cases in *infra*, IV. v, 3.

j. Minnesota.

The constitution and by-laws of a corporation regulated the credit to be allowed to its members, discriminated in the price to be paid for produce against persons not members, controlled the delivery of goods, and provided a penalty by fine and suspension for offending and defaulting members. It was held that such an organization is a combination in restraint of trade, tends to limit and control the market price of produce, limits and interferes with the free and open purchase of commodities, and is 64 L. R. A.

prohibited by chap. 359, Gen. Laws 1899; and the facts that a dealer in produce was a member of such an association, and participated in the adoption of such constitution and by-laws, do not prevent him from maintaining an action against such association and its members for damages caused by the boycotting by them of his business after he was suspended for violation of such by-laws. The acts complained of having been performed after he ceased to be a member, and without his consent, the plaintiff is not *in pari delicto*. *Ertz v. Produce Exch. Co.* 82 Minn. 173, 51 L. R. A. 825, 83 Am. St. Rep. 419, 84 N. W. 743.

In *Minnesota v. Northern Securities Co.* 123 Fed. 692, it was held that the anti-trust law of Minnesota (Laws 1899, p. 487, chap. 359) was substantially in the same language as the Sherman anti-trust law; and that, therefore, under the decisions of the United States Supreme Court, it applied to railroads; and that any combination, contract, or agreement having the effect of preventing competition by fixing rates to be maintained on railroads, was illegal; but that the contract or agreement set forth in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, *supra*, III. i, was not in violation of the statute of the state mentioned. It would seem that by the decision in the United States Supreme Court this case was practically overruled.

Where the business of a gaslight company, as disclosed by its articles of incorporation, was that of manufacturing and selling gas, made from coal or other material, to be used for the purpose of lighting a city; and such articles did not authorize the corporation to engage in the business of buying, selling, or dealing in coke, the latter being a by-product,—an agreement by it with a coal company to sell to such company exclusively all the coke produced by it violates no law prohibiting trusts or combinations, as it has the undoubted legal right to dispose of its by-products, and may sell them all to one customer, and is not bound to sell to all who desire to purchase. *State ex rel. Berryhill v. St. Paul Gaslight Co.* (Minn.) 100 N. W. 216.

cluded practically every pipe manufacturing concern in a situation to compete for the business of the plaintiff. The evidence also tended to show that the object of the combination was to prevent any other producer of such pipe from competing with the Anniston company for plaintiff's business, and that practices were adopted intended to compel it to deal exclusively with the Alabama member of the association, and to pay a price settled by the combination in advance of any bidding. For this privilege the Alabama corporation agreed to pay a large sum into the pool treasury, called a "bonus," which was to be divided among the confederates in agreed proportions. An appearance of competition was to be maintained by bids put in by the other associates, every such bid being higher than the bid to be made by the company, to whom the contract had been assigned. There was to be no chance for any other person to secure a

contract with the plaintiff than that member of the combine selected in advance of the open buildings.

Mr. Justice Peckham in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, 108, where this very combination was under consideration, speaking for the court of the results of the agreement between the corporations who were members of this trust, said: "The combination thus had a direct, immediate, and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in

k. Mississippi.

The legislature, by the chapter on trusts and combines, did not intend to debar a person from conducting his own private business according to his own judgment; and so chap. 140, Code 1892, prohibiting such trusts and combines, will not prevent a manufacturer of goods from confining his sales of goods to a single dealer in a certain territory. *Houck v. Wright*, 77 Miss. 476, 27 So. 616.

The anti-trust laws of Mississippi do not apply to the state, or any of its statutory agencies, in making contracts; and, so, where a corporation which was a publisher of school books made a contract with the county superintendent of public education for an exchange, introduction, and permanent supply of school books, by which new books should be exchanged for old ones without regard to the wear of the latter, up to a certain time, and according to certain rates of exchange agreed upon; and, after the expiration of one year, for the remainder of the time for which the contract was made, the price agreed upon was to take effect and control,—the carrying out of such a contract will not be enjoined. *B. F. Johnson Pub. Co. v. Mills*, 79 Miss. 543, 31 So. 101.

Where, by an agreement between a seller and purchaser of core oysters, the former agrees that, as to three car loads per month,—half the output,—he will be bound absolutely by the price fixed by the purchaser of the other half, such agreement is in violation of Code 1892, chap. 140, § 4437, as it is one to "limit the price of a commodity." *Barataria Canning Co. v. Joullan*, 80 Miss. 555, 31 So. 961.

Under § 4437 of the Code of 1892, which defines a trust and combine as a combination, contract, understanding, or agreement, express or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others, to place the control, to any extent, of business, or of the products of or earnings thereof, in the power of trustees, by whatever name called; and declares the same to be inimical to the public welfare, unlawful, and a criminal conspiracy,—an indictment 64 L. R. A.

against thirty insurance companies, all but one being foreign companies, which charges that the companies were engaged in the business of issuing policies of insurance against loss by fire in a certain county, and, being independent companies, each from all the others, they did unlawfully, etc., enter into an unlawful combination and conspiracy between themselves, respectively and with each other, and each with the other, whereby the defendants, and each of them, did place the control of their said business of insurance, to the extent of fixing and prescribing the rates of the premiums on fire insurance to be charged the public in said county and state, by defendants and each and all of them, in the power of trustees; and that they did unlawfully agree to abide and be bound by the rates fixed by such trustees, and not to vary therefrom,—is insufficient; and a demurrer thereto will be sustained. *Fire Ins. Cos. v. State*, 75 Miss. 24, 22 So. 99.

See *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 470, 70 N. W. 107, 71 N. W. 428, *supra*, IV. f; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, 84 Am. St. Rep. 152, 31 Pac. 1097, *supra*, IV. g; *Ætna Ins. Co. v. Com.* 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624, *supra*, IV. h; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595, *infra*, IV. l.

l. Missouri.

Previous to the passage of the statute of Missouri providing that any corporation, either domestic or foreign, which should enter into any pool, trust, agreement, confederation, or understanding with any other corporation, person, or association to regulate or fix the price or premium to be paid for insuring property against loss by fire, lightning, or storm, or maintain such price when so fixed, should be deemed and adjudged guilty of a conspiracy to defraud and liable to a penalty, an association of fire underwriters of the state had existed for the purpose of establishing and maintaining rates at which property in the state would be insured, and had in its employ a person to fix and maintain the rates. After the adoption of the statute the association dissolved, but

fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."

Undoubtedly it was not competent for the Congress to regulate by legislation commerce which is purely intrastate, and this limitation was recognized in *Addyston Pipe & Steel Co. v. United States*, where the court said: "In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it."

the person mentioned published a book, which he sold to the various insurance companies who were defendants in this proceeding, in which the rates were fixed, and a clerk in his office was made the secretary of a club at a city in the state; and the reports of all the agents doing business in that state were required by the rules of the club to be delivered to him, and he forwarded them to the several defendant companies. If he discovered that an agent had insured at a rate less than stated in the book mentioned, he reported it to the club and the general manager of the company represented by that agent, which resulted in the agent being disciplined. In an information in the nature of a quo warranto by the attorney general the club was held to be a plain, palpable, but bungling, pool, trust, agreement, combination, confederation, and understanding organized to evade the anti-trust laws of Missouri, but wholly insufficient for such a purpose. It was held that what was done was done by the local agents, and all knew it, and their knowledge was the knowledge of their companies and their acts the acts of their companies; and judgment of ouster was rendered forbidding the several different insurance companies from doing business in the state. *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

See *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428, *supra*, IV. f; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, 34 Am. St. Rep. 152, 31 Pac. 1007, *supra*, IV. g; *Etna Ins. Co. v. Com.* 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624, *supra*, IV. h; *Fire Ins. Co. v. State*, 75 Miss. 24, 22 So. 99, *supra*, IV. k.

Acts of several competing dealers in the same line of trade, such as selling at a fixed price from which rebates are given in goods or weights, giving notice of coming advances in person, which always follow as announced, securing concessions from the competitors of the right to sell shopworn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them, shows a combination to fix prices in restraint of trade which is forbidden 64 L. R. A.

The direct intention and effect of the combination were to limit and restrict the right of each of the several companies to compete for business with Atlanta, as well as to enhance the price of the commodity which was the subject of the agreement. We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued. *Stockwell v. United States*, 13

by the anti-trust act of Missouri, and will support a writ of quo warranto to oust the defendant corporations from their franchises to do business in the state. *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 356, 61 L. R. A. 464, 96 Am. St. Rep. 515, 73 S. W. 645.

While questions affecting the right of a corporation to enjoy its franchises, to be a corporation, or its legal entity as such, can only be raised in a direct proceeding to annul or forfeit the grant to which the state granting the charter is a party, for the reason that, as to third parties, the legality of the corporation is avouched by its charter from the state, which reserves to itself the power to withdraw the franchises bestowed upon evidence of fraudulent obtention or subsequent abuse,—the existence of this rule of procedure cannot deprive the legislature of the power of enacting that inquiries affecting the validity of the charter of a corporation may be made in other proceedings than by an action in the name of the state; and this is just what was done when the anti-trust act became the law of the state. *National Lead Co. v. S. E. Grote Paint Store Co.* 80 Mo. App. 247.

Where the provisions of an anti-trust act permit a violation of any of its provisions to be pleaded by a private person in a suit against him for the price of goods purchased of a corporation transacting business contrary to such act, it must follow that the right to plead such a defense entitles the party so authorized to prove what he has pleaded, and evidence tending to prove the real objects of the incorporation of the plaintiff and the nature of the business conducted by it is competent, under the express statutory authority given to the defendant, to plead illegality in the incorporation or business transacted by plaintiff as a ground for the release from the indebtedness sued upon. *Ibid.*

An injunction will not be granted to restrain an association which is a combination in defiance of and under the condemnation of the anti-trust law of the state from expelling the plaintiff in the action from his position as a member. In such an action the plaintiff is in the attitude of asking the court to keep him where the law says he has no right to be, and

Wall. 531, 20 L. ed. 491; *Van Horn v. Van Horn*, 52 N. J. L. 286, 10 L. R. A. 184, 20 Atl. 485; *Robertson v. Parks*, 76 Md. 118, 135, 24 Atl. 411.

Replying to the argument that if the combination did not prevent any particular contract that it had not restrained trade, Justice Peckham, in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 245, 44 L. ed. 136, 20 Sup. Ct. Rep. 109, said: "It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let, the better for the combination. It was formed, not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. . . . The question is as to the effect of such combination upon the trade in the article; and

if that effect be to destroy competition, and thus advance the price, the combination is one in restraint of trade."

If, then, the price of a commodity which is the subject of an interstate contract be unlawfully enhanced by a combination for the purpose of suppressing competition, shall the vendee thus compelled to pay this unlawfully enhanced price be without remedy against the combination because he may happen not to be engaged in the conduct of an interstate business? If the effect of a combination to enhance the price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume of profit of that business. The

to maintain him in a position where he may aid in the support and maintenance of an illegal association, and where he may continue to support and keep up a monopoly of the services of the members thereof. *Froelich v. Musicians' Mut. Ben. Assn.* 93 Mo. App. 383.

See *Greer v. Payne*, 4 Kan. App. 153, 46 Pac. 190, *supra*, IV. g.

A contract or agreement between several brewery corporations of a city that they will not sell to anyone who is in debt for beer to either of the others until he pays that debt is in violation of the statute of Missouri in relation to pools, trusts, and conspiracies, as it tends to lessen full and free competition in the importation, manufacturing, or sale of their production. *Ferd Helm Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691. In this case the court said that the question is, What is the tendency of the agreement? It does not affect the character of the agreement proved, that the brewers only intended a worthy purpose. Intention will not avail when the effect is within the statute. And it has been held by the highest authority that, though no imposition was consummated by the raising of prices; and even though the agreement was necessary to curb unjust or ill-advised competition,—yet, if the effect of the agreement was within the prohibition of the law, it was void.

And the reason given for holding that the brewers had no right to combine to refuse to sell to one who was indebted to one of their number, was that, while it is true that one has a right to refuse to sell to whomsoever he may elect, that very rule, properly applied, was disastrous to the claim that the combination was not unlawful, as anyone may exercise a choice as to whom he will sell his goods, but he cannot enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice, and destroys the very right he claims the privilege of exercising; and, after entering upon such agreement, he is no longer a free agent. *Ibid*.

See *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301, *supra*, IV. h.

Where an association of master plumbers of a city entered into an agreement with manufac-

turers of and dealers in goods used by them, whereby it was agreed that such manufacturers and dealers would not sell to a plumber who was not a member of such association, and the association agreed that its members would not purchase of a manufacturer or dealer who sold to any other than a member of the association, an action will lie to dissolve such illegal agreement and combination, and for an injunction to restrain the manufacturers and dealers from enforcing an agreement against a plumber who was not a member of the association by refusing to sell their goods to him. *Walsh v. Association of Master Plumbers*, 97 Mo. App. 290, 71 S. W. 455.

Where the statute of a state makes it unlawful for any railroad company to own, operate, or manage any parallel or competing railroad in the state, the acquiring by one of two railroads of the stock of another, where the two roads do not touch at any two common points, and for 40 miles another railroad is located between them, and it appears that the business of one, except to a slight extent, would not pass over the other, does not violate such statute, as the two roads are not competing lines within its meaning. *Kimball v. Atchison, T. & S. F. R. Co.* 46 Fed. 888.

Where a corporation had absorbed by purchase the larger part of the business of manufacturing and selling cigarettes and smoking tobacco in the United States, which thereafter, by forcing down the market by means of its superior wealth, acquired by purchase 66 per cent of the business of manufacturing and selling plug tobacco, and in doing so purchased the business of three different manufacturing establishments of that product in the state of Missouri, and thereafter sold to another corporation organized for the purpose of receiving from the first-named corporation the sale of the business plants theretofore engaged in the manufacture and sale of plug tobacco theretofore purchased by it, including the three Missouri concerns; and the purchasing corporation thereafter operated the said three Missouri plants (each being a separate corporation) for its own interest, but each in its own original corporate name,—such a transaction was not

difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination. The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intra state,—whether he buy to extend his plant, or to sell again in an interstate business. This excessive price is the expected and intended result of the unlawful combination to restrain interstate trade in that commodity. That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the 7th section of the law of Congress, under the logic of the decision in *Addyston Pipe & Steel Co. v. United States*. It is possible to so construe this 7th section as to devitalize this section by confining compensatory re-

lief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations, and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to "any person" "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compen-

in violation of the act of 1897, p. 208, § 1, which provides that any corporation which shall create, enter into, or become a member of, any pool, trust, combination, or understanding with any other corporation to fix the price of any manufactured article, merchandise, commodity, etc., shall be guilty of conspiracy, where such last sale was made for a cash consideration and in good faith. *State ex rel. Crow v. Continental Tobacco Co.* 177 Mo. 1, 75 S. W. 737.

m. Montana.

A private citizen is not authorized to present, through the medium of a civil action, and try, the issue whether a corporation is doing business in violation of a law. A determination of this issue as an independent ground of relief must be had, if at all, by the state, and in its own behalf, through the attorney general; and the question whether such corporation is engaged in doing business in violation of law, and is a monopoly and subject to the prohibition contained in § 20 of art. 15 of the Constitution and the penalties provided by § 321 of the Penal Code, can only be inquired into in that way. *McGinniss v. Boston & M. Consol. Copper & Silver Mtn. Co. (Mont.)* 75 Pac. 89.

But, so far as the participation of a Montana corporation and its officers in an unlawful combination to create a monopoly subjects its property and franchises to forfeiture, and thus imperils the property rights of a minority stockholder, he has a cause of complaint against it and them, and may, through the medium of a court of equity, compel it and them to abandon such unlawful connection and return to a performance of their obligations under the charter contract of the company. *Ibid.*

Still not every act of a corporation, though unlawful, will give a minority stockholder therein a right of action against it. So far as he is not injuriously affected, directly or indirectly, he has no ground of complaint, and, until it makes such connection, or pursues such a course, as to make it amenable to the law, he cannot be heard to question its action. *Ibid.*

The court in the above case admitted that it was held by many courts that the mere posses-

sion of power by a combination of corporations, or associations, or persons, injuriously to repress competition, regulate production, and fix prices is against public policy, and all such combinations are by them declared illegal as against public policy; and said that this would be found true of the Illinois supreme court by an examination of *HARDING v. AMERICAN GLUCOSE Co.*; and said that that case was typical of the class which held to this doctrine. "But," said the court, "an examination of them will reveal the fact that, in each particular case before the court for consideration, it appeared, either from the facts proved or admitted, or from the contract itself, that the defendants entertained and were pursuing the unlawful purpose."

n. Nebraska.

An agreement made by the vendors of a laundry establishment with the purchaser thereof that such vendors would not engage in the laundry business in the same city, either for themselves or for any other person, for the period of five years, is not a combination within the meaning of chap. 69 of the Session Laws of 1889, of Nebraska, known as the anti-trust law; and an action may be maintained by such purchaser to prevent the vendor from violating the same. *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900.

See cases in *supra*, III. d; *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, *supra*, IV. i; and cases in *infra*, IV. v. 3.

Chapter 91a, Comp. Stat. 1901, of Nebraska, entitled *Trusts*, is not unconstitutional because § 9 expressly excepts organizations of laboring men, for the purpose of raising wages, from its operation, on the ground that special and exclusive privileges and immunities are granted to laborers contrary to § 15, art. 3, of the state Constitution, as no express exception of organizations of laborers, intended to maintain or advance wages, was necessary to exempt them from its operation. The court said: "The section in question is inserted, rather, out of abundance of caution, to prevent judicial extension of the terms of the act beyond its scope and

satory remedy to any person directly affected by the unlawful agreement.

We see no application of the case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, to the case at bar. Undoubtedly the contract of purchase and sale of pipe was a contract wholly collateral to the unlawful trust agreement between the makers of such pipe, and the vendor could make out a case for the purchase price without reliance upon the unlawful agreement between such makers. The contract of bargain and sale between the Anniston Pipe Company and the plaintiff was therefore a valid and enforceable agreement, and the plaintiff could not defend a suit for the price by showing that the seller was a partner in an illegal association. The court in that case did decide

that the damages recoverable under the 7th section were recoverable only in a direct action, and could not be set off in a suit under a contract for the price. But this was based, not upon any construction of that section, but upon the general principle of law which forbids the setting off of unliquidated damages not directly growing out of the principal transaction. The present suit is a direct action, and is, therefore, unaffected by anything decided in that case.

This brings us to the question of the limitation applicable to the suit. Under the evidence, it was very plain that plaintiff's right of action accrued more than three and less than five years before action commenced. The anti-trust act provides no limitation, and, if any has been prescribed by Federal law, it is that found in § 1047, Rev. Stat.

purpose, than to grant a privilege or immunity to persons who would otherwise fall within its terms. The distinction between goods and merchandise produced by skill and labor, and the skill and labor which produce them, is manifest and reasonable. The statute does not say that laborers who have goods, wares, or merchandise, the produce of labor, for sale, may combine to advance or control the price, but only that the law designed to prevent combinations in restraint of trade in such articles, when produced, shall not be construed to affect organizations formed to regulate the wages of compensation of the labor and skill which produce them." *Cleland v. Anderson* (Neb.) 92 N. W. 306.

The anti-trust statute of Nebraska, which makes any combination of capital, skill, or acts by persons with intent to prevent competition, which seeks to fix the price of any article, commodity, use, or merchandise with intent to prevent others in the like business or occupation from conducting the business or occupation, a trust; and which provides that the charter of domestic corporations shall be forfeited and foreign corporations excluded from the state for a violation of its provisions; and which expressly excepts from its provisions assemblies and associations of workmen, and provides that "there is hereby reserved to them all the rights and privileges now accorded them by law,"—is unconstitutional and void as depriving persons of their liberty in violation of the Federal Constitution, which includes the liberty to make and enforce contracts, which is an institutional and fundamental right of the citizen of the United States; and also for the reason that it excepts labor organizations from its provisions, and thereby denies the equal protection of the laws to all persons. *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816.

c. *New Hampshire.*

The first act in the nature of an anti-trust law which seems to appear in the reports of this country is the statute of New Hampshire of July 5, 1867, chap. 8, which provides "that two or more railroad corporations chartered by the legislature of this state constituting the whole or part of different lines of route for public travel and transportation between any two cities or towns, or between any city and

town either within or without this state, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, or portion thereof, under any business contract, lease, or other arrangement; but each and every railroad corporation so situated shall be run, managed, and operated separately by its own officers and agents, and be dependent for its connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract, or arrangement be first authorized by the legislature and approved by the government and council."

The statute further provides for a penalty for its violation, and also that any citizen may apply to the supreme judicial court, or a justice thereof, whose duty it shall be to issue an injunction to restrain such violation.

Under the provisions of this act, it was held in *Currier v. Concord R. Corp.* 48 N. H. 321, that one having occasion to use the roads so violating the statute, or to purchase articles transported, has such an interest that he may maintain an action for such an injunction, as his interest is not of the character that might be protected by a suit to recover damages.

Under the same statute, it was held in *Morrill v. Boston & M. R. Co.* 55 N. H. 531, that an arrangement between two railroads, one chartered by the legislature of New Hampshire and the other by the legislature of Massachusetts, but, at the time of the making of the agreement, operating and controlling certain railroads chartered by the legislature of New Hampshire, by the terms of which each of the two railroads should retain 60 per cent of its gross earnings between all competing points on their respective routes and the city of Boston, to pay the running expenses of the respective roads, and the balance of said gross earnings, being 40 per cent thereof, should constitute a committee fund to be divided equally between said roads,—came within the prohibition of the act.

p. *New York.*

In a proceeding by the attorney general to

(U. S. Comp. Stat. 1901, p. 727), which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained unless commenced within five years from accrual of penalty or forfeiture. If this is an action to recover a penalty, within the meaning of this statute, the suit was in time. The shorter statute of the state, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no Federal statute that the limitation prescribed by the law of the state is applicable. *Campbell v. Haverhill*, 155 U. S. 610, 614, 39 L. ed. 280, 15 Sup. Ct. Rep. 217; *Brady*

v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62.

We find ourselves in agreement with the court below in holding that an action under the 7th section of the act of July 2, 1890, chap. 647 (26 Stat. at L. 210 [U. S. Comp. Stat. 1901, p. 3202]), is not a penal action. The three first sections of the act are undoubtedly penal. They forbid certain contracts and combinations, and provide that persons doing any of the forbidden things shall be guilty of a misdemeanor, and subject to punishment by both fine and imprisonment. The 4th and 5th sections give jurisdiction to the circuit courts to prevent and restrain violations of the act, and deal with procedure under the restraining power thus granted. The 6th section provides for the forfeiture to the United States of prop-

erty obtained by the examination of witnesses under the provisions of chap. 383 of the Laws of 1897, it is essential that the petition upon which an application is made to the justice of the supreme court for an order providing for the examination of such witnesses for the purpose of determining whether an action should be commenced under the act which is designed to prevent monopolies in articles or commodities in common use should contain a statement that the testimony desired is material and necessary, and specify the facts and circumstances which show that it is so, as provided by art. 1, title 3, chap. 9, of the Code of Civil Procedure; and the provision of the act mentioned, that the provision of art. 1, above referred to, should apply "so far as practicable," does not obviate the necessity therefore. *Re Atty. Gen. 22 App. Div. 285*, 47 N. Y. Supp. 883.

The purchase by a gas company of the stocks and bonds of a rival company, at prices greater than their actual market value, payment being made therefor in stocks and bonds of the purchasing company, will not be enjoined at the suit of a stockholder of the latter company as a combination for the creation of a monopoly or in unlawful restraint of trade or the prevention of competition in a necessary of life, contrary to the provisions of § 7 of the stock corporation law, where it appears that the existence and welfare of the purchasing company depend upon such purchase in order to relieve it from competition which is unprofitable to both companies, and it is not shown that the purchasing company does not intend to use the plant or exercise the franchise acquired by the contract of purchase; nor does the agreement amount to a consolidation of the two companies. *Rafferty v. Buffalo City Gas Co.* 37 App. Div. 618, 56 N. Y. Supp. 288.

In *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, it appeared that the defendants offered to parties purchasing their goods to make a reduction in the price of the goods sold in consideration of the purchaser's agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price than that at which they agreed to sell the defendant's goods, and it was held that such a contract was not within § 1 of chap. 16 of the Laws of 1893, prohibiting combinations to restrain competition. 64 L. R. A.

An organization of coal dealers intended to prevent competition in prices, in pursuance of which the price of coal is raised, is a conspiracy condemned by § 168 of the New York Penal Code making it a misdemeanor to conspire to commit any act injurious to trade or commerce; and raising the price of coal is a sufficient overt act. *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690, 34 N. E. 785, Affirming 66 Hun, 590, 21 N. Y. Supp. 859.

Proceedings under chap. 690, Laws 1899, relating to the suppression of monopolies, are not limited to combinations in process of formation, but reach those already formed which are still maintained and in process of consummation. *Re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 118.

And so the re-enactment, with amendments, of a statute for the suppression of monopolies will not prevent its enforcement against a combination organized before the passage of the new act, but within the life of the prior one. *Ibid.* (See cases in *supra*, III. f.)

Nonjudicial duties are not imposed upon a judge by a statute providing that, when the attorney general has determined to commence an action under the statute for the prevention of monopolies, "it shall be the duty" of the judge to grant his application for an order for examination of witnesses; since he must first decide whether or not a case has been made out pursuant to the statute, so that the duty is judicial in form, and the purpose of the statute is to enable the attorney general to prepare his complaint, or to prepare for trial, which is judicial in nature. *Ibid.*

The constitutional right of liberty and property is not illegally impaired by a statute which requires one to appear before a referee and furnish evidence to aid the attorney general in instituting proceedings for the suppression of a monopoly; and a justice of the supreme court may be authorized by such statute to appoint a referee to take testimony to aid the attorney general in instituting such proceedings. *Ibid.*

In *John D. Park & Sons Co. v. National Wholesale Druggists' Assn.* 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 598, 67 N. E. 136, Affirming 54 App. Div. 223, 66 N. Y. Supp. 615, it was held that a plan by a voluntary as-

erty in course of transportation owned by any such unlawful combination, etc. The 7th section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the "damages by him sustained," costs of suit, and his reasonable attorneys' fees. The remedy is not given to the public, for no one may bring the action save the person "who shall be injured," etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action as penal action, within the meaning of § 1047, Rev.

sociation of merchants engaged in selling proprietary medicines, adopted by manufacturers of them, looking to the maintenance of prices, by which the manufacturers shall sell at fixed prices, with a rebate only to concerns who can be relied on to maintain the selling price, is not void as creating a monopoly or in restraint of trade, nor as against public policy; and that the adoption of a plan for the sale of their product, by manufacturers of proprietary medicines, as proposed by an association of wholesale dealers, which results in a refusal to sell to complainant, is not shown to have been compelled by threats or intimidation, by allegations that the manufacturers were prevented from selling to complainant for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and that the committee of the association recommended "that continuing and untiring opposition be shown to the sale of those articles of those proprietors who do not adopt" the plan.

No boycott against a merchant is effected by the refusal by the manufacturers of a proprietary medicine, at the instance of a voluntary association of merchants engaged in the same line of business, to give him a rebate from the selling price of the medicines unless he will maintain the price to consumers. *Ibid.*

No mention is made in the case in the supreme court, or in the prevailing opinions, that the action was brought for a violation of the anti-trust law, but one of the dissenting judges in his opinion, in endeavoring to show that the association, agreement, or combination in the case is unlawful, cited and quoted chap. 383, Laws 1897, and urged that the association in question was a violation of that act, citing numerous state and Federal decisions in support thereof; and the case has been frequently cited by counsel and courts in actions which were based upon Federal and state anti-trust laws, and very recently was referred to at length and distinguished by the same court in *STRAUS v. AMERICAN PUBLISHERS' ASSO.*

Under the act (chap. 690, Laws 1899) whereby every contract, agreement, arrangement, or combination, whereby a monopoly in the manu-

Stat. (U. S. Comp. Stat. 1901, p. 727). Thus in *Goodridge v. Rogers*, 22 Pick. 495, and *Adams v. Palmer*, 6 Gray, 338, the action was for a tort for entering upon land and committing trespass, and was brought under a statute which gave to the plaintiff three-fold damages. It was, nevertheless, held not to be an action for a statute penalty, so as to bring it under a statute which barred all actions and suits for penalties and forfeitures within one year. In suits for the infringement of patents, judgment for three-fold the actual damages may be rendered; but suits under the statute have never been regarded as penal actions. *Campbell v. Haverhill*, 155 U. S. 610, 39 L. ed. 280, 15 Sup. Ct. Rep. 217. In *Woodward v. Alston*, 12 Heisk. 581, an action against a clerk for fees illegally collected was held not to be a penal action, although called a "penalty" in the statute giving the particular remedy. In *Brady v. Daly*, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62, the suit was under

facture, production, or sale, in New York, of any article or commodity of common use is or may be created, established, or maintained. is declared to be against public policy, illegal, and void, it makes no difference whether such acts, if done by an individual not in the combination, might have been lawful, and a person suffering therefrom would be remediless; and the right of action given by the same statute is so given for the reason that the acts done by agreement or combination of several are made unlawful in an association whose aim is to commit a statutory crime. Nothing may be done in furtherance of the purpose for which it has combined. Every act is unlawful, and for that reason a right of action accrues to each person who suffers an injury. *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373.

And so, where a complaint charged the defendants with forming a combination among themselves and with others for the unlawful purpose of preventing the free pursuit of a lawful business, of increasing the price of commodities in common use, and of preventing the competition in trade in certain articles, all of which things were expressly prohibited by statute and made a misdemeanor, it was held to state a cause of action, and a demurrer thereto was overruled. *Ibid.*

q. North Carolina.

The act of the general assembly of North Carolina (Act 1903, p. 1074, chap. 697), amendatory of § 3122 of the Code, providing who may legally practise medicine and surgery, which provides that, for the purpose of that act, the expression (practice of medicine and surgery) shall be construed to mean the management, for fee or reward, of any disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that the same shall not apply to midwives, nurses, or any person who ministers to or cures the sick or suffering by prayer to Almighty God without the use of any drug or medical means,—is violative of § 31,

§ 4966, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3415), providing that one publicly presenting a copyrighted dramatic performance, without the owner's consent, shall be liable for all damages, "to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent performance as to the court shall appear to be just." The suit was held not to be a suit for the recovery of a penalty or forfeiture.

The whole subject of penal and compensatory actions has been so thoroughly considered in *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, and *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. Rep. 62, 44 L. ed. 109, as well as by the very full and able opinion of Judge Clark in the court below in disposing of a demurrer to a plea, that we feel we can add nothing to the subject.

The limitation applied by the court below was that prescribed by § 4470, Shannon's

Revision, Tenn. Code. Prior to the Tennessee Code of 1858 the statute of limitations operated upon the remedy, and applied to the form of action. By the Code then adopted, and its amendments, the limitation now applies to the cause of action. *Kirkman v. Philips*, 7 Heisk. 222; *Callaway v. McMillian*, 11 Heisk. 557. The limitations of actions other than real are found in §§ 4466 to 4483 inclusive, Shannon's Code. Section 4466 provides that "all civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

Section 4469, among other things, prescribes that actions for "statute penalties" shall be brought within one year.

Sections 4470, 4472, and 4473 must come under consideration, and are here below set out in full:

"Sec. 4470. Actions for injuries to per-

art. 1, of the Constitution, prohibiting monopolies. *State v. Biggs*, 133 N. C. 729, 64 L. R. A. 139, 46 S. E. 401.

T. Ohio.

The act 93 Ohio Laws, 143, while originally and primarily intended to suppress and control what are known as trusts and monopolies, is still so comprehensive and far reaching in its express terms as to extend to every combination by two or more individuals, by their capital, skill, or acts, to create or carry on any restriction in trade or commerce; the boycott is undoubtedly such a combination by individuals for the purpose of creating and carrying out a restriction in trade. *State v. Jacobs*, 7 Ohio N. P. 261.

And so a combination by two or more persons for the purpose of boycotting a third person is a combination to create and carry out a restriction in trade and commerce, and is a violation of 93 Ohio Laws, 143. *Ibid.*

A contract in which a business is abandoned, and the good will as well as personal services transferred, is not a contract or combination solely for the purpose of restraining competition and maintaining prices, so as to be under the condemnation of the Ohio anti-trust law (93 Ohio Laws, 143). *Kevil v. Standard Oil Co.* 8 Ohio N. P. 811.

An indictment which charges that on a certain day the defendant was an active member of, acted with and in pursuance of, aided and assisted in carrying out the purposes of, a coal exchange, an association of persons organized for the purpose of preventing competition in the sale, and to maintain a uniform and graduated figure for the sale of coal, and directly to preclude a free and unrestricted competition among the members of said association, purchasers, and consumers in the sale and transportation of coal, contrary to the form of the statute in such case made and provided,—falls to allege facts sufficient to constitute a crime under the act of April 19, 1898 (93 Ohio Laws, 143). *Gage v. State*, 24 Ohio C. C. 724. 64 L. R. A.

a. Oregon.

A rule promulgated by a board of commissioners for licensing sailors' boarding houses, by which licenses were to be issued to the keepers of such houses who could secure recommendations from persons engaged in shipping at the port, tends to create a monopoly of the business, for the shippers, by concerted action, could secure the appointment of only one person or firm, thereby excluding all competition. Whether or not such a mode of issuing licenses would advance the interest of shippers, or promote the public good, makes no difference, for the board of commissioners for licensing sailors' boarding houses can exercise no greater power than was possessed by the legislative assembly; and, as that body could not create a monopoly of a legitimate business in which every person can engage of common right, without contravening art. 1 of § 20 of the Constitution, *a fortiori* its creatures, the board, are, likewise, prohibited from doing so. *White v. Holman (Or.)* 74 Pac. 933.

t. South Carolina.

The act of 1894 (21 Stat. at L. 812), providing that no corporation, individual, or association, or either or both, shall purchase or lease any railroad lying in whole or in part within the state, or any interest therein, or shall operate the same where such purchaser or lessee already owns, operates, or is interested in, a line or lines of railroad which, either alone or in conjunction with other connecting railroads lying within or without the state, can compete between any two or more points within the state; and any such purchase, lease, or acquisition is declared to be null and void,—was not repealed by the Constitution of 1895, § 8, of art. 9; and so the act of 1897 (22 Stat. at L. 497), providing that any railroad company owning, leasing, or operating competing railroad lines within the state in violation of law shall be subject to a penalty, should be construed in connection with the act of 1894, defining competing railroad lines; and a complaint under the act of 1897, as defined by the

sonal or real property; actions for the detention or conversion of personal property within three years from the accruing of the cause of action."

"Sec. 4472. Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors, and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued.

"Sec. 4473. Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments, and decrees of courts of record of this or any other state or government, and all other cases not expressly provided for, within ten years after the cause of action accrued."

The learned trial judge held this action to be one for an injury to property, within

act of 1894, is not demurrable for not stating a good cause of action against a railroad for operating competing lines. *Edwards v. Southern R. Co.* 66 S. C. 277, 44 S. E. 748.

U. Tennessee.

An agreement between the stockholders of two manufacturing corporations, one of which was composed of three stockholders and the other of five, that the output of the two mills of both corporations should be put into the hands of a third or selling corporation, which was to put the goods upon the markets of the world at one price,—that is, in its hands they were intermingled and sold as the goods of one owner,—was a hard and fast agreement, shutting off competition between the two original corporations. In an action by the new corporation, in the nature of a creditor's suit, to reach the property of one of the original corporations (which had become insolvent), on a claim for money advanced to it, it was held that the complainant could not assert such claim as against other creditors of the insolvent corporation, since the combination was unlawful as tending to prevent competition under Acts 1891, chap. 218, § 1. *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709.

The legal right of each individual plumber to purchase supplies and materials from any dealer or dealers he may choose will not justify a by-law of an association of plumbers which permits them to make purchases only from such dealers as will sell to members thereof exclusively, as the individual right is radically different from the binding action, the former being freedom, the latter restraint, and is violative of the statutes (Shannon's Code, §§ 3185, 3622), which forbid and declare unlawful, null, and void all trusts, pools, contracts, arrangements, or combinations, or corners, or other devices that are intended to destroy or prevent, or that have a tendency to destroy or prevent, full and free competition in the production, manufacture, or sale of any article of legitimate traffic, or that are designed or tend to fix, regulate, limit, reduce, or increase the price of such article, or 64 L. R. A.

the meaning of § 4470, and therefore barred in three years. To this we cannot assent. That section plainly applies only to causes of action arising out of some injury to property, as distinguished from its detention or conversion. Property, either personal or real, may be injured or damaged without its being either detained or converted. But whether the cause of action be an injury or damage to the property, or for its taking or detention, the suit must be brought within the same period. This distinction between the two kinds of injury to tangible personal property is of very ancient origin. Sir William Blackstone (vol. 3, 145, 153), in his chapter entitled *Of Injuries to Personal Property*, says: "The rights of personal property in possession are liable to two species of injuries,—the amotion or deprivation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible

to create a monopoly or a corner therein, or that may in any manner injuriously affect the legitimate trade and commerce of the country. *Bailey v. Master Plumbers' Assn.* 108 Tenn. 99, 46 L. R. A. 561, 52 S. W. 853.

V. Texas.

1. General rule.

Where a railroad is chartered under the laws of the United States, and granted land under the laws of the state, in both of which it is forbidden to discriminate against any connecting or intersecting road,—and the state laws forbid it to enter into any combination in the nature of a partnership with any other railroad of the state running parallel with it or in the same direction, that will give the other road control of rates on it, as a condition of such land grant, a combination by the receivers of the road, or its successor, with another railroad having 200 miles of track parallel to the former, relating to business interchanged in the state, and giving such other road a preference in rates, is violative of both the United States and state statutes; and, upon objection being made by other railroad corporations whose business is interfered with, such pooling and traffic arrangements will be abrogated, although the receivers of the first-mentioned road are willing to make an arrangement with the objecting companies, and the arrangement is satisfactory to the traffic agents of the objecting companies, and is for the benefit of the property of the first-mentioned railroad in the hands of the receiver. *Missouri P. R. Co. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 428, 30 Fed. 2.

In *Texas & P. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919, the question was whether a contract between a coal company, the owner of a large quantity of land, employing several hundred miners and owning various buildings designed for various purposes, among them a saloon, with a person, whereby the company leased to such person its saloon and connecting buildings for a term of years with the privilege of renewal, and obligated itself

into two branches,—the unjust and unlawful taking them away, and the unjust detaining them, though the original taking might be lawful.”

Touching injuries to property, as distinguished from its taking or detention, the same author says: “As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explication. I have only, therefore, to mention the remedies given by the law to redress them, which are in two shapes: By action of trespass *vi et armis*, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential,

and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction, for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knows of such evil habit.”

We find in the very carefully selected verbiage of § 4470 a recognition of the two kinds of injury to which tangible property is susceptible,—one by a damage which does not affect the possession, and the other by a taking or detention which does.

While the precise question has not been decided by the supreme court of Tennessee, we do find an indisposition to give to the section any such broad and indeterminate

to the effect that it would not, during the continuance of such lease, sell, or permit any other person or persons other than the lessee to sell, any wine, beer, or spirituous liquors upon any lands owned or occupied by said company during the term of said lease; and that the company should during said lease “issue checks to all persons in its employ to whom money may be due for wages or labor performed, and redeem weekly all checks so issued which said Lawson [the lessee] may receive for wines, beers, or spirituous liquors sold by him.”—was void as a matter of law, as being an undue restraint upon trade, or as tending and intended to create and foster a monopoly, or as being a trust within the statute which inhibits a “combination of capital and acts;” and it was held that it was.

In an action against an insurance company by a firm manufacturing bagging, the refusal of an instruction by the court that, if there was a trust or combine between bagging manufacturers, of which the manufacturing company to whom the loss under the policy, if any, was by the terms thereof payable, was one, to regulate the prices of bagging in the state of Texas, and one of the plaintiffs knew of it, the jury should find for the defendant,—is not error, as the owner of bagging may insure although he may be a member of a trust for the purpose of controlling the price of bagging. *Springfield F. & M. Ins. Co. v. Cannon* (Tex. Civ. App.) 46 S. W. 375.

A combination or conspiracy between two electric street railway companies, one person being the president of both, and each engaged in producing electricity as a motive power and as a commodity and merchandise at a certain city, and an electric light company and a gas company, engaged in manufacturing, producing, and vending gas and electricity in the same city, to the effect that none of said companies interested in the production of electricity in said city should make any bids upon public lighting of the city bids for which were about to be renewed, and that said railway companies and electric companies should be consolidated; that all of said corporations should ap-

ply to the city council for an extension for a long period of years of their rights, privileges, and franchises theretofore granted to them and then existing, to the end that all the interests of said corporations might be pooled, united, combined, and consolidated in one common management and for one purpose, to wit, the control of the production and price of said commodities, electricity, and gas for lighting and motive power; that the two street railway companies should charge passengers a certain price and no less; that the proposition to the city council should contain a provision that all of the rights, etc., to be so obtained should be assignable; that none of the corporations other than the electric light company should, for a term of years, bid upon the contract for the public electric lights of the city; and that the gas company should have, without competition from the other corporations, the privileges of furnishing and vending gas to the inhabitants of the city,—was held to be in violation of the anti-trust act (Rev. Stat. art. 5318); and, in an action of quo warranto, instituted by the attorney general against the gas company for the purpose of forfeiting its charter on the ground of the violation of said statute, judgment of ouster was rendered and affirmed by the court of appeals. *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289.

The anti-trust statute of Texas (act May 25, 1899, § 12), providing for the recovery back of money paid to members of pools, trusts, and monopolies, does not authorize an action against a corporation or company unlawfully transacting business in violation of that statute, and members of its board of directors, for money thus paid to it, where the corporation has ceased to exist; as the provision is for a penalty, and not for liquidated damages, and a cause of action does not survive the existence of the corporation. *Mason v. Adoue*, 30 Tex. Civ. App. 276, 70 S. W. 347.

A combination of insurance companies to establish uniform rates of insurance and of agent's commissions is not illegal under the Texas anti-trust law of March 30, 1889, prohibiting trusts

meaning as would include a suit which does not involve any actual injury to property. Thus this section was held not to apply to a suit against an attorney for the negligent loss of a debt intrusted to him for collection (*Bruce v. Baxter*, 7 Lea, 477; *Ramsay v. Temple*, 3 Lea, 253); nor to the suit of a stockholder, in behalf of the corporation, against bank directors, for the negligent discharge of their duties, by which the corporation had sustained losses (*Wallace v. Lincoln Sav. Bank*, 89 Tenn. 631, 24 Am. St. Rep. 625, 15 S. W. 448).

In *Kirkman v. Philips*, 7 Heisk. 222, 225, the court said: "The statute of limitations applicable depends upon the nature and character of the action, and not upon its form." In the same case it was held that, although the forms of action have been abolished by the Code, an owner of personal property, whose right to sue for damages for its conversion was barred by the statute of three years, might waive the tort, and sue for the value upon the implied assumpsit, in which case his suit would not be barred in six years: that being the time within which a suit upon a contract might be brought. See also *Alsbrook v. Hathaway*, 3 Sneed, 454. Actions on statute liabilities, not being a statute penalty, and not dependent upon any contract, express or implied, are actions not otherwise "expressly provid-

ed for by any of the other sections of the chapter upon the limitations of actions other than real." Such an action is at the common law,—one in the nature of an action upon a specialty,—and is of a similar kind to those enumerated in § 4473, Shannon's Code. Under the statute of 21 James I., chap. 16, all actions "upon the case," with certain exceptions, and "all actions of debt grounded upon any lending or contract without specialty," were barred unless commenced within the time named in the statute. But an action of debt which was grounded upon a specialty was not within the statute. Specialties were not within the evil intended. Angell, Limitations of Actions, § 80; *Jones v. Pope*, 1 Saund. 38; *White v. Parkin*, 12 East, 578, 11 Revised Rep. 488; *Browne, Actions at Law*, 345; *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121; 4 Bacon, Abr. 471. But the statute of James operated upon the form of action. Thus, all actions "upon the case," whatever the cause of action, were within the bar of the statute, and so were "all actions of debt grounded upon any lending or contract without specialty."

In *Carrol v. Green*, 92 U. S. 509, 23 L. ed. 738, it was held that a suit by creditors of a corporation to enforce their claims against stockholders under a clause of the charter rendering them individually liable was

for restrictions in trade, or the production of price, or rates of transportation for commodities or articles of commerce; since a contract of insurance is not "trade," nor is it "an article of commerce" or a "commodity." *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 397.

See *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428, *supra*, IV. f; *Etna Ins. Co. v. Com.* 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624, *supra*, IV. h.

The words "restrictions in trade," in an anti-trust law making such restrictions a felony punishable by fine or imprisonment, cannot be construed to include all contracts which in any sense restrict trade, but are limited to combinations such as those between producers or dealers to limit the production or supply of an article, and thus acquire a monopoly of it, and then unreasonably enhance prices, or those quasi public corporations which might be disabled by the combination from performing a duty to the public. *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 397.

Where all the liquor dealers in a city unite in a contract to control the beer trade in such city and in the tributary markets, each party to the contract turning all the beer he or they may handle into the trust, such a contract is a violation of the act of 1890, relating to conspiracies against trade, which denounces as an offense a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons for the purpose of preventing competition in the sale of any article of commerce, as the agreement in question pos-

sessed this feature. *Anheuser-Busch Brewing Asso. v. Houck* (Tex. Civ. App.) 27 S. W. 692, Affirmed in 88 Tex. 184, 30 S. W. 869.

Where beer and ice were sold by a brewing company, a Texas corporation, to a firm under a written contract whereby the brewing company agreed to give to the firm the sole representation and sale of its products in a town and vicinity at certain prices, and the firm agreed, among other things, during the term of the contract to handle no other beer than that of the brewing company, except with its express permission, such a contract is one of sale, and not one which merely establishes the dealer as the agent of the company; and is a combination in restraint of trade, and under the condemnation of the statute of March 30, 1889. *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27.

And in *Fuqua v. Pabst Brewing Co.* 90 Tex. 298, 35 L. R. A. 241, 38 S. W. 29, 750, it was held that a contract not to sell, or be interested in the sale of, any beer except that of one company, which in turn agrees not to sell or consign beer to any other party in the vicinity, is a combination of the capital and acts of the parties which constitutes a trust, in violation of the Texas statute of March 30, 1889.

And so beer brought from another state under an invalid trust agreement becomes, upon its arrival in the state, immediately subject to the anti-trust law of the state by virtue of the act of Congress of August 8, 1890. *Ibid.*

And a contract by the terms of which one party obligated itself that no beer should be represented or held for sale by it other than that furnished by or with the consent of a brewing company which company in turn obli-

barred by the South Carolina statute; being, in substance, the act of 21 James I., chap. 16. The reason given for this result was that the charter was a mere offer or proposal by the state, which the stockholders could accept or reject, and that, by taking stock, they assented to the liability imposed, and that the assent thus given and promise implied was the ground of liability, and that the action of case would lie upon such an implied promise, which action was within the bar of the statute. The court, however, went further, and held that the action or suit was not on the statute, and was, therefore, not an action on a specialty. "The statute," said the court, "was only inducement. The implied promise of the stockholders to fulfil its requirements was the agreement on their part, and it was without specialty." The distinctions made in the case are quite refined, and turn upon common-law forms of action. So far as the case goes upon the ground that the charter involved a mere proposal, and that the liability of the shareholder was grounded upon his implied agreement, it is in accord with the great current of authority.

The statute of James, as amended by act N. C. 1715, chap. 21, was in force in Tennessee until adoption of the Tennessee Code of 1858. N. C. Act 1715, chap. 31, Scott's

Revisal, vol. 1; *Pea v. Waggoner*, 5 Hayw. (Tenn.) 19; *Tisdale v. Munroe*, 3 Yerg. 320. By the Code, the statutes no longer operate upon the form, but upon the cause, of action; and, by § 4473, every cause of action not otherwise expressly provided for is barred, without regard to whether it be upon a specialty or not.

It is impossible, having any regard to the verity of things, to conceive how any action would lie, under the 7th section of the anti-trust act, upon any implied agreement of the defendants to compensate the plaintiff for the injury to its business and property. But if we could torture an implied agreement out of the transaction, the defendants would not be in better plight, for, if the cause of action be a contract, express or implied, the action would not be barred for six years. Shannon's Code, § 4472. We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years.

The third and fourth pleas were bad, and the demurrer to them should have been sustained. The direction to find a verdict for the defendants was also error.

The judgment will be reversed, with directions to grant a new trial.

gated itself not to sell beer at two certain places where the other party was engaged in business, other than through such party, during the term of the contract, is a contract of sale, and not of agency, and is violative of Rev. Stat. 1895, art. 5313, avoiding contracts which restrain trade, or prevent competition in the sale of various commodities. *Texas Brewing Co. v. Anderson* (Tex. Civ. App.) 40 S. W. 737; *Texas Brewing Co. v. Durrum* (Tex. Civ. App.) 46 S. W. 880.

In *Vandeweghe v. American Brewing Co.* (Tex. Civ. App.) 61 S. W. 526, the court said: "This is a suit on a contract for the sale of beer. The only defense relied on in this court is that the contract violates the anti-trust statute of this state. The only fact relied upon to show a trust is an agreement by the plaintiff not to sell beer to anyone else within a certain designated territory contributory to the defendant's place of business. We think the case is distinguishable from the cases heretofore held to violate the anti-trust law, and within the doctrine announced in *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079."

A contract by which one party was to have the exclusive agency and right to sell any and all goods manufactured or kept in stock by the other, and the first-mentioned party was not to sell any goods of that character other than those furnished by such other, is in restraint of trade, and not enforceable at law under the Texas statute. *S. S. White Dental Mfg. Co. v. Hertzberg* (Tex. Civ. App.) 51 S. W. 355.

A sale under a contract which is invalid under the statute of Texas cannot be upheld, and the contract enforced, where the defense of invalidity under the statute is made, upon the 64 U. R. A.

ground that the sale and delivery to the purchaser were an interstate transaction, where it appears that, after the interstate portion of the transaction had ended, then the trust part of the contract arose. *Ibid.*

As to what is interstate commerce under Federal anti-trust act, see cases in *supra*, III. b.

2. Violation of statute as a defense.

Where a foreign corporation contracted with a person for the sale of its goods within the state of Texas, and by the contract gave to such person the exclusive right to sell its goods in that state, the contract also fixing the price at which they should be sold, in an action for the purchase price of the goods sold under such agreement, it was held that the same was a violation of arts. 5313, 5319, Rev. Stat., and void; and no recovery could be had. *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232, 54 S. W. 804.

A contract or agreement between a corporation engaged in the manufacture of carriages in another state and a person, whereby, in consideration of its giving to such person the exclusive sale of the vehicles manufactured by it for the state of Texas, except one town, the other person to the contract agreed to handle and sell the work of the company to the exclusion of all similar grades of work, at prices, terms, and conditions mentioned in the contract, falls under the condemnation of the statute against trusts and conspiracies against trade; and, in an action by the company against the other party to the contract upon notes given for vehicles furnished him by the company, the 47

ILLINOIS SUPREME COURT.

George F. HARDING *et al.*, *Plffs. in Err.*,
v.

AMERICAN GLUCOSE COMPANY *et al.*

(182 Ill. 551.)

1. Upon a bill to enjoin the creditors of a corporation from selling its property to an organization intent on forming an illegal trust and crushing out competition, evidence is admissible as to the purchase, by the trust, of other plants of similar nature.
2. The withdrawal of their answers, by the defendants, in a suit to enjoin the sale of property to an illegal trust will not prevent consideration of the evidence which had been taken under the issues formed by the answers in disposing of the case.
3. A bill should not be dismissed as to defaulting defendants where it is sufficient to justify the relief prayed for, and its material allegations are sustained by the proofs.
4. Option contracts providing for the sale of plants organized for the manufacture of glucose to a corporation organized to do a banking business and having no authority to purchase such plants, are void.
5. An illegal trust is created by the conveyance, by the stockholders of several competing companies engaged in the manufacturing business, to one company organized for the purpose of taking their property and consolidating their interests.
6. A formal written agreement is not necessary to constitute an illegal trust;

invalidity of the agreement for the reason stated is a good defense to the action. *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120, 47 S. W. 288.

Where a corporation engaged in the manufacture and sale of carriages, buggies, and wagons entered into a contract with a firm by which the latter agreed and bound itself to purchase of the company 100 vehicles of its manufacture during a certain year, and it was agreed that the corporation would sell to the firm, and to no other persons in certain towns during that year, the 100 vehicles, or more if required; and the corporation bound itself not to sell any of its goods to any other purchaser or customer,—in an action upon the contract for goods sold, the defendant answered that the agreement was in violation and contravention of the anti-trust law, and also at the same time filed a plea in reconvention against the plaintiff for damages. The court, following the decision of the supreme court in *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 951, held that, inasmuch as the contract sued upon was in violation of the anti-trust law of Texas, neither party could maintain an action upon it, and therefore the plaintiff could not recover; nor could the defendant recover on its plea of reconvention. *Troy Buggy Works Co. v. Eife* (Tex. Civ. App.) 74 S. W. 956.

An agreement whereby a wholesale dealer in gloves agreed to sell to a retail merchant the gloves manufactured by it, and not to sell to
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it is sufficient that concerted action showing an understanding or scheme is shown by the acts of the parties.

7. A stockholder has the right to maintain a suit to enjoin the corporation from entering an illegal trust, where the effect will be to subject the charter to forfeiture and destroy the value of the stock, since it will, in any event, close down the business of the corporation, and prevent the further earning of profits.
8. A stockholder of a corporation may bring an action on behalf of itself and others who shall come in and become parties, to prevent the officers and a majority of the stockholders of the corporation from dealing wrongfully with the corporate property to the injury of stockholders, where it is reasonably certain that a demand upon the proper officers to bring the action would be unavailing.
9. That a foreign corporation doing business in the state has power, under its charter, to relinquish the transaction of a branch of its business, does not authorize it to enter into a trust combination, or sell property required for the transaction of its business in violation of the local laws, or deprive the local courts of the power to see that the business transacted in the state shall not be disposed of in such a way as to violate the local statutes.
10. A contract by one selling his business not to engage in it again for a series of years within the territory where it could be profitably transacted is void as in general restraint of trade.
11. Answering to the same portion of

any other merchant in the retailer's city,—and the retailer contracted to handle the wholesaler's gloves exclusively,—falls under the condemnation of the anti-trust law of 1899 (Laws 26th Leg. p. 246, chap. 146); and no action by either can be maintained against the other thereon. *Francis T. Simmons & Co. v. Terry* (Tex. Civ. App.) 79 S. W. 1103.

3. Not to engage in business.

The anti-trust law does not apply to the sale of a business and the good will thereof, accompanied by an obligation on the part of the seller not to resume business for a limited time at a specified place, where the purchaser is a single person or firm. *Comer v. Burton-Lingo Co.* 24 Tex. Civ. App. 251, 58 S. W. 969.

And so where there were four different lumber dealers in a town, and three of them combined to buy, and did buy, the stock and good will of the fourth for the purpose of preventing competition and controlling prices, these facts did not show any injury or wrong done to, or suffered by, the firm so selling out; and, there being no allegation of an agreement between the three dealers who purchased the business of the other not to compete with each other, or of an agreement to sell only at certain prices, the public was not affected; and an action to restrain the seller, under the contract not to engage in business in the same place for a certain period of time, was held to be maintainable.

Ibid.

a bill which is demurred to overrules the demurrer.

12. A purchaser from defendant pendente lite acquires his interest subject to the decree which shall be rendered on the hearing; so that, in case a decree is entered against the vendor, setting aside the sale, the vendee will be bound thereby.

13. A witness cannot refuse to answer a question merely because it calls for immaterial evidence.

14. Error in sustaining a demurrer of a party disclaiming any interest in the litigation is not sufficient to justify a reversal and remanding of the cause for the purpose of allowing him to answer.

(October 19, 1899.)

ERROR to the Circuit Court for Peoria County to review a judgment in favor of defendants in a suit to prevent the conveyance of the property of the American Glucose Company to the Glucose Sugar Refining Company for the alleged reason that it was an attempt to create a monopoly. *Reversed.*

Statement by Magruder, J.:

This is a bill filed on August 3, 1897, by the plaintiffs in error against the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, Joseph Firmenich, George Firmenich, C. H. Matthieson, F. O. Matthieson, and the officers, directors and stockholders of the American Glucose Company, and the unknown owners or hold-

ers of the option given by the American Glucose Company for the sale of the plant in Peoria, and the unknown persons having any interest in such option or under it.

The complainants in the bill represent that they were the owners of 203.5 shares of the capital stock of the American Glucose Company, a corporation organized under the laws of the state of New Jersey, with its general offices in Buffalo, New York, and office situate, and plant and property operated, in Peoria, Illinois; that such shares of stock are represented by a certificate issued to said Harding, July 1, 1885; that the Chicago Real-Estate Loan & Trust Company is the equitable owner of said stock as pledgee for the security of a loan, but that said Harding is the owner thereof, subject to the rights of said pledgee; that the capital stock of the American Glucose Company is \$1,500,000, the shares being \$100 each, but the original issue of said stock (of which the present certificate represents the reduced issue) made the said shares of said Harding 2,035 in number, and of the par value of \$203,500, instead of \$20,350; that Harding paid in property \$203,500 for the original stock; that, by reason of these facts, orators became, and now are, the owners of one sixty-second part of the entire capital stock of the said American Glucose Company, if all of the stock had been issued but about \$400,000 of it never was issued, but is owned by the corporation itself; that the American Glucose Company has, for many

In order to constitute a trust under Rev. Stat. 1893, art. 5313, and within the meaning of that statute, there must be a "combination of capital, skill, or acts by two or more." Combination as here used means union or association. If there be no union or association by two or more of their "capital, skill, or acts" there can be no "combination," and hence no "trust." And the union or association of "capital, skill, or acts," denounced, is where the parties in a particular case designed the united co-operation of such agencies which might have been otherwise independent and competing for the accomplishment of one or more of such purposes. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079.

And so where a merchant sold his stock, and agreed with the purchaser thereof to retire from the mercantile business in the town for the period of twelve months, such agreement is not within the condemnation of that statute; as, by the transaction, neither the capital, skill, nor acts of the parties were brought into any kind of union, association, or co-operative action. *Ibid.*

See cases in *supra*, III. d; and *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900, *supra*, IV. n; *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, *supra*, IV. i.

4. Contracts in regard to patents.

A contract, whereby a corporation of another

state owning and manufacturing a patented wire fence leased to a person the exclusive right to build, weave, and construct wire fences under its letters patent, in part of a certain county and all of other counties for the term of one year; and whereby such person agreed that all wire pickets and stays and machines used in building fences under said patent should be furnished by said foreign corporation,—is valid, and does not come within the condemnation of the anti-trust statute. *Clark v. Cyclone Woven Wire Fence Co.* 22 Tex. Civ. App. 41, 54 S. W. 392.

A contract by a corporation which is the owner of a patent windmill, wherein it agrees to give to another party the exclusive right to sell during a year certain the said patent of the windmill manufactured by it in certain named counties, but in no other, such other party not to make any sale below a price list attached to the contract marked "net price," nor above the price list attached marked "selling price,"—is not a contract within the condemnation of the statute against trusts (Acts 1889, chap. 117, p. 141), which inhibits "two or more persons combining their capital, skill, or acts" for certain purposes, as the contract is not a sale, but merely the creation of the relation of principal and agent. *Welch v. Phelps & B. Windmill Co.* 39 Tex. 633, 36 S. W. 71.

See cases in *supra*, III. g; and *Columbia Wire Co. v. Freeman Wire Co.* 71 Fed. 302, *supra*. IV. d.

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years past, been engaged in the manufacture and sale of glucose and grape sugar in Peoria; that the management during that period has been in the hands of the said Cicero J. Hamlin, late president, and his two sons, William and Harry Hamlin, and the board of directors have been and are now controlled by said Hamlin and sons; that your orators are unable to give a detailed statement of the management and administration of the affairs of the company, because the details thereof have been and are persistently, wilfully, and fraudulently concealed by the said Hamlins and their codefendants from your orators; that the defendants have fraudulently manipulated and controlled the board of directors of said company, and conducted the affairs and business thereof fraudulently, for their own interest and profit, and in gross disregard of the interest of your orators as stockholders, and have fraudulently paid, and still pay, enormous salaries to themselves and others in the business of said company, and, by these and other fraudulent expenditures and practices, have diverted to their own use the profits of said business, and prevented the payment to your orators of such dividends as they were entitled to receive; that, during that entire period, said Hamlins and said defendants have fraudulently controlled, and still fraudulently control, all the capital stock of said company, except that owned by your orators, and a few hundred dollars of stock owned by minority stockholders; that your orators file this bill, not only in their own behalf, but also in behalf of all other stockholders similarly situated, who may see fit to come into this suit and join therein; that said fraudulent salaries paid have been more than ten times the value of the services rendered, and said sums so diverted have amounted to the sum of \$100,000 a year during that period, and thereby your orators have been greatly defrauded and injured. The bill further represents that a giant pool, trust, or combine has been recently formed, for the purpose of unlawfully regulating and fixing the price of glucose and grape sugar, being articles of merchandise and commodities manufactured and sold throughout the United States and in this country. The bill further proceeds as follows:

"That the names of the persons forming such pool are now unknown to your orators, who have been unable, after diligent inquiry, to ascertain the same, but they are informed and believe and charge that all said defendants are parties thereto or interested therein, with others unknown; that said pool, trust, and combine is to be accomplished through and in the form of a giant corporation, with many million dollars of capital

stock, formed or to be formed under the laws of the state of New Jersey; that the parties organizing, creating, promoting, and managing and interested in the said pool, trust, and combine have recently perfected their arrangements, contracts, and agreements for the purpose of unlawfully monopolizing, controlling, regulating, and fixing the price of glucose and grape sugar within the state of Illinois and the United States, and for such purpose said parties have already obtained control of the factories and plants of nearly all the corporations and individuals heretofore engaged in the manufacture and sale of said commodities in the United States; that, for the purpose aforesaid, the said parties organizing said pool have made overtures to the board of directors of said American Glucose Company to secure the control of the plant and property of the said American Glucose Company, situated and operated in Peoria, and used in the manufacture of said commodities; that said Hamlins and said other defendants, and the directors of said company, whose names are unknown, and when known will be made parties, with said other stockholders unknown, have fraudulently promised and agreed with said parties forming said pool, for the fraudulent purpose aforesaid and in violation of the statutes of Illinois, to sell and transfer and convey to said parties forming said pool, or the corporation to be used as the instrument to carry into effect the said pool, all the plant and property of the said American Glucose Company hereafter more particularly described, situated and used in the said city of Peoria, without the consent of your orators, or either of them, and without the consent of any stockholders except the fraudulent stockholders aforesaid, or said directors, except the fraudulent directors completely under the control of the said Hamlins and interested with them; that the said Hamlins and the said other defendants, and said stockholders and directors, will convey and sell and transfer said plant and property unless enjoined from so doing by the order of court, and are now planning fraudulently, wrongfully, and unlawfully, in violation of the statutes, and arranging to get the authority of the stockholders fraudulently for such sale, other than your orators and independent stockholders, and in violation and fraud of your orators' rights to the premises; that the purpose and intent of the said pool and combination, and of said defendants, jointly and severally, is to create a trust in, and monopoly of, the said articles, and give the said corporation, trust, or pool the power to regulate and fix the price of such articles in the state of Illinois and elsewhere, and to control the entire output throughout the

United States amounting now, in the aggregate, to about 1,250,000,000 pounds annually, and consuming about 40,000,000 bushels of corn annually; that said pool and combine, and the effect, intent, and purpose of it, and of the said defendants severally, is in direct violation of the laws of the state and statute, and the method of said pool and combine, and of said parties forming and using the same or interested therein, is to swallow up and merge in this pool the organizations and plants in the United States heretofore engaged in the manufacture and sale of said articles, issuing to the said organizations heretofore engaged stock in said pool and combine or in said trust or corporation, and, where this method fails, to buy such other organizations and plants for cash; that, on account of being unable to deal with your orators in the favorite method above referred to, the said pool and combine, and said parties creating the same, have resorted to the second method above referred to, so far as the American Glucose Company is concerned, and now propose and intend to thus fraudulently and unlawfully obtain the property and plant of said glucose company, and the title and control of it, combining and conspiring with the Hamlins and directors and stockholders, and all the other defendants in this bill, for said purposes, and the said Hamlins, and said stockholders and directors, and the said defendants, are actively and knowingly and unlawfully participating and joining in said fraudulent intent and preparing fraudulently and unlawfully to sell the plant and property aforesaid to the persons and parties aforesaid, for the fraudulent purposes aforesaid; that your orators are informed and believe, and so charge, that said pool, and said parties promoting the same, have unlawfully and wrongfully already purchased, for the purposes aforesaid, the Chicago Sugar Refinery consuming about 26,000 bushels of corn daily in the manufacture of said articles, and the Peoria Grape Sugar Company consuming about 15,000 bushels, and the Rockford Sugar Works consuming about 16,000 bushels of corn daily, and the Davenport Sugar Refinery consuming about 9,000 bushels of corn daily, and the Firmenich Manufacturing Company consuming about 9,000 bushels of corn daily, in the manufacture of said glucose and by-products, and other factories heretofore engaged therein, all consuming more than 100,000 bushels of corn daily in said manufacture; that C. H. Matthieson is one of the men engaged in forming said trust, with F. O. Matthieson, prominently connected with the American Sugar Trust, and the said sugar trust and the said glucose trust are intended, by the said parties forming the

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same, to work together to control and regulate the price of grape sugar and glucose, and all other sugar products, and the stockholders of said new pool and combine include all the stockholders of said American Glucose Company except your orators and the owners of a few other shares, powerless to prevent said wrongful sale and transfer, without the aid of this court; that, after diligent inquiry, your orators have not been able to ascertain the price at which the plant and property of said American Glucose Company or pool is to be so sold and transferred to said pool, although they have repeatedly applied to the officers and directors of said company to learn the same, and to the said defendants to ascertain the same, and they charge that such price has been wrongfully and fraudulently agreed upon at so small a sum as to be destructive of the value of your orators' said stock, and said Hamlins, and said stockholders and directors, and said defendants, co-operating in the said fraudulent conspiracy, are to fraudulently receive, in addition, large sums as a bonus for such unlawful and fraudulent sale, to go to them individually, none of which will accrue to the benefit of your orators and the other stockholders of said company, or to said company, and your orators, if possible, are to be frozen out and defrauded by the carrying out of said contract of sale, contrary to equity and good conscience and the statutes of this state; that there is now no occasion for the sale of the said plant and property in Peoria; that it ought not to be sold; that it is to the interest of the stockholders of said American Glucose Company and of said company and of the public, that the said company continue to own and manage its property and plant, and manufacture, as heretofore; that such manufacture now is, and is becoming exceedingly profitable; and all that prevents great profits, and such continuance of ownership and conduct of business, is said fraudulent conspiracy of said parties above named or referred to as defendants to this bill.

"Orators charge that Joseph Firmenich, C. H. Matthieson, F. O. Matthieson, George Firmenich, George W. Lamb, secretary of the said American Glucose Company, and Thomas Grant, and the officers, directors, and stockholders of said company, are fraudulently co-operating and conspiring with and aiding the said Hamlins, and so are all the other parties defendant herein, and they control more than half the entire capital stock of said American Glucose Company, and will fraudulently sell and transfer to said trust said plant and property of the said American Glucose Company, to the great wrong and injury of your orators, unless restrained by the court; that the said

Hamblins and the other directors of said American Glucose Company, if said plant and property be allowed to remain under the control of said Hamblins and of said company, will wreck and destroy it, and destroy the value of your orators' stock therein; that to prevent this a receiver should be appointed for the said American Glucose Company and its property and the business of said company carried on by such receiver, under the directions of this court, until an accounting can be had in the premises, and said company reorganized, under the direction of this court, and its property and business preserved for its stockholders, and such other relief granted as may be proper in the premises; that all the acts of said defendants above referred to, and of the said pool and trust interested in the same, are with the fraudulent intent to effect a combination of capital, skill, and of firms and persons, to limit and reduce the production of glucose and grape sugar, and regulate and fix and control and change, at their will, the price of the same, and to prevent competition in the manufacture and sale, and to make contracts by which all of said parties shall bind themselves not to sell the same below its price, and to keep the price at a fixed figure, so as to prevent a free and unrestricted competition, in violation of the statute of Illinois entitled 'An Act to Define Trusts and Conspiracies against Trade,' etc., approved June 20, 1893, in force July 1, 1893; that all the acts of said defendants and of said pool are with the fraudulent purpose to regulate and fix the price of said commodities, and to limit the amount of manufacture; that the said articles—glucose and grape sugar—are not articles of merchandise the cost of which is mainly made up in wages, and the purpose and intent of said parties, or the principal object of or the effect of their said acts, are not to maintain or increase wages, all of which is in violation of the act to provide for the punishment of persons or corporations forming pools, approved June 11, 1891, and amended in 1897, and said acts of defendants are with the intent to place the management and control of such combination and pool, and the manufactured product, in the hands of a trustee or trustees, to limit and fix the price, and lessen the production and sale, of said articles, and to prevent the manufacture thereof, except as controlled by them, in violation of said statutes of the state of Illinois; that the legal description of the real estate on which the said plant, machinery, etc., of said American Glucose Company is situated, in Peoria, Illinois, and which real estate is a part of said plant is a part of lot numbered 6, in Frink & Sanger's extended addition to the city of Peoria, etc., situated in the southwest 64 L. R. A.

quarter of section 17, etc.; that the glucose business is a business of enormous proportions, to which it has recently grown; that the manufacturers thereof now produce about 40 pounds out of a bushel of corn; that it is a white, mobile, sweet syrup, weighing about 12 pounds to the gallon, with many properties and uses, daily extended, of value and importance to the health and wealth of the country; that it formerly sold it at about 7 cents per pound; that its price ruled, before the formation of said trust and pool and before its plans for incorporation, as low as 70 cents per 100 pounds; that its products were, and still are, used everywhere, and their commercial importance and manifold by-products are outranked in few instances; that it is an important constituent for fine table syrups, and used in every household, and in making jellies and jams, confectioners' jellies and brewers' glucose, in the manufacture of leather, dyes, and many medicines and candies and in the manufacture of beers and wines and cordials, and it is an anhydrous sugar, and of universal necessity and its by-products are used in the manufacture of paints, and are substituted for olive oil, and are used for food for horses, cattle, and sheep, and from the residue is produced common meal from the hulls of corn, by grinding; that these are but the beginnings of its uses, daily discovered and daily extended, beginning about 1867 at 50 bushels of corn per day, and now amounting to over 100,000 bushels per day, of which 60,000 bushels per day are used at home and 40,000 bushels are exported; that great skill and vast capital are employed in said business, making competition so great that the price of glucose has gradually worked down, but good profits and great fortunes have been and are still realized therefrom, and from the manufacture, and in the purchase of the plants, said new trust proposes to further increase the profits by limiting production and regulating prices, and reducing operating expenses and cost of same,—all in violation of the letter and the spirit of the statutes of Illinois, and in various ways best known to other monster trusts of the same class in other industries; that it is not an easy matter for persons or corporations to go into this business, and this new proposed organization includes plants engaged in both glucose and grape sugar, and that it requires considerable time to erect a plant, and some of the most important processes are patented and owned by the owners of the present plants, forbidding their use in new factories and for the further reason that it requires special skill and experienced men to erect and operate a modern glucose plant which can compete at all with these great concerns, much less with this great

proposed trust, and the proper class of men to operate same is limited in number, and not easily obtained, and the best men are controlled by the owners of the present plants, and will be controlled by the proposed trust; that the organizers and promoters of this proposed glucose trust propose and intend to stop competition and limit production, and regulate and fix prices, by closing up several of the plants which they have purchased or agreed to buy; that the effect of the destruction of competition in this business is already shown in the fact the price per hundred is now \$1.25 as against 70 cents per 100 pounds two months ago and by far the greater part of this gain of 55 cents was made within the few days past, and is due to the formation of this trust and to the shutting down, actual or expected, of the plants, in the interest of the said trust and the price, now nearly doubled, will still further advance and is entirely within the control of this organization, which will control 95 per cent of the glucose plants of this country, and will practically destroy all competition and dictate prices; that the plants which are not yet in the new organization have agreed to fix the price as named by said proposed trust, which makes said trust absolute master of this mighty product of such vital importance to every class of men in the United States, and especially in this state, whose chief product is corn, and where many of the now competing plants to be swallowed up are situated; that the American Glucose Company is a corporation organized under the laws of New Jersey; that, on inquiry from the officers of said company, your orators have learned that the president has given a cash option for the plant at Peoria, and has been informed that it has been accepted; that this option has been given to said proposed trust, and that an acceptance has been given by this trust, as so stated, and that a special stockholders' meeting has been called, of which notice has been given your orators by printed notice, of which exhibit A, attached, is a copy, as follows, to wit:

"The board of directors of the American Glucose Company, on this 19th day of July, 1897, declare and resolve that it is advisable that this corporation relinquish the business of manufacturing glucose and grape sugar, and such other business as it has hitherto engaged in at the city of Peoria and state of Illinois; that the nature of its business be changed accordingly; that the branch of its business at Peoria be relinquished, its manufacturing business be confined to the manufacture of starch at Buffalo, its plant and property at Peoria be sold, and that a meeting of the stockholders be called to meet in

Buffalo on the 3d of August, 1897, at 11 o'clock, pursuant to the statute, to take action thereon. "George W. Lamb, Sec.

"To this is attached, namely:

"You will please take notice that a meeting will be held at the office of the company in Buffalo on the 3d of August, 1897, for the purposes specified in such resolution.

"July 18, 1897. George W. Lamb, Sec.

"Your orators further show that this proposition referred to in said exhibit A, to give up the business of manufacturing glucose and grape sugar and other business in Peoria, and sell its plant, indicates the mode in which this new trust has planned and intends to control the glucose business of this country, and that for that purpose it intends to absorb the business of the American Glucose Company at Peoria, Illinois; that said American plant is one of the largest of the rival manufacturing plants of the country, consuming daily 26,000 bushels of corn,—nearly one third of the total manufacture of glucose and grape sugar and 90 per cent of the glucose and grape sugar manufactured in this state,—and this option and proposed purchase now proposed to be fraudulently ratified by the stockholders on August 3, 1897, will practically destroy all competition in the manufacture of this most useful product in the state of Illinois, and will leave the new trust omnipotent in the markets of this state and Chicago, the largest and best in the world, and will destroy the property and business of said glucose company, and irreparably injure your orators.

"Your orators charge that they have not been able to ascertain at what price the said option is given, although they have applied to learn at the office of the company and to its officers, but they are informed and believe that it is a price destructive to the value of the stock and some contract exists by which the great sacrifice of this property is to be made good at the option of certain stockholders, not including your orators nor the minority not interested in said fraudulent conspiracy, but the benefits of said sacrifice will inure to the stockholders who are stockholders of the new trust, and that a scheme is adopted, or to be adopted, by which this pretended sale will effect a sacrifice of the interests of your orators in said property for the benefit of other people and other stockholders, which is against equity and good conscience; that the country and people are now at the bottom of the panic, but business is rapidly improving, and the price for which this plant is proposed to be sold is a panic price, which sale ought not to be made, and said American Glucose Company has no call nor necessity to make such sale, and its real

interests are to continue in the manufacture of glucose in the business heretofore profitable to them, and which cannot be less profitable than at present; and that by retaining the plant the said American Glucose Company will enjoy the enhanced price and share in the prosperity of this and all other business about to be realized; that negotiations were begun for the creation of this trust some time ago,—precisely when cannot now be ascertained by your orators, because of the secrecy observed by those engaged in the conspiracy against the public weal,—but your orators charge that the creation was within three months past, and negotiations for the purpose of secretly forming the trust began about that time with the said American Glucose Company, the plant of which at Peoria is regarded and is an essential element to the creation of such monopoly, without which no such trust could profitably be formed and that at first, and up to a late date, the negotiations and organization had taken the shape of a union of the plants above described, and were and are intended to include the plant in Peoria of said American Glucose Company; that, in whatever form they may be made to appear the real organization and substance of said glucose trust is a union of said plants embracing all plants outside of said American Glucose Company and seeking to include said company and its plant in Peoria but that for some unknown reason, believed to be because there was some outstanding stock such as that of your orators, which it was necessary to get up, or the parties in charge of said negotiations on the part of said American Glucose Company were unwilling to have a full share in the profits that would accrue to the American Glucose Company by such organization given to said outstanding stockholders, its officers, secretly conducting the said negotiations, have chosen said form of sale, and chosen that the first step should be uniting in said trust an ostensible sale of said plant at Peoria to said company for cash; that, in order that the trust might go forward, a price was named by the president for said plant, and was accepted by said glucose trust, and your orators allege, upon information and belief, and allege as a fact, so far as concerns themselves, that such price, and all the details of said negotiations, have been kept secret at all times, and still are kept secret, especially from your orators, who have been unable, after much inquiry, to learn the truth; that your orators allege that they are informed and believe that options are outstanding, given by said trust as a part of this sale to said Hamlin and the other defendants to this bill, to take said stock of said trust, giving a most favorable price, and an option to take said stock in

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lieu of cash, greatly increasing the value of the stock of said preferred stockholders; that said stock in said trust company has been listed to the amount of \$40,000,000, as your orators are informed and believe upon the New York Stock Exchange, of which \$14,000,000 are preferred stock and the remainder is common stock; that said stock is now selling, as the market reports show, at 105 cents on the dollar offered for it, but offered on the exchange to be sold only at the sum of 115 cents on the dollar; that your orators cannot learn, after much inquiry, whether the deed for said plant has been prepared or executed or delivered in escrow nor whether the call of said meeting on August 3d for said ratification is merely a form, or whether this form precedes or succeeds the sale and conveyance to said trust, but allege, upon information and belief, that the deed has not yet been delivered, although prepared, and that the possession of the plant has not yet been delivered, although ready for delivery; that a time is fixed, August 10th, or earlier, for such delivery; that payment has not yet been made; that the money for such payment lies in escrow in the hands of the Illinois Trust & Savings Bank of Chicago, and with it, as claimed, said deed; that the works of said plant at Peoria prepared to deliver it, have been closed down and shut up, and that the agents, managers, and officers lately in charge are now absent, the office having been removed by the said conspirators ostensibly from Peoria to Buffalo; that they are now engaged in the necessary preliminaries for the performance of said contract, as made by said president, and a part of the officers are in Peoria, engaged in preparing the plant for sale and delivery, by direction of said Hamlin; that if any information or notice should be given to the officers or defendants of any opposition to said sale or as to the filing of this bill, or of any application for an injunction, immediate delivery would be made, in order to defeat said injunction; that the said 203 shares of stock of your orators, originally of the par value of \$203,500, and only cut down to avoid taxation, have cost and were of the original value to your orators of the sum of \$500,000; that by said sale, if carried out, the most valuable parts of the property and business of said American Glucose Company will be sacrificed, and your orators' stock will be reduced in value to less than one twentieth of its cost, but, if said property is retained and continued to be operated as heretofore, said stock, in the approaching prosperity now dawning upon the country, will enable your orators to realize a much larger per cent of the said value, and repay the original cost of \$500,000, instead of the pitiful sum for which, under said al-

leged contract and fraudulent sale, it is now being sacrificed; that said plant at Peoria consists of buildings and appurtenances admirably fitted for the purpose of manufacturing glucose and grape sugar, and in all particulars is a modern plant; that it is situated upon the southwest quarter of section 17, in township 8, range 8 north, in Peoria county, Illinois, and owned by said company, as accurately described elsewhere; that some of the stockholders of the American Glucose company who have promoted this sale to the said trust are interested as beneficiaries in the trust, and as stockholders therein, obtained by them in part by the sale to said trust of parts or the whole of other factories, and that said stockholders of said American Glucose Company, under option given or understandings with said trust, will be able to realize larger returns than those which are claimed to be dividends, out of said sale or its proceeds, to accrue to your orators.

"Your orators allege, upon information and belief, that said American Glucose Company has been conducted as a private company under charge of the said Hamlins, and its proceeds, or the proceeds of its business, have been fraudulently and wrongfully diverted to the pockets of said Hamlins in divers and sundry ways, and, among others, in payment of enormous and fraudulent salaries to themselves and others interested with them, and in payments for contracts, corn, etc., or materials, made by agents or other persons representing the dominating stockholders, and an accounting ought to be had in favor of your orators with said stockholders, consisting of the Hamlins and others, and the company, to ascertain the amount of moneys which your orators charge have been so abstracted contrary to equity, from the treasury of said company, and of dividends so wrongfully paid, and your orators ask for an order referring the case to the master for the purpose of such action.

"Your orators further show that they fear and believe and so charge, that the contract of sale between the American Glucose Company and the new trust has been carried so far that it may be possible to claim, on the part of the contracting parties, that the contract has been executed by the delivery of the deed in escrow, in which event your orators ask the relief that the trust shall not be permitted to enter into possession or use or operate the plant, and shall not be permitted to pay, nor the American Glucose Company to receive, any further sum, or take any further action, in performance of the said contract, by delivery of deed or by other action; that it is part of the said contract of sale, they are advised, that the American Glucose Company shall agree not to further continue the manufacture of glu-

cose, and shall not use their factories elsewhere which can be used for such purpose, and thus promote the said trust; that the proposition sought by said conspirators to be ratified on August 3, 1897, to relinquish the manufacture of glucose at Peoria or elsewhere, is a part of said contract, because said American Glucose Company prefers to dispose of their plant for cash, in form, rather than take part in the formation of a new company, and to permit them to convert their cash received into stock or otherwise, by secret agreement, exclusive of your orators, the object of such trust in acquiring said plant at Peoria being well known to them; that the transaction, as proposed to be made by said American Glucose Company and said trust, is simply a mode of union of the glucose plants of the country after the manner of the Standard Oil Company, and will constitute a grand monopoly, for the purpose of controlling, regulating, and fixing the price of glucose and glucose by-products, syrup, and the sugar of the country, for the entire market of Illinois and the United States, and your orators pray that the stockholders be enjoined from ratifying said transactions and sale of said plant, and such relinquishment of the manufacture, on the 3d day of August, 1897, or taking any steps to aid in the creation of said trust or any other trust, or to ratify the offer or option for the sale of said plant; that all the other stockholders of the American Glucose Company, so far as known to your orators, and certainly the great majority, consisting of the Hamlins and family, and the Firmenichs, and others of like character or associated with them, regard themselves and are interested in the consummation of this sale for a consideration unknown to your orators and believed to be outside consideration to be paid therefor, and so they and the officers and directors of the American Glucose Company are hostile to the interests of your orators, and to the true interests of the stockholders, and are desirous of carrying out said sale, and to make said deed and delivery of possession under said contract of sale, and it is worse than useless to ask said company, or the directors and officers, to file this bill or unite in it, or take the proper steps to defeat the action of the president, as shown by said option, now proposed to be ratified on August 3, 1897; that since said offer of sale of said plant, and since said price was made and named by President Hamlin to said trust in said option, said plant has greatly increased in value, for the value of its products has doubled,—for example since July 1, 1897, the value of glucose has increased from 70 cents per 100 pounds to \$1.60 per 100 pounds, the lowest price for glu-

cose being when said option was made and accepted; that said Hamlin had no right or power to offer said plant, or to agree to the conditions of said offer, especially that the company should relinquish the manufacture of glucose and other by-products and grape sugar, and withdraw from competition with said trust company, which said option contains; that the said proposed corporation of New Jersey, which is the said glucose trust aforesaid, has not, as yet, elected any president or other officers, and that said American Glucose Company is a corporation of New Jersey, and incorporated under the laws thereof, although doing its business within this state, at Peoria, in the manufacture of glucose, which constitutes its main business, but its general offices, formerly at Peoria, have now been fraudulently removed to Buffalo, and that said factory constituting said plant has been closed; that in some way, unknown to and concealed from, your orators, the said American Glucose Company has, by its officers, obtained some contract, or options, or understandings, permitting them to take stock in said trust company on terms that will give to them, as a consideration of said plant, and so as to give them, for their stock, a consideration much greater than now proposed to be paid and to be given *pro rata* to your orators, for such price will only give your orators a dividend of one twentieth of the cost of the said stock, and is a great sacrifice of your orators' interest in said property.

"To the end, therefore, that your orators may have equity in the premises; and that the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, Joseph Firmenich, George Firmenich, C. H. Matthieson, F. O. Matthieson, the officers, directors, and stockholders of the American Glucose Company, the unknown owners or holders of the option given by the president of the American Glucose Company for the sale of the plant in Peoria, the unknown persons having any interest in said option or under it, all of whom are made parties defendants, may be duly summoned to answer (but not under oath, their oaths being waived); that there may be an accounting, under the order of the court; and that your orators may have decreed to them such dividends or sums as they may be found entitled to as stockholders of said stock; and to the end that all of the said defendants and agents may be restrained and enjoined from closing up the business of manufacturing glucose and grape sugar, and such other business as said American Glucose Company has hitherto engaged in in the city of Peoria, and from changing the business, and from relinquishing this branch of the business and from carrying out in any way said option for

sale or transfer of said property, or any part thereof, and from aiding or assisting any of the said acts, and from selling or transferring the said plant to any pool, trust, or combine, or any association, corporation, or individual, in violation of the laws of Illinois, or to any person, or corporation or pool, or trust, or association, etc., to enable them to regulate or fix the price of glucose, or grape sugar, or by-products, or to fix the amount to be manufactured of same, and from any other violations of said acts of the general assembly of Illinois, approved June 11, 1891, and amended in 1897, and also act approved June 20, 1893; and that a receiver may be appointed of the said American Glucose Company to take charge of and protect and preserve its plant and property, and manage same, under the orders of this court; and that such injunction may be made perpetual; and to the end that your orators may have such other and further and different relief in the premises as equity may require."

This bill was sworn to, and the injunction writ was granted, as therein prayed. The summons and injunction writ were served upon the American Glucose Company, at Peoria, on August 3, 1897, the day the bill was filed. Answers to the bill were at once filed by the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, and the officers, directors, and stockholders of the American Glucose Company (except the complainants in the bill). The solicitors for the defendants who thus answered were Frank D. Locke and Stevens, Horton & Abbott. On August 9, 1897, in vacation, a motion was made on behalf of the defendants, who thus answered by their solicitors, to dissolve the injunction on the answers and affidavits filed. On August 10, 1897, replications were filed by the complainants to all of said answers. On August 10, 1897, an affidavit by George F. Harding, and certain exhibits thereto were filed, and it was subsequently agreed by counsel that the said affidavit should be treated as a deposition. On the same day, August 10, 1897, the defendants, Joseph Firmenich and George Firmenich, demurred jointly and severally to the whole bill. The counsel filing the demurrer for them were Moran, Kraus, and Mayer. On August 11, 1897, in vacation, the circuit judge dissolved the injunction; and thereupon counsel for the American Glucose Company, and the Hamlins and other defendants, answering the bill, asked leave to file suggestion of damages. Such suggestion of damages amounting to \$7,000, was filed on August 13, 1897. Immediately upon the dissolution of the injunction, on August 11, 1897, complainants below asked and obtained leave to amend the bill and to make new

parties defendants. Thereupon, on August 13, 1897, complainants filed an amendment to their bill by inserting the following: "Upon information and belief, the plaintiffs charge that the name of said pool, trust, and combine so formed, or to be formed, is the Glucose Sugar Refining Company, a corporation under the laws of the state of New Jersey; that the said Illinois Trust & Savings Bank is in some way connected with it, and interested in said trust and formation thereof, and in said proposed sale and transfer of said plant and property, and in said option; that they, the plaintiffs, allege against the said Glucose Sugar Refining Company and the Illinois Trust & Savings Bank, and each of them, all matters and things alleged in this bill against the other defendants hereto, or either of them and that said bank has no right or authority, under its charter, to purchase or receive title to said property or any interest therein; that said American Glucose Company has no authority or power nor its officers, directors, or stockholders, to do any corporate act, or the proposed acts referred to in said exhibit A, nor all or any or either of them, at Buffalo, New York, because the same is beyond the limits of the state chartering said company to wit, New Jersey. By inserting on the next page of said bill, just after the words, 'acceptance thereof and each of them,' the words, 'the Glucose Sugar Refining Company, a corporation under the laws of the state of New Jersey, and the Illinois Trust & Savings Bank, a corporation under the laws of the state of Illinois,' thus making the said last two named corporations defendants to said bill. By inserting in the prayer for summons in said bill the names of defendants the Glucose Sugar Refining Company and the Illinois Trust & Savings Bank as above described."

The Illinois Trust & Savings Bank made defendant to the amended bill was served on August 19, 1897, and on September 4, 1897, entered its appearance, and filed a general demurrer to the bill by its counsel, Wilson, Moore & McIlvaine, the senior member of the firm being John P. Wilson. On October 28, 1897, the Glucose Sugar Refining Company, made defendant by the amended bill, was served with summons by the sheriff of Peoria county, and on October 29, 1897, by the sheriff of Cook county. On November 17, 1897, the Glucose Sugar Refining Company, by John P. Wilson, its solicitor, and Wilson, Moore, & McIlvaine, of counsel, filed a paper purporting to be a demurrer of said defendant to a part of the amended bill and a special answer to the residue thereof. This demurrer and answer in one is as follows: "This defendant to so much of complainants' amended bill as charges and sets forth the formation of a pool, trust, or combine for

the purpose of unlawfully regulating and fixing the price of glucose and grape sugar, and of acquiring and purchasing factories and plants engaged in the manufacture and sale of glucose, and as charges that the board of directors of the American Glucose Company, Cicero J. Hamlin and sons, and any other of the defendants, have promised, arranged, and agreed that the parties forming and controlling the said alleged pool, trust, or combine to sell, transfer, convey, and set over to them, or to the corporation which is to be used by them to accomplish their said purpose, the plant and property of the said American Glucose Company in Peoria; and to so much of said amended bill as sets forth and charges that the purpose and intention of the said pool, trust, or combine, and of defendants to said amended bill, is to create a trust in, and monopoly of, the articles manufactured at the plant of the said American Glucose Company in Peoria, and to give the corporation of such pool, trust, or combine the power to regulate and fix the price of said articles, and to control the entire output thereof, in the state of Illinois and elsewhere, and that the method of the parties forming said pool has been and is to swallow up and merge in itself the organizations and plants heretofore engaged in the manufacture and sale of said articles, issuing to the latter stock of said pool or in such trust corporations, and, where this method fails, to buy such organizations for cash; and as to so much of the said bill as relates or sets forth each and every of the charges therein contained in relation to the formation of any pool, trust, or combine by the defendants thereto, or any of them, for the purpose of securing a monopoly or limiting the output, or fixing or controlling the price, of glucose or any other products heretofore manufactured at the plant of the said American Glucose Company in Peoria; and as to so much of said bill as relates to the purchase by said pool, or this defendant, of any other plant or property other than that owned by the American Glucose Company at Peoria; and as to so much of the said amended bill as relates to the purposes for which the proposed purchasers of said plant contracted to purchase the said plant, and to the use which is to be made of said plant by the said purchaser; and as to so much of the said amended bill as relates to the extent and character of the glucose business and of their by-products; and as to so much of said amended bill as prays for any relief based upon said parts of said bill,—this defendant demurs, and for cause of demurrer shows that plaintiffs have not made such a case as entitles them to the relief prayed for, and prays judgment of the court as to such parts of the bill. And as to the residue of

the bill this defendant for answer says it has no knowledge or information as to whether the complainants own said stock, and leaves the complainants to make proof thereof; that it has no knowledge as to the value of the stock of the American Glucose Company or the amount of its capital stock, or the cost thereof to complainants, and therefore leaves complainants to make proof thereof, and neither admits nor denies the same; that it has no knowledge regarding the management of the affairs of the American Glucose Company, or relations thereto of the defendants, Cicero J., William, and Harry Hamlin, nor as to salaries or dividends, and therefore neither admits nor denies the allegations touching the same, but leaves the complainants to make proof thereof as they may be advised; that this defendant is a corporation duly organized under the laws of the state of New Jersey, for the purpose of, and lawfully engaged in the business of, manufacturing glucose and grape sugar and other products of corn, in Illinois; that by its deed, bearing date August 7, 1897, the American Glucose Company conveyed to Edwin L. Johnson its plant in Peoria, which deed was delivered August 11, 1897, and recorded August 12, 1897 (copy attached and made a part hereof, marked 'exhibit A'); that said Johnson, by his deed bearing date the 9th of August, 1897, conveyed to defendant said plant, deed being delivered August 11th, and recorded August 12th (copy attached, marked 'exhibit B'); that at the date of the delivery of said deeds it paid for the premises so conveyed, in cash; that at the date of delivery of said deeds from the American Glucose Company to Johnson and from Johnson to this defendant, purchase price was paid in cash to the American Glucose Company, the amount paid in cash on the 11th of August being \$1,977,000, including personal property used with the said plant, and conveyed by bill of sale to defendant by the American Glucose Company, and that immediately after delivery of said deeds defendant entered into possession of said plant, and has ever since continued in possession, and has been operating said plant continuously in the manufacture of glucose and other products of corn. Defendant denies that said Hamlin, or stockholders or directors or officers of the American Glucose Company, were on the 13th of August, 1897, or before, interested, as stockholders or otherwise, in this defendant corporation, or were interested in the organization or connected with it, or had any interest in the purchase, except as stockholders and officers of said American Glucose Company; and denies that said Hamlin and other defendants, officers or directors of the American Glucose Company, have at any time con-

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federated or conspired with any of the other defendants for the purpose of, or in connection with, the sale of the plant of the said American Glucose Company to this defendant, or any of the other defendants, except as officers of said glucose company; that it admits said American Glucose Company is a corporation organized under the laws of New Jersey; that an option was given to purchase the plant at Peoria to the Illinois Trust & Savings Bank, which said option was afterwards duly assigned to Edwin L. Johnson, grantee of the deed from the American Glucose Company; admits that a special stockholders' meeting of the stockholders of the American Glucose Company was called, as alleged in said bill, but denies on information and belief, that any option was given at any time to said Hamlin, or to any officers, directors, or stockholders of the American Glucose Company, to take or receive any of the stock of this defendant at any price, or upon any terms whatsoever, at any time. Defendant denies, on information and belief, that any of the stockholders of the American Glucose Company have or will, directly or indirectly, receive any greater returns out of the said sale of the plant than a *pro rata* share of the price, or that any options or understandings have at any time existed between the officers or stockholders of the American Glucose Company, with any other person or persons whatsoever by means of which said officers and stockholders would derive any benefit from the said sale of said plant, other than through the distribution of the proceeds of said sale by the American Glucose Company between the stockholders; and denies that any collateral agreements have ever existed for the benefit of any stockholders in the American Glucose Company, permitting them to convert their cash into stock, or otherwise participating in any benefits resulting from the sale of said plant not common to said complainants or of said stockholders; and denies that the American Glucose Company, or any of its officers, agents, or directors, have at any time obtained any contract permitting them to take stock or to become interested or derive any benefits from the sale of said plant, other than through the consideration paid in cash, or that they have any right to receive, or option to receive, any benefit or advantage, in any way, otherwise than through the cash consideration and distribution to the stockholders; alleges that at a meeting of the stockholders of the American Glucose Company held at the city of Camden, in the state of New Jersey, on August 28, 1897, the stockholders of said corporation ratified and confirmed the action of the president and directors in selling the plant at Peoria, as hereinbefore stated, and voted to relinquish

the business of manufacturing glucose and grape sugar in Peoria, and that its manufacturing business should be confined to the manufacture of starch at Buffalo, by a vote of two thirds of the stockholders, and to reduce the capital stock from \$1,500,000 to \$150,000, and the stock actually issued from \$1,322,500 to \$132,250, and that the proceeds of the sale should be distributed among the stockholders *pro rata*, and that by an instrument signed by the owners of 12,590.4 shares of capital stock of said company, out of a total number of said shares of stock outstanding of 13,225, each of said changes and action so held was ratified, and the action was duly certified to and filed with the secretary of state of the state of New Jersey for the purpose of effecting the decrease of the capital stock and changes in the charter to said company (a copy of which is attached as exhibit C, and made a part hereof), and by this action of said stockholders and officers the sale of said plant was duly and regularly ratified and confirmed, and the changes in the charter and capital stock were regularly made; and denies that any other matter or thing in the said bill of complaint as amended, not hereinbefore demurred to or answered, is true."

Exhibit A, referred to in the answer of the Glucose Sugar Refining Company, is an indenture or deed by which the American Glucose Company, for \$1,750,000, warrants to Edwin L. Johnson the plant in Peoria. It is dated August 7, 1897, and recorded August 12, 1897. Exhibit B to said answer of the American Glucose Company is a deed from Johnson to the Glucose Sugar Refining Company of said plant, granting to said trust said plant in Peoria in consideration of \$10 and other good and valuable considerations. It is dated August 9, and recorded August 12, 1897. Exhibit C to said answer is a certificate of the American Glucose Company, by William Hamlin, as president, and Henry E. Grant, secretary, dated August 30, 1897, certifying that the company has reduced its authorized capital stock from \$1,500,000 to \$150,000, and its stock actually issued from \$1,322,500, to \$132,250, and has ratified the action of its stockholders at their meeting on August 3, 1897, to give up the business of glucose and such other business as it has been engaged in in Peoria, and that it has changed, accordingly, the nature of its business, and given up its business in Peoria, and confines its business to the manufacture of starch in Buffalo, and directed that its plant and property at Peoria be sold, and has ratified the action of the president and directors in selling the plant at Peoria to Edwin L. Johnson, of Chicago, and has authorized the distribution of the proceeds received from such sale among the stockholders, said

changes having been declared by resolution of the board of directors to be advisable, and having been duly and regularly assented to by more than two thirds of the stockholders at a meeting called by the board of directors to be held at Camden on August 28, 1897, and the written assent of said stockholders being hereto appended. This certificate was signed by the president and secretary on August 30, 1897, and to this certificate is appended a certificate by a notary public, William Johnson, that Grant swore to the above facts stated in said certificates, etc.; and a certificate to this is appended of George Bingham, clerk of Erie county, New York, where said William Johnson purported to be a notary public, that Johnson was a notary public, etc., dated August 30, 1897. To this also is appended a ratification of the action by the stockholders at a meeting held on the 3d day of August, 1897, declaring it advisable that the corporation relinquish the business of manufacturing glucose in Peoria, and confine itself to the manufacture of starch at Buffalo, and that its plant and property at Peoria be sold, and also ratifying the action of the president and board of directors in selling said property to Edwin L. Johnson, and giving assent to each and every one of such changes, and to each and every one of the acts aforesaid, which paper is dated August 28, 1897, and purports to be signed by the holders of 12,590 shares of stock; and to this is appended the certificate of the secretary of the state of New Jersey that the foregoing is a true copy of the certificate of decrease of the capital stock, etc., filed in the office on the 3d day of September, 1897.

Testimony was taken on behalf of the complainants in the bill before a notary public in Chicago at various times in the months of October and November and December, 1897, beginning on October 11, 1897, and ending on December 17, 1897. During this period, thirteen witnesses were examined on behalf of the complainants, and John P. Wilson and John S. Stevens appeared on behalf of defendants. In April and May, 1898, the depositions of three witnesses were taken on behalf of the defendants before a commissioner in Buffalo, New York, and these depositions were filed in the circuit court of Peoria county, June 1, 1898. On June 6, 1898, the demurrers of the Illinois Trust & Savings Bank and of Joseph Firmenich and George Firmenich to the whole bill, and the demurrer of the Glucose Sugar Refining Company to a part of the bill, were sustained; and thereupon the complainants came and abided by their bill.

On June 21, 1898, the cause came on for hearing before the circuit judge, and it appeared that a subpoena *duces tecum* had been

served on Conrad H. Matthieson, president of the Glucose Sugar Refining Company of New Jersey, to appear as a witness, and produce the underwriters' agreement of the Glucose Sugar Refining Company, and the option contracts for the sale to the bank by the six corporations above named of their respective properties, and other papers and books named in said subpoena, and all letters, records, and documents touching the organization of said Glucose Sugar Refining Company. Said Matthieson did not appear, and thereupon the complainants moved for an attachment against him; whereupon attorneys for the defendants resisted said motion. In the course of the argument on said motion, Stevens, Horton, & Abbott moved for leave to withdraw the answers filed by that firm for the American Glucose Company, the Hamlins, and all the officers, directors, and stockholders of the American Glucose Company (other than complainants), and to withdraw their appearance for said defendants. Complainants objected to this motion, but the court allowed it; and thereupon the following order was entered, on June 22, 1898, to which date the hearing had been adjourned from June 21, 1898, to wit: "Now come the parties herein, by their respective solicitors, and on motion of Stevens, Horton, & Abbott, as solicitors for the American Glucose Company, Cicero J. Hamlin, William Hamlin, Harry Hamlin, and directors of said company, and the stockholders of said company (other than defendants herein), leave is hereby given said defendants to withdraw their answers herein; and, the same being done, it is hereby ordered that the bill of complaint, as herein amended, be, and the same is hereby, taken as confessed by said defendants and every of them; and, on motion of said attorneys, Stevens, Horton & Abbott, their appearance as solicitors for said defendants is hereby withdrawn, and the appearance of said firm is hereby entered as one of the solicitors for the defendant herein the Glucose Sugar Refining Company."

The motion of the complainants for an attachment was then further argued, but said attorneys for defendants claimed that no evidence from said Matthieson was then required, as the truth of the allegations of the bill was admitted by their demurrer, and by the decree *pro confesso* entered. John P. Wilson then stated to the court that the said Matthieson would attend on the next morning as a witness. Matthieson produced in court from his possession the option contracts or agreements between the Illinois Trust & Savings Bank and the Peoria Grape Sugar Company, and between the bank and the Rockford Sugar Refining Company, and between the bank and the American Preserv-

ers' Company, and between the bank and the Firmerich Manufacturing Company, but stated that the option contract with the Chicago Sugar Refining Company was not among the papers, and that he did not know where it was. Counsel for complainants offered the option contracts in evidence for the purpose of showing that the transaction of the American Glucose Company was part of the same transaction of five other corporations, and was all one. Wilson refused to allow counsel for complainants to see the option contracts unless the court should so order, and, when the court decided that the counsel of complainants had a right to inspect the contracts, Wilson announced that he would send the books and papers out of the court room, and handed the same to his assistant, with instructions to take them from the court room. Thereupon the court, after an inspection of the contracts by the court, decided that the contracts were not material, but held that they might be inserted in the record and shown by the record. The court refused to allow counsel for complainants to inquire of Matthieson, the witness, what had become of the absent contract with the Chicago Sugar Refining Company. Counsel for the complainants exhibited to the witness certain copies of deeds from the Chicago Sugar Refining Company to Edwin L. Johnson, and from said Johnson to the Glucose Sugar Refining Company, dated, respectively, August 7 and 9, 1897, and inquired of the witness what he had had to do with the execution and delivery of the deeds, with a view of showing the price at which the plant of the Chicago Sugar Refining Company had been sold, to wit, \$6,250,000, and for the purpose of showing that the sale took place as a part of the same transaction, which involved a sale of the plant of the American Glucose Company; but the court refused to allow the witness to testify upon the matters thus inquired about. Counsel for complainants also offered in evidence, with the several option contracts, certain assignments attached thereto showing assignments of said contracts by the bank, the vendee therein, to Edwin L. Johnson; but the court refused to admit said assignments, and also refused to admit in evidence certified copies of said deeds.

The court, upon objection by Wilson that the evidence was incompetent and immaterial, refused to allow the witness Matthieson to state where the money came from to pay the Chicago Sugar Refining Company for its plant, or to state whether or not the money was that of the Illinois Trust & Savings Bank, or of Johnson, the grantee in the deed, or of the Glucose Sugar Refining Company; or to state how many deeds he received for the plants of the six corporations, as pre-

dent of the Glucose Sugar Refining Company, on August 11 and 12, 1897; or whether the transactions on August 11 and 12, 1897, with the six corporations, were carried out in his presence, at the same time, or not. The court, also, upon similar objections by Wilson, refused to allow the witness to state, in answer to questions by counsel for appellants, whether it was the understanding and agreement by the six corporations with the Glucose Sugar Refining Company that the conveyances and sales were to be carried out at the same time; or whether the properties were first deeded to Johnson, and then by Johnson to the Glucose Sugar Refining Company; or whether the six plants described in the option contracts are now in the possession of the Glucose Sugar Refining Company; or whether witness was in the management and control of the six corporations, as president of the Glucose Sugar Refining Company; or why the option contracts were taken to the Illinois Trust & Savings Bank for the sale of the plants of the six corporations; or whether the witness or his company fixed the price for glucose in the Chicago market, or the price at which the products of these six plants were sold in Chicago and elsewhere; or what was the price of glucose on April 1, 1897, on May 19, 1897, on June 9, 1897, on August 3, 1897; or whether the six plants in question had been competitors in the sale of glucose; or whether or not any stock of the Glucose Sugar Refining Company was used to buy either of the six plants; or whether or not the money to pay for the plant of the American Glucose Company was obtained from subscriptions under the underwriters' agreement in New York; or the price at which the several plants were bought by the Glucose Sugar Refining Company; or how the price, at which the several plants as described in the several option contracts were bought, was paid, whether in money or in stock; or whether the proceeds of the underwriters' agreement were ever given to Edwin L. Johnson, or ever used by him to pay for the several plants; or whether the money paid for the American Glucose plant was received from Johnson; or what dividends had been paid by the Glucose Sugar Refining Company; or whether the Glucose Sugar Refining Company sold its glucose with reference to rebates; or whether the said company had a rebate agreement. The witness was then shown a paper, over the signature of the Glucose Sugar Refining Company, dated September 23, 1897, addressed "to the trade," and stating: "You are hereby notified that on and after September 27, 1897, a rebate of one-quarter per cent per pound will be paid six months after purchase to all buyers of glucose and grape sugar who shall

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comply with the terms of purchase, and who shall buy glucose and grape sugar exclusively of the Glucose Sugar Refining Company. A memorandum voucher will be furnished each customer entitled to said rebate, and his certificate, stating that he has complied with the conditions governing said rebate, will be required." But the witness was not allowed to state whether his company had issued to the trade the paper shown to him; or to state whether, as president of the Glucose Sugar Refining Company, he had received, and had on hand out of these rebates, a sum approximating \$1,000,000, so as to control the parties dealing in glucose, and compel them to buy of his company; or whether or not any part of the purchase price of the six plants was paid in the stock of the Glucose Sugar Refining Company, either to the corporation, or to the stockholders of the old corporation.

After hearing had upon the evidence taken as aforesaid, the court, on June 23, 1898, decreed that the bill, as amended, should be dismissed for want of equity. The present writ of error is sued out for the purpose of reviewing the decree of the circuit court which so dismissed the amended bill for want of equity.

Mr. William J. Ammen, for plaintiffs in error:

The combination was in contravention of public policy, and illegal and void.

Morris Run Coal Co. v. Barclay, Coal Co. 68 Pa. 173, 8 Am. Rep. 159; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Merz Capsule Co. v. United States Capsule Co.* 67 Fed. 415; *People v. North River Sugar Ref. Co.* 22 Abb. N. C. 104, 2 L. R. A. 33, 3 N. Y. Supp. 401.

A combination the tendency of which is to prevent general competition and to control prices is detrimental to the public, and unlawful.

Spelling, Trusts, 77.

Messrs. Wilson, Moore, & McIlvaine, for defendant in error Glucose Sugar Refining Company:

The demurrer of the Glucose Sugar Refining Company was properly sustained.

Cope v. District Fair Assn. 99 Ill. 492, 39 Am. Rep. 30; *Union Nat. Bank v. Byram*, 131 Ill. 100, 22 N. E. 842; *Springer v. Walters*, 139 Ill. 422, 28 N. E. 761; *Haves v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 628; *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 28 L. ed. 961; *Morawetz, Priv. Corp.* § 271; *Pom. Eq. Jur.* §§ 1090, 1094, 1095; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 566; *Tracy v. Talmage*, 14 N. Y. 162.

Messrs. Moran, Kraus, & Mayer, for other defendants in error:

The bill does not show that a trust or monopoly contrary to statutory prohibitions was established or contemplated. The act of 1891 does not apply, because there was no allegation or proof of a combination to fix prices or to limit production, as is required by that act.

Coquard v. National Linseed Oil Co. 171 Ill. 480, 49 N. E. 563.

Complainants cannot attack the sale on the ground of public policy, or to enforce the laws of the state.

Ibid.; *United States Vinegar Co. v. Foshrenbach*, 148 N. Y. 58, 42 N. E. 403; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Greer, M. & Co. v. Stoller*, 77 Fed. 1; *Cope v. District Fair Asso.* 99 Ill. 489, 39 Am. Rep. 30; *Kerfoot v. People*, 51 Ill. App. 409; *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 654.

That the sale was made to an alleged trust was no ground for relief, because the sale was not an *ultra vires* act. It was expressly authorized by the statutes of New Jersey.

N. J. Laws 1896, chap. 185, §§ 27, 28; *Branch v. Jesup*, 106 U. S. 468, 27 L. ed. 279, 1 Sup. Ct. Rep. 495; *Chicago Hanson Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Wallace v. Pierce-Wallace Pub. Co.* 101 Iowa, 313, 38 L. R. A. 122, 63 Am. St. Rep. 389, 70 N. W. 216; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685; *Peabody v. Westerly Waterworks*, 20 R. I. 176, 37 Atl. 807; *Meredith v. New Jersey Zinc & Iron Co.* 55 N. J. Eq. 211, 37 Atl. 539.

The courts of this state will not attempt to control a foreign corporation as to a matter touching the management of its affairs or the exercise of its charter powers. Such proceeding must be instituted in the courts of the domicile of the corporation.

North State Copper & Gold Min. Co. v. Field, 64 Md. 154, 20 Atl. 1039; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638, 37 Atl. 817; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. 775; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439.

On petition for rehearing.

Messrs. Thomas A. Moran and John J. Herrick, for Glucose Sugar Refining Company:

Where at the time a bill is filed there is an existing executory contract for the sale of the property involved, although the contract has not been consummated, the vendee

in such contract should be made a party defendant; and, if he is not, and subsequently the purchase is completed by the payment of the purchase money and the delivery of the deed, the deed will not be defeated under the doctrine of *lis pendens*.

Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656; *Wade, Notice*, 2d ed. §§ 363, 364; 1 Freeman, Judgm. 4th ed. § 201; *Parks v. Smoot*, 105 Ky. 63, 48 S. W. 146; *Steel v. Long*, 104 Iowa, 39, 73 N. W. 470; *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Trimble v. Boothby*, 14 Ohio, 109, 45 Am. Dec. 526; *Gibler v. Trimble*, 14 Ohio, 323; 13 Am. & Eng. Enc. Law, p. 898.

The fact that the answer covers parts of the bill to which the defendant has demurred is only ground for overruling the demurrer, and there should be an order overruling the demurrer as in any other case.

Barbey's Appeal, 119 Pa. 413, 13 Atl. 451; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417; *Wangelin v. Goe*, 50 Ill. 459; *Bruen v. Bruen*, 4 Edw. Ch. 460; *Robinson v. Thompson*, 2 Ves. & B. 118; *Wetherhead v. Blackburn*, 2 Ves. & B. 121; *Sherwood v. Clark*, 9 Price, 259; *Jarvis v. Palmer*, 11 Paige, 650; *Spofford v. Manning*, 6 Paige, 383; *Cotes v. Turner*, Bunbury, 123; *Kuypers v. Reformed Dutch Church*, 6 Paige, 570; *Suffolk v. Green*, 1 Atk. 450; *Corbett v. Hawkins*, 1 Younge & J. Exch. 421; *Crampton v. Meath, Sausse & S.* 297; *Beauchamp v. Gibbs*, 1 Bibb, 481; *Souzer v. De Meyer*, 2 Paige, 574; *Ballance v. Loomiss*, 22 Ill. 84; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 304, 23 N. E. 621; *Dunham v. Dunham*, 162 Ill. 617, 35 L. R. A. 70, 44 N. E. 841; *Mitford & Tyler, Pl. & Pr.* in Eq. pp. 113, 204, 305, and note; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 258, 40 L. ed. 414, 417, 16 Sup. Ct. Rep. 291.

It is the uniform practice in courts of last resort, in holding that a demurrer was improperly sustained below, to remand the case with directions to overrule the demurrer, and give the defendant an opportunity to answer.

Brown v. Hogle, 30 Ill. 145; *Henry County v. Winnebago Swamp Drainage Co.* 52 Ill. 454; *Harris v. Cornell*, 80 Ill. 54; *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473, 32 N. E. 283; *Bond v. Pennsylvania Co.* 171 Ill. 508, 49 N. E. 545; *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27; *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223; *Lambert v. Lambert*, 52 Me. 544; *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25 L. ed. 77; *Pierson v. David*, 1 Iowa, 23; *Hammond v. Alexander*, 1 Bibb, 333.

The bill was multifarious.

Johnson v. Brown, 2 Humph. 327, 37 Am.

Dec. 556; *Dunn v. Cooper*, 3 Md. Ch. 46; *McIntosh v. Alexander*, 16 Ala. 87; *Bradley v. Gilbert*, 155 Ill. 157, 39 N. E. 593.

The bill in this case seeks to define and control the charter powers of the directors and stockholders of a New Jersey corporation, and asks the court to intervene and direct the exercise of such powers. This is not within the limits of the jurisdiction of the courts of this state.

Madden v. Penn Electric Light Co. 181 Pa. 617, 38 L. R. A. 638, 37 Atl. 817; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Wilkins v. Thorne*, 60 Md. 253; *Redmond v. Enfield Mfg. Co.* 13 Abb. Pr. N. S. 332; *Stafford v. American Mills Co.* 13 R. I. 310; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. 775.

Even if a particular covenant is bad, as in restraint of trade, that covenant will not vitiate the entire transaction.

Mullan v. May, 11 Mees. & W. 652; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 70, 22 L. ed. 319; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; *Peltz v. Eichele*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480.

If the restraint, whether it is general or partial, imposed by the contract, merely extends over the territory over which the business and good will extended,—thus being merely coextensive with the business sold and the interest to be protected by the covenant,—the contract is valid.

Nordenfeldt v. Mazim Nordenfeldt Guns & A. Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 353, 39 L. J. Ch. N. S. 86, 21 L. T. N. S. 661, 18 Week Rep. 572; *Underwood v. Barker* [1899] 1 Ch. 300, 68 L. J. Ch. N. S. 201, 80 L. T. N. S. 306, 47 Week. Rep. 347; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L. R. A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L. R. A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; *Beal v. Chase*, 31 Mich. 490; *Krumer v. Old*, 119 N. C. 1, 34 L. R. A. 389, 56 Am. St. Rep. 650, 25 S. E. 813; *United States Chemical Co. v. Provident Chemical Co.* 64 Fed. 946; *Badische Anilin und Soda Fabrik v. Schott* [1892] 3 Ch. 447, 61 L. J. Ch. N. S. 698, 67 L. T. N. S. 281; *Rousillon* 64 L. R. A.

v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 603; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861.

Magruder, J., delivered the opinion of the court:

The bill in this case is filed by a stockholder in the American Glucose Company, a corporation organized under the laws of New Jersey, but doing business and owning property at Peoria, in Illinois. The stockholder who files the bill is a citizen of Illinois. The American Glucose Company owned a plant, consisting of real estate, together with the buildings and machinery located thereon, and also personal property, in the city of Peoria, in Illinois. The land upon which the plant is situated is specifically described in the bill. The primary object of the bill, and the chief relief sought by it, are to prevent the officers and directors of the American Glucose Company from selling and disposing of its plant in Peoria, and from closing out the business, in which it is there engaged, of manufacturing glucose and grape sugar. The bill charges that the officers and directors of the corporation have been squandering its assets by diverting the profits made in its business to their own use; and that in further consummation of their fraudulent disposition of the property of the company, they are about to make a sale of the manufacturing plant in Peoria to a new corporation organized under the laws of New Jersey, and to give up and abandon the business of the company as theretofore conducted in Peoria. The bill further charges that not only is the American Glucose Company about to make a sale of its plant to the new corporation, but that five other corporations, engaged in the same business of manufacturing glucose and grape sugar, are about to make sales of their respective plants to the same newly organized corporation; that all of said sales constitute one transaction; and that the sale of the American Glucose Company is merely a part of that transaction. It is charged in the bill that the arrangement, by which the proposed new corporation is to take conveyances of all these plants, constitutes a giant pool, trust, or combine, formed for the purpose of regulating, fixing, and controlling the prices of glucose and grape sugar, and of suppressing competition in the manufacture thereof, and of creating a monopoly therein.

1. Shortly after the filing of the bill, on August 3, 1897, the American Glucose Company and William Hamlin, president thereof, and Cicero J. Hamlin and Harry Hamlin, directors and officers thereof, and all other di-

rectors and officers and stockholders thereof (except appellants), filed their answers to the bill. These answers were subsequently withdrawn, but not until June 22, 1898, while the cause was on hearing before the circuit court. Replications were filed to these answers, and an issue of fact was thus made upon the allegations of the bill, which set up the formation of an illegal trust or combine. Upon the issue of fact as to the purchases of the plants of other corporations than the American Glucose Company, with a view of forming an illegal trust, and crushing out competition, and creating a monopoly in the manufacture of glucose and grape sugar, testimony was taken on behalf of the complainants in the bill. We are unable to see why the consideration of the facts as developed by this testimony is not necessarily involved in the decision of this case by this court, notwithstanding the insistence by one of the counsel for defendants in error in his brief that "no discussion of any evidence, or pretended evidence, in relation thereto, is proper in this court." It is true that, upon the hearing of the cause, the American Glucose Company, and its officers and directors and majority stockholders, withdrew their answers, and permitted a default and decree *pro confesso* to be entered against them. This action on their part was a confession of the truth of all the allegations of the bill, which they had answered and put at issue. But the proof, taken in support of those allegations, was not thereby necessarily withdrawn from the consideration of the court in passing upon the issues involved in the case. Section 18 of the chancery act provides that, "where a bill is taken for confessed, the court, before a final decree is made, if deemed requisite, may require the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine him on oath or affirmation, touching the facts therein alleged. Such decree shall be made in either case as the court shall consider equitable and proper." 1 Starr & C. Anno. Stat. p. 401, chap. 22. Here the court did not require the complainants below to introduce proof to sustain the allegations of their bill, but the complainants had the right, even before issue joined, to take depositions to substantiate the averments of their bill. *Doyle v. Wiley*, 15 Ill. 576. Certainly, they had a right to do so, after issue was joined. It being a matter of discretion with the court, even after default, to require proofs of the averments of the bill, it may be that if the complainants, on being required by the court to do so, should fail to comply, their bill might be properly dismissed for want of such proofs. But the general rule is that, where a bill is sufficient on its face to sustain the contention of the

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complainants therein, and to entitle them to the relief prayed for, a decree dismissing the bill for want of equity should not be entered in favor of defendants, who, by their defaults, have confessed the bill. *Hoffman v. Schoyer*, 143 Ill. 598, 28 N. E. 823. In the present case, the court below dismissed the bill as to the defaulted defendants, as well as to the other defendants. This action of the court was, in our opinion, erroneous, not only because the bill was sufficient to justify the relief prayed for, but because its material allegations were sustained by the proofs. This proof was clearly applicable to the actions taken in the premises by the American Glucose Company and its officers and directors and majority stockholders, who answered the bill. Whether such proof is binding upon the Glucose Sugar Refining Company, holding from and under the American Glucose Company, will be considered hereafter.

As, therefore, the proof is before us in the record, and the case is one of great importance, we deem it our duty, before discussing the questions of law arising out of the demurrer or demurrers to the whole bill or to parts thereof, to examine the testimony upon the issue of fact made by the answers filed.

In the spring of 1897 six corporations were engaged in the manufacture of glucose,—two of them in the state of Iowa, and four of them in the state of Illinois. They were the Chicago Sugar Refining Company, operating in the city of Chicago; the American Glucose Company, operating in the city of Peoria; the Peoria Grape Sugar Company, also operating in the city of Peoria; the Rockford Sugar Refining Company, operating in Rockford, Illinois; the American Preservers' Company, otherwise spoken of as the Davenport Sugar Refining Company, operating at Davenport, Iowa; and the Firmenich Manufacturing Company, operating at Marshalltown, Iowa. There was another manufactory of glucose at St. Charles, Illinois, known as the St. Charles Glucose Company, operated by one Charles Pope, of St. Charles and Chicago. Pope refused to enter the combination hereinafter mentioned at the outset, and is spoken of by some of the witnesses as an "awkward" competitor. The Pope manufactory, however, was of small capacity compared with the others. All of these corporations, thus engaged in the manufacture of glucose and grape sugar, were competitors with each other in that business. The proof shows that glucose cannot be successfully manufactured except in what is known as the corn belt of the United States, including the states of Illinois, Iowa, Kansas, Missouri, and parts of Nebraska, South Dakota, Ken-

tucky, and Indiana. The corn belt constitutes an ellipse of about 950 miles in length from east to west, and about 700 miles in width, with Peoria as the geographical center, and all within 1,000 miles of Chicago. The products of glucose are extensively used, and it is an important constituent in the matter of making table syrups, jellies, and jams, and is also used in the manufacture of beers and wines and cordials. The manufacturing, as above named, consumed a little more than 100,000 bushels of corn daily in the manufacture of their products. The American Glucose Company consumed daily about 26,000 bushels of corn; the Chicago Sugar Refining Company consumed in said manufacture about 26,000 bushels of corn daily; the Peoria Grape Sugar Company, which was, however, slightly crippled by a fire consuming part of its plant, consumed therein about 15,000 bushels of corn daily; the Rockford Sugar Refining Company consumed about 16,000 bushels of corn daily; the Davenport Sugar Refining Company, or the American Preservers' Company, consumed about 9,000 bushels of corn daily; and the Firmenich Manufacturing Company consumed about 9,000 bushels of corn daily. The capacity of the Pope Manufacturing Company was about 6,000 or 7,000 bushels of corn daily.

Some time in May, 1897, as nearly as we can gather from the record, a scheme was formed for the purpose of uniting all these corporations in one ownership. The plants, including both real and personal property, so far as they were engaged in the manufacture of glucose and grape sugar, were to be transferred by these corporations, respectively, to a new corporation to be organized under the laws of New Jersey. Such corporation was not organized completely until August 2, 1897. Its charter, or certificate of organization, bears date August 2, 1897, though it would appear that it did not go into practical operation until August 3, 1897, or shortly thereafter. The parties, who were engaged in forming, promoting, carrying out, and consummating the scheme for the consolidation of the property interests of all of said corporations, were principally the officers, directors, attorneys, and majority stockholders in the old corporations, respectively. Nearly all of them, if not all of them, were citizens of Illinois. The principal persons engaged in forming and consummating this consolidation were Norman B. Ream and John W. Doane, who were largely interested in the Rockford Company, above mentioned; William Hamlin, the president of the American Glucose Company; Conrad H. Matthieson, of the Chicago Sugar Refining Company; two Chicago lawyers, named John P. Wilson and 64 L. R. A.

Levy Mayer, Wilson being also a stockholder in the Chicago Sugar Refining Company; William H. Henkel, secretary of the Illinois Trust & Savings Bank of Chicago; and one J. B. Greenhut. Norman B. Ream was a director in the Illinois Trust & Savings Bank of Chicago. Between the early part of May, 1897, and August 11 or 12, 1897, all the plants above mentioned, except that of Pope, belonging to the six corporations hereinbefore described, were transferred to the Glucose Sugar Refining Company of New Jersey; and said plants since August 12, 1897, have been in the possession of, and operated by, the Glucose Sugar Refining Company of New Jersey. After August 7, 1897, they ceased to be operated by the respective corporations theretofore owning them. As we understand the evidence, these six corporations were, with the exception of the Pope manufactory at St. Charles, Illinois, the only manufacturing engaged in the manufacture and sale of glucose and grape sugar within the limits of the corn belt already described. The negotiations and transactions, leading to the result thus accomplished, were conducted secretly and with great caution. The organization of the new corporation, which was to be vested with the title to the plants, was deferred until the last moment, and was not consummated until the day before, or the day on which, the present bill was filed.

The general method adopted for the consolidation of these properties was substantially as follows: Option contracts were drawn up, one for each of the corporations already mentioned. By the terms of these option contracts, which were made between each of said corporations on the one part, and the Illinois Trust & Savings Bank of Chicago on the other, the corporation agreed to sell all its real and personal property and plant, and leaseholds, machinery, easements, buildings, fixtures, and utensils, located at the place at which it was engaged in the manufacture of glucose, together with its good will, trade rights, trademarks, and the right to use its patents, to the bank, upon the request of the bank, or its transferee, provided such request should be made before August 15, 1897. The option contract between the Firmenich Manufacturing Company of Iowa, and the Illinois Trust & Savings Bank, of Chicago, was dated May 24, 1897; the contract between the Rockford Sugar Refining Company, Limited, of Illinois, and the bank was dated May 25, 1897; the contract between the Chicago Sugar Refining Company, of Illinois, and the bank, and that between the Peoria Grape Sugar Company and the bank, were dated June 7, 1897. There are two contracts between the American Preservers' Company, of West Virginia, and the bank,

one dated June 3, 1897, and the other dated July 19, 1897, the latter recited to be a substitute for the former. The second contract between the American Glucose Company of New Jersey and the bank was dated June 9, 1897. Some of these contracts state that a part of the purchase money for the plant and property to be sold is to be paid in the stock of a corporation with a capital stock of \$40,000,000, of which \$14,000,000, is to be preferred stock, and \$26,000,000 common stock, which said corporation is about to be organized and to acquire said property, and also the properties specified in the contracts made between the five other corporations and the bank. Some of these contracts provide that the bank may pay for the property, at its option, in the stock of the new corporation to be formed, instead of cash. The contracts also contain a provision by the terms of which the vendor corporation and its officers agree not to buy or sell or manufacture glucose, or its kindred products or by-products, for a certain term of years, within 1,000 miles of Chicago; the said term of years being three years in some instances, and twenty-five years in at least one instance. The defendant in error the Glucose Sugar Refining Company of New Jersey, a corporation which was to be organized according to the terms of these option contracts, and which was finally organized as above stated, is a corporation whose certificate of organization provides that it shall have power to conduct business throughout the United States and all foreign countries, with the object of manufacturing and selling glucose, and buying and selling corn, and all its products and by-products, and similar articles of merchandise, and to transport the same, and to do all lawful business incidental thereto; and said certificate further provides that the total amount of the stock shall be \$40,000,000, of \$100 per share; \$14,000,000 to be preferred stock, and \$26,000,000 common stock, etc.

The first option contract made between the defendant in error the American Glucose Company and the Illinois Trust & Savings Bank was dated May 19, 1897. Thereby the American Glucose Company agreed to sell to the bank its plant, etc., for \$1,750,000, one third in cash, and the balance to be paid by notes secured by mortgage on the property. It further provides that "it is the purpose of the bank, or of those for whom it acts, to organize a corporation, under the laws of one of the states of the Union, for the purpose of operating this plant." The contract of May 19th further provides that an exhibit of the new corporation and its means shall be made to the president of the American Glucose Company, and then proceeds as follows: "If he [said president] be satisfied with the na-

ture and extent of the property so owned, or if it be the property which has been verbally stated to him will be acquired by such corporation, then \$600,000 in amount at par of the preferred stock of such corporation, out of a total issue not exceeding \$14,000,000, and \$850,000 in amount at par in the common stock of such corporation, out of a total issue not exceeding \$26,000,000, shall be lodged with such president, and this stock shall be held as an additional collateral security for the payment of such notes and each thereof," etc. This agreement of May 19th also provides that the bank is to purchase all the supplies and material on hand belonging to the American Glucose Company, and is to assume all the bona fide contracts made by the company in due course of business. It also provides that the company, and its officers and directors, including the Hamlins, shall bind themselves to the corporation not to buy or sell glucose within 1,000 miles of Chicago. An unsigned copy of this contract is in the record. The contract of May 19, 1897, was not signed by the bank, and it is claimed by William Hamlin, the president of the American Glucose Company, that it was not signed by that company. We think, however, that it was signed by the American Glucose Company, as it was originally drawn. A new option contract for the sale of its property to the bank, bearing date June 9, 1897, was executed by the American Glucose Company, by William H. Hamlin, its president, as a substitute, as is alleged, for the contract of May 19, 1897; and it makes the following recital in the eleventh paragraph, to wit: "This agreement is in lieu of, and in substitution for, a certain other option, bearing date the 19th day of May last, which was executed by the glucose company, running to the bank, and which was delivered to J. B. Greenhut," etc. The option agreement of June 9, 1897, fixes the price of the realty of the American Glucose Company at \$1,750,000, and its section 6 provides that the American Glucose Company and the Hamlins are not to make or buy or sell glucose for five years within 1,000 miles of Chicago.

The agreement of June 9, 1897, is claimed by plaintiffs in error to be a contract of sale to the bank of the property of the American Glucose Company for cash, and it is contended that all the provisions for the taking of stock in the new corporation to be organized, either as purchase money, or as collateral to notes given as purchase money, were eliminated. The evidence certainly shows that many of the officers and stockholders in the corporations which sold their plants to the new corporations held stock in the latter after the transfer of the plants to it. William Hamlin and Harry Hamlin both

held stock in the Glucose Sugar Refining Company at a date subsequent to the delivery of the deed which conveyed to that company the plant of the American Glucose Company. It is a fair conclusion from the testimony that the purchases of many of the six plants were paid for, either in whole or in part, by the stock of the new company. An instance of testimony of this kind is furnished by the letter of June 21, 1897, written by Levy Mayer to William Hamlin, and Hamlin's reply thereto, dated June 22, 1897. That letter and reply are as follows:

"First. You will underwrite \$500,000, taking \$500,000 preferred stock and about 143 per cent additional common, and will make a contract with a responsible party by which, in effect, you are to have the right to 'put' the amount so underwritten within a year, and the other parties to have the right to 'call' that amount within the same time, the purchase price to be the amount to pay for the underwriting and 6 per cent additional. This arrangement to be embodied in a contract which shall be legally enforceable. Second. You will underwrite an additional \$500,000 upon a basis say of 50 per cent, you to get the \$500,000 preferred stock and about 143 per cent additional common stock, and to make a contract by which the second party is to have the right, within one year, to purchase of you this \$500,000 so underwritten, and to receive from you the \$500,000 preferred stock, and 143 per cent common stock, and to pay the price you paid therefor,—that is to say, 50 per cent, or \$250,000, and 6 per cent interest thereon; you to have no right to 'put,' but the other party to have the right to 'call.' All this to be embodied in a contract legally enforceable." The letter then adds, *viz.*: "Should what I state here be in any way different from your understanding of the facts, I shall be glad if you will send me a line putting me right."

Buffalo, N. Y., June 22, 1897.

Mr. Levy Mayer,

811-839 Unity Building, Chicago, Ill.

Dear Sir:—

Your favor of the 21st inst. is this morning received. Your understanding of my proposition to underwrite, as therein expressed, is correct in every particular. You will remember that you said on Saturday that a "put and call" arrangement, such as I have suggested, would not be legal in Illinois, and that you did not know whether it would be in New York state or not. At this writing I have had no legal advice upon the subject.

Yours very truly,

William Hamlin.

June 9th, when the last option contract of the American Glucose Company with the bank was executed by that company, Hamlin proposed to underwrite more than \$1,000,000 of stock in the new corporation to be formed. He says that the proposition to take this stock was made on behalf of the company, and would inure to the benefit of the stockholders. But whether the plant of the American Glucose Company was paid for in cash, or in stock of the Glucose Sugar Refining Company, makes no practical difference. The purchase of the plant of the American Glucose Company was a part of the single transaction, which involved the purchase, at one and the same time, of the plants of all the six corporations. This was well known to William Hamlin, president of the American Glucose Company. He knew, and was informed by letters from the promoters of the transaction, that they were trying to purchase or secure the property of the other five companies. He also knew that the purchase of the other properties and the organization of the new corporation would not be effected or accomplished, unless there was at the same time a transfer of the property of the American Glucose Company. The parties organizing the combination refused to consummate it, unless Hamlin would bring into the combination the property of the American Glucose Company. Money and subscriptions were secured upon the faith of the option contract executed by Hamlin for the American Glucose Company, and deposited with the Illinois Trust & Savings Bank, on account of the belief by the parties paying such money and subscriptions, that the American Glucose Company was to be a party to the combination.

That all the corporations acted together in the matter is shown clearly by the correspondence, including the letters of the attorneys, and by the facts that the option contracts of all the companies were delivered at the same time to the same repository, to wit, the bank, to be transferred by the bank as the promoters of the scheme should direct, and by the further fact that all the deeds conveying the several properties to the new corporation were executed about the same time, and delivered simultaneously.

On June 11, 1897, John P. Wilson, Levy Mayer, and J. B. Greenhut, over their own signatures, addressed and delivered to the Illinois Trust & Savings Bank of Chicago a written communication, by the terms of which they deposited with the bank the six option contracts, executed by the six corporations, respectively, and by the terms of which it was agreed to sell their respective properties to the bank; and in said written communication after describing the contracts, the following statements were made,

to wit: "All of the said contracts are deposited with you on the following conditions: First, you shall hold, transfer, assign, or otherwise dispose of all of the said contracts in such way, and in such way only, as you shall be directed to do by the joint order in writing of the undersigned; second, unless you shall receive the joint order to the contrary thereof before August 16, 1897, you are authorized, upon the request of said parties to said contract, to surrender and deliver to said respective first parties their respective contracts." Below the signatures of Wilson, Mayer, and Greenhut the Illinois Trust & Savings Bank, by William Henkel, its secretary, wrote the following, to wit: "The undersigned hereby acknowledges the receipt of all the contracts mentioned in the foregoing instrument, and hereby agrees to hold said contracts subject to the conditions and provisions specified in said foregoing instrument."

The option contracts, thus deposited with the Illinois Trust & Savings Bank, remained with that bank until about August 5, 1897, or a few days thereafter. Let us see what was done in the meantime. On July 15, 1897, Levy Mayer telegraphed to William Hamlin, president of the American Glucose Company, to send abstract of title, and in his telegram added the following words: "Deal closed. Keep strictly confidential." About the same time Mayer wrote to Hamlin, acknowledging the receipt of a letter and telegram from him in regard to notice of a stockholders' meeting thereafter to be held, in which letter Mayer says: "The Davenport Company, I am satisfied, for legal reasons, could not be legally shut down, owing to the fact that its plant is in possession of its lessee, the Davenport Syrup Refining Company, which latter has a number of substantial contracts yet to be filled. I succeeded, however, in making very satisfactory arrangement, by which it will be optional to the new company to take over outstanding contracts and to purchase undelivered produce on hand. May I trouble you to send me, as soon as possible, accurate memoranda of the improvements, and contracts for improvements, etc., which under your contract you will ask the new company to assume."

On July 17, 1897, Mayer sent to William Hamlin, president of the American Glucose Company, at Buffalo, New York, the following telegram: "Letter received. Matter has reached a point where its consummation is a certainty. It has been financed successfully and most satisfactorily, as you will agree when you learn details. If your counsel thinks stockholders' meeting necessary, please have same called to-day. A day or two is of the greatest service to me at this

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time. In your notice of meeting, please state no more than is legally requisite. Am procuring the consent of different companies to shut down. Chicago, Peoria, Rockford, have agreed to do so at once. Firmenich has agreed to do so not later than next Saturday. Am now negotiating with Davenport in that direction. Would like you to do as we have done." To this telegram from Mayer, Hamlin sent the following telegram in reply: "We will do everything to facilitate you. Works stopped grinding Thursday on account of coal strike."

Can there be any doubt, after reading these letters and telegrams, that these parties were engaged in a scheme to have all the six corporations shut down their manufactories and abandon their business? Can there be any doubt that Hamlin, president of the American Glucose Company, knew that the other corporations were shutting down their plants with a view to conveying them to a new corporation, and that, in transferring the plant of his own company, he was aiding the consolidation of all the properties in one giant trust? It must be remembered, in this connection, that preparations were all the time going on for the organization of the new corporation, and that this new corporation was organized on August 2 or 3, 1897, and took possession of and commenced operating all the plants of the six corporations, which had suspended business, on and after August 12, 1897. But this is not all. On July 19, 1897, the board of directors of the American Glucose Company made and passed a resolution, which is set out in full in the statement preceding this opinion, wherein it was resolved that it was advisable to relinquish the business of manufacturing glucose and grape sugar, and such other business as it was engaged in at Peoria; and wherein it was resolved that the nature of its business should be changed, and that its plant and property in Peoria should be sold, and that its manufacturing should be thereafter confined to the manufacture of starch in Buffalo; and that a meeting of stockholders should be called to take place in Buffalo on August 3, 1897; and to which resolution was attached a notice, signed by George W. Lamb, secretary, that the meeting would so be held at the office in Buffalo on August 3, 1897, for the purposes specified in the resolution. On July 23, 1897, John P. Wilson wrote the following letter to William Hamlin: "In the matter of the proposed sale of the plant of the American Glucose Company at Peoria, under the contract heretofore executed between said company and the Illinois Trust & Savings Bank, I beg leave to say that all the arrangements have been perfected by the proposed purchasers to complete the purchase and pay for the plant within

the time limited by said contract. The uncertainty as to the date of closing the purchase lies in the fact that a number of properties are under contract, the purchase of all of which had to be completed simultaneously. We have not yet received the abstracts of title to some of these plants. These abstracts of title will have to be examined, and the titles to all of the plants proposed to be purchased approved, before the transaction can be closed, as it is a single transaction." If this letter, written by the attorney who was most active in promoting and carrying out the scheme for the consolidation of these properties, does not show that the several purchases of all the plants were to be made simultaneously, and together constituted a single transaction, then we fail to understand the meaning of the English language.

On July 26, 1897, Mayer wrote to Hamlin as follows: "I thank you for your very kind letter of the 24th inst. I hope to be able to arrange matters so that the recent destruction by fire to one of the buildings of the Peoria Grape Sugar Company will not interfere with the pending arrangements for the purchase of its property by the new glucose company. My address in New York will be Savoy Hotel, or American Spirits Manufacturing Company, Mills Building." On the same day Mayer wrote to Hamlin in reference to the salaries to be paid by the new company to Henry E. Grant, treasurer, and George W. Lamb, secretary, of the American Glucose Company, as follows: "Under existing contracts, the time has arrived to determine, as I am advised, what arrangements can be made with your Messrs. Grant and Lamb. As I am told, neither Mr. Grant nor Lamb seems to be satisfied with the amounts offered; Mr. Grant suggesting that he should receive \$25,000 a year, and Mr. Lamb \$10,000 a year. It is, however, important that the new company should, if possible, secure the services of those gentlemen mentioned at salaries not exceeding those fixed by Mr. Matthieson. It is therefore now opportune for you to undertake the office of negotiating, if possible, with Messrs. Grant and Lamb, so that contracts as contemplated can be secured from them."

On July 27, 1897, Mayer wrote to Franklin B. Locke, of Buffalo, an attorney and a director for many years of the American Glucose Company, the following letter: "You ask for the name of the grantee. That has not yet been positively determined, though it is very probable that the name will be 'United States Glucose Company.' This matter will be determined, in all probability, some time this week, when it is expected to apply for the charter. The new company will be organized under the laws of New Jersey. It
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is our intention to have printed contracts uniform, as near as possible, for execution by the different officers of the vendor companies." On the same day, Locke wrote to Mayer as follows: "I now hand you draft of the little agreement promised yesterday. If satisfactory, kindly O. K. it, and return it to me, so that I can have it executed upon being advised of the formation of the new corporation."

The letters thus quoted not only show that the contracts of sale to be executed by the various corporations, selling their properties, were to be uniform in their terms, but also show that the new company was to silence opposition, as well as competition, by providing places for the officers of the old companies, and by taking from them contracts not thereafter to engage in the manufacture of glucose. The above letter from Locke to Mayer refers to an agreement under which the Hamlins stipulated not to engage in the business of manufacturing glucose for a certain number of years. This transaction is thus brought within the scathing condemnation of the Supreme Court of the United States in *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, where it was held not to be "for the substantial interests of the country that any one commodity should be within the sole power, and subject to the sole will, of one powerful combination of capital;" and where it was held to be unfortunate for the country to deprive it "of the services of a large number of small, but independent, dealers;" and where it was held to be "not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company, and bound to obey orders issued by others."

About this time, or shortly before this time, Mayer wrote a letter to Hamlin as to the insurance policies upon the property, asking for information in regard to the same, "so that, when the transfers are made to the new company, no time may be lost." He also wrote the following letter: "I want to say that I find on my return this afternoon that the matter is progressing to my entire satisfaction, and I have no doubt whatever that all the transactions can be completed unless some hitch should occur by reason of some defect in the titles, the abstracts of which are now being either brought down to date or examined. Some three have already been completed and delivered to us, and the others are being

hastened forward to be completed. We are still waiting for your abstract."

On July 28, 1897, Hamlin wrote to Mayer as follows: "Mr. Grant's connection with us has given him perfect satisfaction in the past, is satisfactory to him now, and his contract insures him a comfortable living for five years to come. We are satisfied with the contract and intend to carry it out to the letter, unless at his request, it be terminated before its natural expiration. We feel that some line of business not in competition with the new glucose company will soon be thought of by us in which Mr. Grant's knowledge and abilities will not only enable us to secure satisfactory returns, but will provide him with agreeable occupation and assure him fair pecuniary returns. The price for his services that he named to Mr. Matthieson, while very much in excess of the contract price with us, is not so unreasonable as it might seem at the first blush. In my judgment, Mr. Grant is more responsible than any other individual for the condition of affairs that rendered it possible for all parties to give favorable consideration to the consolidation plan. I will do that which I can fairly to promote his interests and those of the new company."

On July 29, 1897, John P. Wilson wrote to Locke as follows: "Will you kindly leave the name of the grantee in the contract blank for the present, and I will wire you the name of the grantee in ample time to be inserted before execution." In one of his letters written at this time, William Hamlin says: "Under Mr. Grant's management, the capacity of the work was increased over 50 per cent to 22,000 or 23,000 bushels. The increase of capacity, attended by a process that lessened the cost, enabled the American Glucose Company to produce its products and to sell them at a price that made the business, as a whole, unprofitable, in my opinion, to its competitors. We had lessened the cost of the labor and the cost of fuel, and increased the quantity, and bettered the quality, of the main and by products."

On August 2, 1897, Wilson wrote to Locke as follows: "Might it not be well to keep the meeting of board of directors and stockholders alive by adjournment, so that, if any question should arise requiring action, the same might be speedily taken?"

On August 3, 1897, Mayer wrote William Hamlin as follows: "I find that during my absence all the moneys necessary to complete the purchase of the properties by the new company have been paid to the Illinois Trust & Savings Bank and are now awaiting distribution. While east, the charter of new company was prepared, and was yesterday filed for record at Trenton, so that the
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new company, the Glucose Sugar Refining Company, is now in actual existence. The abstracts of title to the six properties have been furnished and have been examined. As you can well imagine, in a deal of this magnitude there are a large number of details to be looked after, as well as instruments to transfer and other contracts to be executed and delivered. These contracts must necessarily all be delivered contemporaneously. We shall be able to begin to close the transaction this coming Thursday morning at 10 o'clock, and hope to be able to conclude the entire work during that day, if possible. It is therefore necessary that all of the parties in interest should be in this city at the hour indicated." In reply to this letter, Mayer received the following telegram from Hamlin on August 4, 1897: "I will call on you at your office to-morrow morning."

On August 3, 1897, the meeting of the stockholders of the American Glucose Company was called pursuant to the notice already mentioned. At that meeting, George F. Harding, one of the plaintiffs in error and the stockholder who filed this bill, and who had theretofore written several letters to officers of the American Glucose Company, but had failed to obtain any definite or reliable information as to the proposed sale of the company's plant, made a motion that the stockholders of the company should refuse to ratify the alleged contract for the sale of the Peoria plant of the company to the glucose trust or corporation, or its representative, upon the grounds that the sale was unlawful, as being prohibited by the statute against trusts of the state of Illinois; and that the creation of a trust in glucose by contract with the company for the purchase and sale of a necessary element in the unlawful combination by such sale was in violation of the powers of the company as given by its charter; and that the contract to relinquish the right to manufacture glucose was against both the right, interests, and powers of the company; and that the price named and made in the offer was grossly inadequate; and that it was not within the powers or duties of the president of the company to make the sale.

At this stage of the proceedings, and upon this date, to wit, August 3, 1897, the original bill in this case was filed, and an injunction was obtained. The new company, the Glucose Sugar Refining Company, had only come into existence on the day before the bill was filed. All the proceedings which are now to be detailed occurred after the filing of the bill in this case, and, inasmuch as the American Glucose Company, was served with summons August 3, 1897, the transfers and other transactions herein-

after mentioned were made and took place *pendente lite*.

By an instrument in writing, dated August 5, 1897, signed by John P. Wilson, Levy Mayer, and J. B. Greenhut, and concurred in in writing on August 7, 1897, by Edwin L. Johnson, hereinafter named, and addressed to the Illinois Trust & Savings bank of Chicago, the bank was designated as the party of the second part in the option contracts, heretofore referred to and made by the six corporations already named; and said communication to the bank recited that all of said contracts had been deposited by Wilson, Mayer, and Greenhut with the bank, to be held, transferred, and disposed of by it subject to their joint order; and that, in and by all said contracts, it was understood and agreed that the same might be transferred and assigned by the bank; and that, when so transferred and assigned, the said contracts, respectively, and all of their respective parts or provisions, should inure to the bank, and should run in favor of, and be obligatory upon, its transferee, and be of the same purport and effect as though such transferee had originally been made second party to the said contracts, respectively; and it was further therein recited that it was in all said contracts further provided that, in case of said transfer and assignment by the bank, all of its rights, as well as said obligations under said contracts, respectively, whatever the same might be, should forthwith cease and terminate; and after such recitals the said Wilson, Mayer, and Greenhut therein requested that, pursuant to the terms of all said contracts, respectively, the bank should forthwith, by proper instruction, transfer and assign all said contracts, respectively, to Edwin L. Johnson, of Chicago, and all of said contracts when so transferred and assigned by it to Johnson, should inure to his benefit, and run in favor of, and be obligatory upon, him, to the same purport and effect as though he had originally been made the second party to said contracts respectively.

The Illinois Trust & Savings Bank of Chicago was a corporation organized under the laws of Illinois for the purpose of doing a banking business and had no power under its charter to purchase the plants and properties of corporations engaged in the manufacture of glucose and grape sugar. Therefore the option contracts providing for a sale of these properties to the bank, were absolutely void. It does not appear that the contracts were signed by the bank, but, when signed by or for the respective corporations, they were accepted and held by the bank. The bank claims that these contracts were delivered to it to hold in 64 L. R. A.

escrow, and that it merely acted for the parties as the repository or custodian of these contracts, subject to be disposed of as the parties might order. The proof tends to sustain the contention of the bank that it was a mere repository of the papers. It went further, however, in its assistance of these parties to carry out their scheme, than merely to act as custodian of the papers.

Attached to each contract of sale was a written assignment thereof by the bank to Edwin L. Johnson, who therein accepts the assignment, and assumes all the obligations created by the contract in favor of the bank. These written assignments, signed by the bank and Johnson, appear to have been dated August 9, 1897, except the assignment on the contract of the American Glucose Company, which was dated August 11, 1897. At least two of the contracts thus signed provided that the proposed corporation should be organized in such state, and in such manner, as should be satisfactory to John P. Wilson and Levy Mayer.

A deed dated August 7, 1897, was executed by the American Glucose Company, by William Hamlin, its president, conveying the plant of the company in Peoria to Edwin L. Johnson, of Chicago, for an expressed consideration of \$1,750,000, which deed was recorded on August 12, 1897. A deed dated August 9, 1897, was executed by Edwin L. Johnson conveying the said plant in Peoria to the Glucose Sugar Refining Company of New Jersey for an expressed consideration of \$10, and other good and valuable considerations, which deed was also recorded on August 12, 1897. A deed dated August 7, 1897, was executed by the Chicago Sugar Refining Company, conveying to said Johnson its plant in Chicago, and the real estate on which it was situated, for an expressed consideration of \$6,250,000, which deed was recorded also on August 12, 1897. A deed dated August 9, 1897, was executed by said Johnson, a bachelor, of Chicago, to the Glucose Sugar Refining Company of New Jersey, conveying the same property, in consideration of \$10 and other good and valuable considerations. Other deeds were executed by the other corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company. The witnesses testify that these deeds were delivered to the Glucose Sugar Refining Company, or to C. H. Matthieson, its president, simultaneously. The deeds were delivered at the banking office of the Illinois Trust & Savings Bank on the evening of August 11, 1897, at 5:30 o'clock, which was after the regular business hours.

The injunction writ was served upon the American Glucose Company on August 3,

1897, and the injunction was in force until August 11, 1897, when it was dissolved. It will thus be observed that the request of Wilson, Mayer, and Greenhut to the bank to assign the contracts, and the execution of the deeds by the corporations to Johnson, and by Johnson to the Glucose Sugar Refining Company, were all made and effected while the injunction was pending. The option contracts referred to, and the assignments attached thereto, were also delivered by the bank to Johnson on the evening of August 11, 1897, but these and all other papers were at once handed back by Johnson to the bank, and placed in its vaults. Edwin L. Johnson, above referred to, was a clerk in the law office of John P. Wilson. He never paid a dollar for the purchase of the vast properties which were conveyed to him, nor did he receive a dollar when he conveyed these properties to the Glucose Sugar Refining Company. When he signed the deeds, he did not know what he was doing, nor did he know that any deeds were executed to him by these various corporations, nor were any such deeds delivered to him. The testimony of Johnson is in the record, and he says: "I am a clerk in Mr. Wilson's office. . . . Never had any connection in any way with the defendants. . . . Never received a deed from any of them that I know of, nor from the American Glucose Company, nor authorized anyone to receive one for me. Some papers I executed. I don't know whether they were deeds or not. I did not read the papers there. . . . I was acting under instructions of Mr. Wilson. He did not tell me what they were. To my knowledge, I never received any deeds." At the taking of the testimony in this case, Wilson made the following statement, which was taken down by the commissioner, and is in the record: "As to Mr. Johnson's testimony, Mr. Johnson was a clerk in my office, and I stated to him, in connection with the transfer of the titles of the glucose property, that I should like to have the titles taken in his name, and have him make the conveyance to the new company. He consented, and he signed such papers as I presented to him, on my statement that they were all right. His relation was merely acting at my request as the person through whom the title should be conveyed, and having no part in the negotiations whatever. He was present when the deeds were received and delivered, and received the documents. I am not sure whether the deeds passed into his hands, but I think they did, and this was done in his name, with his consent. Mr. Johnson would not be able to state the contents of the documents, not having read them."

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Henkel says that all the papers in regard to this transaction, that came into the hands of the bank, were vouched for by Wilson and Mayer; and that, among the paper so handed to the bank and vouched for by Wilson and Mayer, was a written order, signed by Edwin L. Johnson, and indorsed as correct by Wilson and Mayer, dated Chicago, August 10, 1897, and which is in the following words: "I hand you herewith certificates for 34,500 shares of preferred stock, and 49,285³/₄ shares of common stock, of the Glucose Sugar Refining Company of New Jersey, with which to satisfy and cancel the receipts for money received by you under the underwriters' agreement in regard to said company, and request you to turn over and pay out all money so deposited under the underwriters' agreement as follows, namely: To the American Glucose Company of New Jersey, \$1,977,000.00; to the American Preservers' Company of West Virginia, \$700,000.00; to the Glucose Sugar Refining Company of New Jersey, \$773,000.00. The above amounts include two subscriptions, aggregating \$75,000.00, upon which you have as yet issued no certificates." What the underwriters' agreement referred to in this order was, the record does not show, as Wilson refused to allow the witnesses to testify in regard to it, and refused to allow it to be produced in evidence. That underwriters' agreement was the authority under which the bank received the money and gave the receipts mentioned in the order. The details in the matter were conducted and arranged with the bank by Wilson and Mayer; but, owing to the refusal of the witness to testify at the suggestion of counsel, it is impossible to state what those details were.

On the evening of August 11, 1897, the officials and representatives of the six corporations entering into the consolidation scheme were present at the Illinois Trust & Savings Bank; and there, upon that occasion, a delivery took place to the parties of the deeds and other documents. A check was there handed to H. E. Grant, treasurer of the American Glucose Company, for \$377,000, but not for \$1,977,000. The amount named in the order of August 10th, to wit, \$1,977,000, exceeded the consideration, to wit, \$1,750,000, named in the deed of the American Glucose Company to Johnson, by \$227,000. Why the amount named in the deed was thus increased, or what became of the excess does not appear.

It appears in the testimony of H. E. Grant and C. H. Matthieson that in the bank on the evening of August 11, 1897, there were present Matthieson and Wilson, representing the Chicago Sugar Refining Company; Ream, representing the Rock-

ford Company; Best and Krause, representing the American Preservers' Company; Edward Mayer, representing the Peoria Grape Sugar Company; George Firmenich, representing the Firmenich Manufacturing Company; and Grant, representing the American Glucose Company. Grant says: "The deeds were all delivered there at about the same time. I was paid first, delivered my papers, and took my check. I was called by Mr. Henkel, secretary of the bank. He stood in the middle of the room, and called the American Glucose Company. I delivered the papers, took my check, and went out. Don't know who was called next."

An agreement, dated August 11, 1897, the same day on which the delivery of the deeds took place as above stated, was executed between the American Glucose Company, as party of the first part, and the Glucose Sugar Refining Company, as party of the second part, which agreement is as follows: "Whereas, the parties hereto are engaged in the business of manufacturing and selling glucose, grape sugar, starch, and kindred products, and the various products of a glucose factory; and whereas, contemporaneously herewith, the second party has purchased all the real estate, leasehold, buildings, improvements, appurtenances, easements, plant, machinery, fixtures, and utensils belonging to the first party, and situate in the city of Peoria, etc.; and whereas, a valuable and substantial part of the consideration paid by the second party for the property so as aforesaid described was and is the agreement herein contained: "Now, therefore, in consideration of the premises, and of the sum of one dollar (\$1.00) and other good and valuable considerations, the first party hereby covenants and agrees with the second party, its successors or assigns, that the first party shall not and will not, at any time during the period of twenty-five years from and after the date hereof, within a radius of 1,500 miles of the city of Chicago, Illinois, engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products now produced by any glucose factory; and the first party shall not, and will not, at any time during said period of twenty-five years from and after the date hereof, use in its starch factory at Buffalo the process commonly known as the 'acid' process, which process is now in general use in glucose factories in this country."

On August 7, 1897, or about that date, the American Glucose Company assigned to Johnson its patents and policies of insurance, and its business and factories at Peoria, and all of its good will, and its business, etc. On August 28, 1897, at a meeting of a majority of the stockholders of the 64 L. R. A.

American Glucose Company at Camden, New Jersey, that company reduced its authorized capital stock from \$1,500,000 to \$150,000, and its stock actually issued from \$1,322,500 to \$132,250, and ratified the action taken at the other meeting on August 3, 1897, and ratified the action of the president and directors in selling the plant at Peoria to Edwin L. Johnson, of Chicago. The action taken at Buffalo, New York, on August 3, 1897, was taken in New York by the stockholders of a New Jersey corporation. It has been recognized as a general rule by this court that the power of a corporation to perform corporate acts outside of the state of its creation, and where the laws of its corporate existence have no force, does not exist. *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090. As to the attempted ratification of the alleged sale to Edwin L. Johnson, it has already been shown that there was no sale to Johnson.

2. A question of law which arises in the case is whether the facts set up in the bill constitute an illegal trust. The pleadings in the case are in a somewhat singular condition. Some of the defendants answered the bill. One of the defendants to the amended bill filed a paper, which was in part an answer and in part a demurrer. Others of the defendants demurred to the whole bill. All the demurrers, both in whole and in part, were sustained by the trial court. We are of the opinion that they should have been overruled.

A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy, and is void. 2 Cook, Corp. 4th ed. § 503a. It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates, or whether it is effected by creating a new corporation, and conveying to it all the property of the competing corporations. The test is whether the necessary consequence of the combination is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as thereby to create a monopoly. The demurrers confess the truth of the allegations in the bill; and those allegations are that a

trust was created, or proposed to be created, by the organization of a new corporation, and the conveyance thereto of all the property owned by the six competing corporations, and the execution of agreements by the corporations, thus parting with their property, not any longer to engage in the manufacture of the industrial products in which they had been previously engaged. Six corporations were engaged in the manufacture of glucose, which can only be manufactured in a certain district or extent of country, and, with the exception of one small plant, were the only corporations engaged in such business. The allegations of the bill show that the ability to prosecute such business was rare, and that it is difficult for new parties, not familiar with it, to engage in it. Necessarily, when corporations thus situated unite together all their properties in one new organization, and permit the latter to operate their properties, competition will be suppressed, and the new corporation will possess the power to limit production and control prices. All of the competing corporations have been put out of the business by disposing of the plants with which they conducted their business. The grantee of said corporations has no competitor in the market.

The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and in the constant practice of government officials. When the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates. *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. The public policy of the state of Illinois has always been against trusts and combinations organized for the purpose of suppressing competition and creating monopoly.

In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, we held it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, and is illegal and void.

In *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798, we forfeited the charter of a company on the ground that it was formed to bring about an illegal combination; and held that an agreement tending to prevent competition and create a monopoly is void by the principles of the common law, because it is against public policy, and that public policy favors competition in trade, and is opposed to monopoly, as tending to advance market prices to the injury of the general public.

In *More v. Bennett*, 140 Ill. 69, 15 L. R. 64 L. R. A.

A. 361, 33 Am. St. Rep. 216, 29 N. E. 888, we held, again, that contracts restraining the freedom of trade, diminishing competition, or regulating the prices of commodities are prohibited by law; and that all combinations of capitalists and of workmen in their especial favor, by raising or reducing the prices, are so far illegal; and that agreements to combine for such purposes will not be enforced by the courts.

Again in *Bishop v. American Preservers' Co.* 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765, we held that an agreement providing for the welding together of all the interests engaged in a certain business in one giant combination, under the absolute dominion and control of a board of trustees, was void, as contrary to public policy.

It makes no difference that the agreement for the illegal combination is not a formal written agreement. It may be a verbal agreement or understanding, or a scheme not embodied in writing, but evidenced by the action of the parties. In the present case each of six corporations, engaged in the manufacture of glucose, made a contract to sell its plant to a new corporation to be organized, and agreed not to engage in such manufacture for a term of years, and then conveyed all its property to the new corporation organized to conduct the same kind of business; and it did all this with the knowledge and understanding that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance, in respect to their own respective properties, all to be consummated and delivered at the same time, and under the direction and management of agents or promoters employed by all the corporations. If the transactions referred to in the bill in this case did not amount to an absolute agreement made in advance between the six corporations, they, at least, constituted a scheme understood by all the corporations, and participated in by them all. The carrying out of the scheme, thus understood and participated in, would necessarily result in the suppression of competition in the manufacture of glucose, and in the creation of a monopoly in that business. A part of the scheme was that none of the six corporations or their officers should, for years, engage in the manufacture of glucose, and this feature of the scheme necessarily contemplated a wiping out of all competition in the business.

In *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188, we held that a combination to control the manufacture and sale of all distillery products, so as to stifle competition and regulate and dictate prices, was an illegal attempt to create a monopoly, and that as

organization, which has a tendency to create a trust and constitute a monopoly, is contrary to public policy and unlawful. In the latter case it was claimed that the illegal character of the combination was removed by a change of organization, so as to have the properties of the combining distillery companies transferred directly to the new corporation organized for that purpose; but it was held that this change was formal, rather than substantial, and that the same interests were controlled by the same agencies as had controlled them under the former organization. So it is in the case at bar. The men who controlled the new corporation which was organized, to wit, the Glucose Sugar Refining Company, are the same men, for the most part, who were interested in and controlled some one or more of the six corporations which disposed of their plants. Many of the stockholders in the old corporations are holders of stock in the new corporation.

In *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188, this court spoke with approval of the case of *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; and in the Michigan case it appeared that the corporation known as the "Diamond Match Company" was organized to manufacture, buy, sell, and deal in friction matches, etc., and that the real object of the corporation was to buy up the property of all the corporations, or of individuals, engaged in the manufacture of friction matches, exacting from the seller in the several cases a bond that he would not for a term of years engage in, or aid anyone else in, the manufacture of matches, in any place where his action might conflict with the interests, or diminish the profits, of the Diamond Match Company; and in that case the purposes of the company were declared to be unlawful, and it was held that any contract made to further them was void, as against public policy. In *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188, we used, in reference to this Michigan case, the following language (p. 489, 156 Ill., p. 217, 47 Am. St. Rep., and p. 201, 41 N. E.): "It was held that a corporation organized for the purpose of controlling the manufacture and sale of friction matches, and by means of which all competition was stifled, and opposition crushed, and the whole business of the country in that line engrossed by the corporation, was a menace to the public, its object and direct tendency being to prevent fair competition and to control prices; that it is no answer to say that the monopoly had in fact reduced the prices of friction matches; that such policy may have been necessary to

crush competition; that the fact exists that it rests in the discretion of the corporation to raise prices at any time to an exorbitant degree; and that such combinations have frequently been condemned by courts as unlawful and against public policy."

The material consideration in the case of such combinations is, as a general thing, not that prices are raised, but that it rests in the power and discretion of the trust or corporation taking all the plants of the several corporations to raise prices at any time, if it sees fit to do so. It does not relieve the trust of its objectionable features that it may reduce the price of the articles which it manufactures, because such reduction may be brought about for the express purpose of crushing out some competitor or competitors. In the case at bar, however, the proof shows that, upon the completion of the new organization, and as soon as it began to operate the several plants conveyed to it, the price of glucose and its various products began to go up. One of the witnesses testifies that in May, 1897, the price of glucose was about 75 cents per 100 pounds, and that after that it began to go up, and went as high as \$1.65 per 100 pounds.

The public policy of this state in regard to this matter is not only manifested by the decisions of the supreme court of the state, as already referred to, but by the legislation of this state. By an act approved June 11, 1891, the legislature of Illinois enacted that, "if any corporation organized under the laws of this or any other state . . . for transacting or conducting any kind of business in this state, or any . . . individual or other association of persons whosoever, shall create, enter into, become . . . a party to, any pool, trust, agreement, combination, confederation, or understanding with any other corporation, . . . individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise, or commodity, or shall enter into, become a member of or a party to, any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, such corporation . . . or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act." Section 2 of the act provides that "it shall not be lawful for any corporation, . . . agent, officer, or employee, or the directors or stockholders of any corporation, to enter into any combination, contract, or agreement with any person or persons, corporation, or corporations, or with any stockholder or director

thereof, the purpose and effect of which combination, contract, or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee, or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article." Section 3 provides that if a corporation, or a company, firm, or association, shall be found guilty of a violation of the act, it shall be punished by a fine running from \$500 to \$15,000, according to the number of times the offense is committed. Section 4 of the act provides that any president, manager, director, or other officer or agent, or receiver, of any corporation or association, or any member of any company or association, or any individual, found guilty of a violation of the 1st section of the act, may be punished by a fine of not less than \$200, nor to exceed \$1,000, or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court, etc. Section 5 of the act provides that any contract or agreement in violation of any provision of the first four sections of the act shall be absolutely void. This act of June 11, 1891, came under the consideration of this court in *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651, and was there held to be constitutional. Ill. Sess. Laws, p. 206.

If the allegations of the bill in this case are true, the parties engaged in the formation of the trust and combination heretofore described are guilty of the offense specified in the act of June 11, 1891. The demurrers admit the allegations of the bill to be true. The American Glucose Company, a corporation organized under the laws of the state of New Jersey, for transacting business in Illinois, and the other persons whose names appear in the record, created and entered into a trust or combination with themselves, and with one or more of the five corporations other than the American Glucose Company, who conveyed their plants to the Glucose Sugar Refining Company, and with the Glucose Sugar Refining Company, to regulate and fix the price of glucose and grape sugar and their products and by-products; and they also entered into such combination to fix or limit the amount or quantity of glucose to be manufactured, produced, or sold in this state. These parties, therefore, under the act, were guilty of a conspiracy to defraud. The testimony tends to sustain the allegations of the bill. James A. Lamon says: "The price of glucose has been within thirty or sixty days past \$1 [per 100

pounds]. . . . The price is made, as I understand it, by Pope and by the combination. As I understand it at the present time, the glucose is \$1.35, I believe, and twenty-five or a quarter of a cent a hundred rebate made at the expiration of six months to the purchaser. That is by this trust or combination." L. G. Yoe testifies: "Our last purchase was made of the Glucose Sugar Refining Company on the first of this month [October or November]. The price was \$1.25. We were to have a rebate at the end of six months on condition of dealing exclusively with them." The evidence shows that efforts were made to induce Pope to go into the combination and transfer his plant or manufactory to the Glucose Sugar Refining Company. When Pope was on the stand as a witness in this case, and declined, under instructions from Wilson, to state whether or not he was manufacturing glucose at all at that time, or whether he had ever sold glucose, or whether he had manufactured much glucose during the preceding two years, he stated that he had had negotiations with Wilson, and with parties claiming to represent a combination or union of factories, but declined to state what price Wilson offered him for his factory.

By the act approved June 20, 1893, in regard to trusts and combines, the legislature of Illinois enacted "that a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of two or more of them for either, any, or all of the following purposes: First, to create or carry out restrictions in trade. Second, to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third, to prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth, to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any article or commodity of merchandise, produce, or manufacture intended for sale, use, or consumption in this state; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up, and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth, to make or enter into, or examine or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind, or have bound, themselves not to sell, dispose of, or transport any article

or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected." Section 2 of the act of 1893 provides that any corporation holding a charter under the laws of this state, which shall forfeit its charter and franchise. Section 4 provides that any foreign corporation violating any provision of the act is thereby denied the right and prohibited from doing any business in this state. Section 5 provides that "any violation of either or all of the provisions of § 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person, who may be, or may become, engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than \$2,000.00 nor more than \$5,000.00." Section 6 provides that, in any indictment for any offense under the act, it shall be sufficient to state the purposes and effects of combination, and that the accused was a member of, and acted in pursuance of, it, without giving its name or description, etc. Section 7 provides that, in prosecutions under the act, it shall be sufficient to prove that a trust or combination as defined therein exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it might have been based, or that it was evidenced by any written instrument at all. Section 8 provides that any contract or agreement in violation of the act shall be absolutely void, and not enforceable, either in law or in equity.

The bill in this case most certainly contains allegations in regard to the existence of a combination of capital, and acts by two

or more persons and corporations, to prevent competition in the manufacture of glucose and grape sugar, and their products and by-products, and to create and carry out restrictions in trade; which allegations bring the transactions referred to in the bill within the scope and meaning of § 1 of the act of 1893. Therefore the demurrers were improperly sustained to the bill.

3. Counsel for the Glucose Sugar Refining Company claim, however, that the demurrer was properly sustained to the bill upon the ground that a stockholder has no right to file such a bill as this. The position of counsel is that a stockholder can only file a bill to prevent the corporation from disposing of its properties upon the ground that it will affect his pecuniary interests, and because of the necessity of protecting his property rights, and because of the necessity of protecting himself from pecuniary loss or injury; and that a stockholder in a vendor corporation has no right to enjoin a sale and transfer of a factory owned by such vendor upon the ground that the vendee corporation proposes to create a monopoly in the manufacture of glucose, and to use the property sold to that end, the vendor being charged to have knowledge thereof. It is said that a stockholder does not represent the public, and has no right to maintain a bill to protect the public interests, or to prevent a violation of the law against trusts and combines. This contention assumes that the creation of a trust and monopoly, as described in the bill, will work no injury to the stockholder filing the bill. In support of this contention, counsel rely mainly upon the cases of *Cope v. District Fair Assn.* 99 Ill. 489, 39 Am. Rep. 30, and *Coguard v. National Linseed Oil Co.* 171 Ill. 480, 49 N. E. 563.

In *Cope v. District Fair Assn.* 99 Ill. 489, 39 Am. Rep. 30, the bill was filed by a stockholder in an incorporated fair association to restrain the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company during its annual exhibitions; but it did not appear there, from the bill or otherwise, that the complainant therein or the company had thereby sustained any pecuniary injury or loss. Here, the demurrer admits the allegations of the bill to be true, and the bill alleges that the proposed action of the American Glucose Company and its directors in disposing of its property will destroy the value of the complainants' stock therein, and will destroy the property and business of the glucose company, and irreparably injure the complainants, and that their stock will be reduced in value to less than one twentieth of its cost. Moreover, the bill ex-

pressly refers to the acts of 1891 and 1893, above set forth; and the latter act provides for a forfeiture of the charter and franchise of any corporation violating the provisions of the act, and the dissolution of its corporate existence. It is idle to say that a stockholder in a corporation would suffer no injury from a forfeiture of its charter rights and from its dissolution. In such a case, the corporation being destroyed, his stock therein would be completely wiped out, and be made of no effect. The stockholder has a right to protest against such use of its property by the managing officers of a corporation as will lead to such forfeiture and dissolution. But the matter complained of in the *Cope Case* did not relate to any disposition of the corporate property, but related merely to a license, given by the association to outside parties, permitting them to gamble. The case is not on all fours with the present case in any particular.

As to the case of *Coquard v. National Linseed Oil Co.* 171 Ill. 480, 49 N. E. 563, the main object of the bill there was to enjoin the officers of a corporation from interfering with the right of a stockholder to examine its books, etc. It would also appear that, in that case, the prayer of the bill was that the corporation should be wound up, and its charter should be forfeited; and it was held that such forfeiture, for injury to the public and to its rights, could only be enforced by the state. In the case at bar the bill does not seek the forfeiture of the charter. Moreover, it was alleged there that the stockholder filing the bill had, for anything that had appeared to the contrary, participated in the illegal acts of which he complained, and for a number of years had full knowledge of the occurrences which he recited, and it was there said that his participation or laches of many years barred him from obtaining relief on his own account. In that case, the main ground upon which the decision of the court was based was that, in order to entitle himself to relief against the formation and operation of an illegal trust, the complaining stockholder must be free from participation in such illegality, and cannot take personal advantage thereof, when he has been guilty of acquiescence and long delay. The *Coquard Case* is not applicable here. The bill here alleges, and the proof shows, that the dissenting stockholder who filed the bill vainly sought information from the officers of the American Glucose Company as to what they proposed to do in the matter of organizing a trust and disposing of its property thereto. The bill and proofs show that the stockholder filing this bill attended the meeting of stockholders held at Buffalo, August 3, 1897, for the purpose of taking action in ref-

erence to relinquishing the manufacturing of glucose and grape sugar, and selling the plant and property of the company; and that he there protested against such action on the part of the company, and presented a motion that the stockholders should refuse to ratify the offer and proposed contract for the sale of its Peoria plant. So far from acquiescing in the illegal action of the corporation, the plaintiff in error Harding did all that he could to defeat and prevent such action, and did this at once and without delay.

It must be remembered that here the pecuniary interest of the complaining stockholder was to be, and was, affected by the sale of the entire property of the American Glucose Company against his consent, and by the abandonment of its charter business against his consent, and by the utter inability of the corporation to make money or win profits, which necessarily resulted from such a sale, and from a contract not to further engage in the charter business, notwithstanding the American Glucose Company was a solvent and going concern, and doing, and able to continue to do, a profitable business. The shares of stock owned by a stockholder derive their value from the corporate property and franchise, although the stockholder's legal property in his stock is distinct from the property of the corporation. *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561. If the shares derive their value from the corporate property and franchise, they will have no value, practically, when all such corporate property is disposed of, and the right to carry on business is destroyed. What was here attempted was an abandonment of the business, and a sale of the assets, without a legal termination or dissolution of the company. It makes no difference that the stockholder is to be allowed to receive his proportionate share of the proceeds of the sale of the property. He has the right to hold his investment in the form of stock, and a change of such investment against his consent is a change which affects his pecuniary or financial interests. He has the right to be the judge whether such a change in his pecuniary status shall be made, or whether he shall continue his investment in the form of stock.

The bill in this case recites that the complainants therein filed it, not only in their own behalf, but in behalf of all other stockholders who might see fit to come into the suit and join therein. Where the officers of a corporation wrongfully deal with its property to the injury of the stockholders, the latter may maintain a bill against the company and its officers for relief against such misappropriation. Originally, the rule was that such a suit should be brought by

the corporation itself; but equity permits a stockholder, either individually or on behalf of other stockholders similarly situated, to bring such a suit, where the corporation itself either refuses to do so, or where the facts show that the wrongdoing defendants constitute a majority of the managing body, or where it is reasonably certain that a demand made upon the proper officers of the corporation to bring the action would be unavailing. *Green v. Hedenberg*, 159 Ill. 489, 50 Am. St. Rep. 178, 42 N. E. 851; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417. Here the bill alleges, and the proof shows, that the officers and directors of the American Glucose Company and the majority of its stockholders were in favor of disposing of its property to the new corporation to be formed, and that they adopted a resolution to carry out such action against the protest of Harding. Therefore no previous demand upon the managing officers to bring this suit would have been availing. It follows, however, that, where the bill in such case is filed by the stockholder, the final relief, when obtained, belongs to the corporation and all its stockholders, and not alone to the stockholder complaining. In view of this fact, Pomeroy, in his work on Equity Jurisprudence (§ 1095), says: "This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such direct interest. The defendant corporation alone has any direct interest. The plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice." Morawetz, in his work on Private Corporations (§ 271), says: "A corporation and its shareholders are identical. . . . Obviously, then, any injury to a corporation must be an injury to its shareholders; and it follows that, subject to the limitations which have been pointed out, a shareholder is entitled to relief in equity on account of any wrong constituting an infringement of the corporate rights."

The views above expressed are abundantly sustained by authority. In *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372, Gil. 348, the supreme court of Minnesota said: "We agree with the plaintiff's counsel, and with the cases by him cited, that it is against the general policy of the law to destroy or interfere with free competition. . . . An unauthorized monopoly is therefore against public policy, as destroying and interfering with free competition. . . . If a corporation is employing its statutory powers, funds, etc., for purposes not within the scope

of its institution, a court of equity will, upon the application of a single dissentient stockholder, interfere by injunction. . . . The right of a stockholder to this interference seems to be placed upon the ground that, from the fact that the corporation was created for certain purposes, there is an implied contract that it shall not divert its powers or funds to other purposes, and that such diversion would be a species of breach of trust, . . . as well as a violation of law, which might endanger the existence of its charter. . . . But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights. . . . There is no good reason, of which we can conceive, why the plaintiff's right to maintain this action should stand upon any different footing because the contract provides for a monopoly than because it is simply *ultra vires*. In either case, the contract is illegal. . . . Defendant's objection that the complaint does not state a cause of action in plaintiff because no facts are alleged going to show that he will suffer any pecuniary damage in consequence of the contract complained of, is not well taken, not only because the complaint alleges that the effect of the contract, if carried out, will be to render plaintiff's stock worthless, but because, if the contract is illegal, as alleged, it may lead to a total forfeiture of the charter of the company in which plaintiff is a stockholder."

In *Small v. Minneapolis Electro-Matrix Co.* 45 Minn. 284, 47 N. W. 797, the court said: "We need not inquire how far, or under what circumstances, considerations of public policy and of the general interests of the state may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a nonassenting stockholder, arising from the contract implied, if not expressed, in the creation of such an organization, and he would be entitled to have such acts restrained by injunction." See also *Abbot v. American Hard Rubber Co.* 33 Barb. 578; *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

In the fourth edition of Cook on Corporations (§§ 669, 670), it is said: "That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly im-

bedded in the jurisprudence of modern times. . . . Any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the expressed or implied powers of the charter of incorporation or of association—in other words, any *ultra vires* act—is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract as set forth in the charter.

. . . Ever since the case of *Abbot v. American Hard Rubber Co.* 33 Barb. 578, the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors, or by a majority of the stockholders, where the corporation is a solvent, going concern. And, even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. . . . If the purpose of such dissolution is not the bona fide discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. . . . Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly."

The allegations of the bill in this case, as well as the answer of the Glucose Sugar Refining Company, and the testimony taken in the case, show that the property of the American Glucose Company was passed over to a new corporation, to wit, the Glucose Sugar Refining Company, and that the latter company was to continue the business theretofore prosecuted by the American Glucose Company, which was a solvent concern and doing a profitable business. There is no reason why the American Glucose Company should not have continued to prosecute its own business, instead of turning it over to be prosecuted by a new corporation, unless the officers, directors, and stockholders making the transfer to the new corporation expected, by suppressing competition, to fix and control prices, and thereby increase their own profits to the injury of the consumers of the manufactured products and of the public generally. It must be remembered that these transfers of properties were not made by the six corporations to a corporation already existing and doing business, but a new corporation was to be created, and was created, for the express purpose of taking and using the properties to be conveyed to it. All the arrangements for the several transfers were made before the new corporation was al-

lowed to come into existence. The only purpose of its existence was to take and use, in a consolidated form, all the plants of the six old corporations. The illegal trust or combination was formed, not after the making of the sales, but by the sales themselves.

The contention of counsel for the Glucose Sugar Refining Company that the American Glucose Company had a right to make a sale of its plant to the new corporation, and that this transaction must be regarded by the court merely as a valid sale, is not supported by the allegations of the pleadings, or by the proofs herein. The transfer of its property, made by the American Glucose Company, was a transfer to a corporation created for the express purpose of taking its property and the property of other corporations, so as to use them in the suppression of competition, and in the creation of a monopoly in the manufacture of glucose and grape sugar, and their products and by-products. The whole scheme, as devised and consummated, was a fraud, not only on the public, but upon the dissenting stockholder filing this bill. We are therefore of the opinion that the bill was not demurrable because brought by a stockholder, and that the court below erred in sustaining the demurrer, if it was sustained upon that ground alone.

4. It is claimed by counsel that, inasmuch as the American Glucose Company is a corporation organized under the laws of the state of New Jersey, this bill will not lie. Counsel for defendants below introduced in evidence sections from 6 to 32 of an act of the legislature of New Jersey concerning corporations, passed in 1896, after the American Glucose Company was incorporated, which was in 1883. Section 27 of the act in question provides that every corporation organized under that act may change the nature of its business, increase and decrease its capital stock, etc., in the manner provided for in that section. Section 28 of the act provides that any corporation, whether organized under a special act of incorporation or under general laws, with certain exceptions, may relinquish one or more branches of its business. It is claimed that, under said §§ 27 and 28, the American Glucose Company was authorized, under the laws of the state which gave it its charter, to do the acts which have been heretofore referred to and set forth; and that, by reason of its being a foreign corporation, this state cannot entertain a bill which seeks to inquire into the manner in which its directors manage its affairs and exercise its charter powers. The bill alleges, and the proof shows, that the American Glucose Company owned a plant, consisting of real estate and buildings thereon, to-

gether with the machinery, fixtures, etc., therein, situated in the city of Peoria, in this state, and that it operated said plant in this state, and therewith conducted the business of manufacturing glucose and grape sugar. Being a foreign corporation, thus owning property and doing business in this state, it is subject to the same regulations and restrictions which apply to corporations organized under a charter granted by the state of Illinois. Section 26 of the Illinois act in regard to corporations provides that "foreign corporations and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." Section 5 of the Illinois act in regard to corporations provides that corporations formed thereunder "may own, possess, and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation." As foreign corporations, and their officers and agents, doing business in this state, are subject to the liabilities and restrictions of domestic corporations of like character, and as domestic corporations are allowed to sell and dispose of the real and personal property used by them for the transaction of their business, when not required for the uses of the corporation, it follows that foreign corporations may sell and dispose of the real and personal estate necessary for the transaction of their business, when the same is not required for the uses of the corporation. There is no allegation in the pleadings in this case, and no testimony tending to prove, that the property of the American Glucose Company at Peoria was not required for the uses of that company. On the contrary, the proof tends to show that the property was required by the company for the business there conducted. As has already been stated, the company was in a solvent condition, and was doing a prosperous business. The disposition made of its property to a gigantic trust, with a capital stock of \$40,000,000, was such a disposition as was not authorized by the statute. The act of 1891, which has already been set forth, applies to foreign corporations; as well as to domestic corporations; and the act of 1893, above set forth, by providing in § 4 that every foreign corporation, violat-

ing any provision of that act, shall be denied the right to do business within this state, impliedly requires the obedience of all foreign corporations doing business in this state to the provisions of that act.

It is the settled doctrine of this state, established by many decisions of this court, that foreign corporations do not come into this state as a matter of legal right, but only by comity, and that said corporations are subject to the same restrictions and duties as corporations formed in this state, and have no other or greater powers. *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339; *Pennsylvania Co. for Ins. on Lives & G. A. v. Baurie*, 143 Ill. 459, 33 N. E. 166; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 173 Ill. 439, 51 N. E. 55; *Freis v. No. 4 Fidelity Bldg. & Sav. Union*, 166 Ill. 128, 57 Am. St. Rep. 123, 46 N. E. 784; *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 621, 42 L. R. A. 93, 50 N. E. 998.

In *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188, where the defendant corporation was organized to monopolize the business of manufacturing and selling all distillery products, and the various plants and properties used in that business were transferred to the defendant corporation, we said (p. 491, 156 Ill., p. 220, 47 Am. St. Rep., and p. 202, 41 N. E.): "The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the the purpose of carrying on a general distillery business." This language applies both to the American Glucose Company and to the Glucose Sugar Refining Company. Foreign corporations cannot be permitted to come into this state for the purpose of asserting rights in contravention of our laws. *Hazelton Boiler Co. v. Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339.

In *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839, it was held that comity between different states does not require a law of one state to be executed in another when it will be against the public policy of

the latter state; that no state is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws; and that a contract made in one state will not be enforced in another, when to do so would contravene the criminal laws of the latter state, or would be against the express prohibition of its laws. This same doctrine was also announced in *Rhodes v. Missouri Sav. & L. Co.* 173 Ill. 621, 42 L. R. A. 93, 50 N. E. 998.

The proof shows that nearly all the parties organizing and engineering the illegal combination known as the Glucose Sugar Refining Company were citizens of Illinois, and that four of the corporations which transferred their property to the Glucose Sugar Refining Company were operating their plants in Illinois, at Peoria, Rockford, and Chicago. Citizens of Illinois cannot evade the laws of Illinois passed against trusts and combines, and defy the public policy of the state, by going into a foreign state, and chartering a corporation to do business in this state in violation of its laws. When these foreign corporations come into this state to do business, they must conform to the laws and public policy of this state. Moreover, the property transferred to Johnson, and through him to the Glucose Sugar Refining Company, consisted largely of real estate located in Illinois, and nothing is better settled than that the validity of all transactions relating to land depends upon the laws of the state where the land is situated. *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195. If real estate in Illinois owned by domestic corporations cannot be used for the purpose of carrying out the business of an illegal trust or combination, real estate in Illinois owned by a foreign corporation cannot be used for such a purpose. We are therefore of the opinion that the fact that the American Glucose Company and the Glucose Sugar Refining Company were foreign corporations does not militate against the power of the courts in this state to grant relief under such a bill as is filed in this case.

5. One of the features of the transaction by which the property of the American Glucose Company was taken from it is the contract entered into on August 11, 1897, between that company and the Glucose Sugar Refining Company. This contract indicates clearly that the object of the whole scheme was to suppress competition in the manufacture of the products referred to, and to create a monopoly therein. By the terms of that agreement, the American Glucose Company agreed that it would not, at any time during the period of twenty-five years from that date, within a radius of 1,500

miles of Chicago, engage in the business of buying, manufacturing, or selling glucose, grape sugar, or any of the products produced by any glucose factory; and it was therein recited that the agreement so to refrain from engaging in such business for the period named was a part of the consideration paid by the Glucose Sugar Refining Company for the purchase of the property of the American Glucose Company. Contracts in total restraint of trade are void; but contracts in restraint of trade are valid, and will be enforced, where the restraint is reasonable, partial, and founded upon a good consideration. In other words, all contracts made in general restraint of trade are void. A contract to refrain from trade throughout an entire state has been held to be general and illegal, while limitation to a particular place is allowable. It has, however, been held that some callings would be treated as being under general restraint, if inhibited by contract throughout the state, while others would not. 3 Am. & Eng. Enc. Law, p. 882; 9 Am. & Eng. Enc. Law, pp. 884-888. Where a contract in restraint of trade is general not to pursue one's trade at all, or not to pursue it in the entire realm or country, the contract is clearly against public policy, and as such is void. Beach, Trusts, p. 114, § 37. In *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735, we said: "Undoubtedly, contracts in total restraint of trade are void. . . . A contract in restraint is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state."

The evidence shows that the manufacture of glucose and grape sugar and their products is confined to a certain "corn belt," where corn is raised, and that this district is embraced within the territory specified in the contract of August 11, 1897; that is to say, within a radius of 1,500 miles of Chicago. As the evidence in this record tends to show that glucose can only be manufactured successfully within this radius, the agreement not to manufacture and sell it therein amounted, in effect, to an agreement in total or general restraint of trade. Hence the agreement was void, and stamps the transaction of which it was a part as illegal.

6. The question arises, What is the proper judgment to be rendered by this court in this case? As has already been stated, the Glucose Sugar Refining Company filed a demurrer to a part of the bill and an answer to a part. The demurrer was directed against such parts of the bill as alleged the sale of the property of the American Glucose Company to be a part of one general transaction, which involved the sales of the properties of five other corporations. The

answer purports to be directed to those parts of the bill which specify other features of the transfer of the property of the American Glucose Company outside of the connection of such transfer with the other transfers in question. The main relief sought by the bill is the setting aside of the transfer of the property of the American Glucose Company. It matters not that such transfer is sought to be set aside on several grounds. The relief is the same, whatever ground may be relied upon. The answer sets up the fact that the American Glucose Company is a corporation organized under the laws of New Jersey, for the purpose of engaging in the business of manufacturing glucose, etc., and other products of corn, in Illinois. It then proceeds to set up the execution of the deeds of the American Glucose Company to Johnson, and of Johnson to the Glucose Sugar Refining Company, and it then alleges that the latter company paid cash for the premises at the date of the delivery of said deeds. The bill had alleged that the method of the pool or combination was to swallow up or merge therein the plants engaged in such business in the United States by issuing to the several corporations, theretofore operating that business, stock in the said pool or combine or in said trust or corporation; and that, where this method failed, its method was to buy such other organizations and plants for cash. The buying of some of the plants for cash, when it was necessary, was a part of the method of carrying out the pool or combination. The demurrer, being directed to such parts of the bill as had reference to the formation of the pool or combination, was necessarily directed to those parts which alleged the payment of cash as a method of carrying it out, as well as to those parts which alleged the taking of stock in the new corporation as the method of securing the properties to be purchased. Hence the answer was directed to the same part of the bill to which the demurrer was directed. Again, the answer sets up facts showing that the American Glucose Company relinquished its manufacturing business at Peoria, and transferred its property, through the deeds to Johnson, to a new corporation, organized in New Jersey to do the same business in Illinois which the American Glucose Company had theretofore done in Illinois. In other words, the answer sets up facts showing that the American Glucose Company discontinued the business for which it was created, and surrendered to another corporation its property and the conduct of such business, without alleging in any way that the American Glucose Company was insolvent, or that it was necessary for it so to transfer its business and property. The effect of such transfer was

to lessen the number of corporations engaged in the business of manufacturing glucose, because the answer treats the Glucose Sugar Refining Company as an already existing corporation, engaged in the business when the transfer to it was made. If this was so, the American Glucose Company, without cause, suppressed competition in the business to the extent stated. This part of the answer, therefore, was directed to the allegations in regard to the formation of a trust set forth in the bill, and was therefore directed to the same part of the bill which was demurred to. Again, the bill was charged by the Glucose Sugar Refining Company to be demurrable upon the ground that it was filed by a stockholder; and the reason why it is urged that a stockholder cannot file a bill is that a stockholder cannot enjoin the sale of the property of a corporation upon the ground that the purchaser intends to violate the criminal law of the state. The answer, however, proceeds to reply to the bill as though it was properly in court, and the stockholder had a right to file it. In other words, the answer concedes what the demurrer denies. The defendant may not answer and demur also to the same part of the bill. If he demur to a part, and answer to the same part, both cannot stand. The demurrer, in such case, is overruled by the answer. *Barbey's Appeal*, 119 Pa. 413, 13 Atl. 451; 6 Enc. Pl. & Pr. p. 414. We are inclined to the opinion that the answer of the Glucose Sugar Refining Company overrules its demurrer in one or more of the respects above referred to.

But, whether this is so or not, the Glucose Sugar Refining Company was a purchaser of the property *pendente lite*. Counsel for the Glucose Sugar Refining Company claim that there was a sale of this property to it. It is doubtful, under the evidence, whether there was any sale at all. The deed by the American Glucose Company was made to Johnson; but he swears that it was never delivered to him, and that he never purchased the property. The deed by the American Glucose Company was not made to the Glucose Sugar Refining Company, but was made to Johnson, and the deed is alleged to have been made by him to the Glucose Sugar Refining Company. Johnson received no purchase money, and when he signed the deed was not aware of the character of the instrument he was signing. The deed made to him, and the deed made by him, were made after this bill was filed, and after summons was served upon the American Glucose Company. *Lis pendens* begins from the service of the summons or subpoena after the filing of the bill. *Grant v. Bennett*, 93 Ill. 513. "A purchaser from the defendant while the suit is pending acquires his interest sub-

ject to such decree as may be rendered on the hearing." *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233, 38 N. E. 762. In *Norris v. Ile*, *supra*, we said (p. 205, 152 Ill., p. 244, 43 Am. St. Rep., and p. 766, 38 N. E.): "Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives title, but 'the litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit.' He is not a necessary party because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase, and proceed to final decree against the original parties." Here the American Glucose Company, and the officers and directors thereof, and the majority of stockholders, withdrew their answers, and submitted to a default, and a decree confessing all the allegations of the bill was entered against them. That decree is binding upon the Glucose Sugar Refining Company as a purchaser *pendente lite*. As a decree *pro confesso* was entered against the American Glucose Company, finding such allegations of the bill to be true as justify the setting aside of the sale of its property, the Glucose Sugar Refining Company, which claims to derive title from the American Glucose Company, is bound by this decree against the latter company. The decree *pro confesso* is sustained by the testimony in the record. Wilson, counsel for the Glucose Sugar Refining Company, was present at the taking of all the testimony on the part of the complainants below, and cross-examined the witnesses. The interests of the American Glucose Company, and its officers and directors, were one with those of the Glucose Sugar Refining Company. According to the showing made by this record, as soon as the answers of the former were withdrawn, their counsel at once entered their appearance as solicitors of the latter.

It is true that counsel for the Glucose Sugar Refining Company refused to allow witnesses to testify upon many material and important matters. Many of these witnesses say that they declined to answer simply because Wilson objected to the questions. Two of the counsel in this case refused to answer questions when they were upon the stand as witnesses. As we understand the record, the refusal to answer was not placed upon the ground that the witnesses would thereby criminate themselves, as showing their violation of the laws of the state against trusts and combines. Their privilege in this regard was not claimed. Nor did the main counsel, when testifying, base the refusal to answer upon the ground that to do so

would be to divulge privileged communications. These witnesses were forbidden to answer merely upon the alleged ground that the questions addressed to them called for immaterial testimony. This is no reason why a witness should refuse to answer, where in the question no self-crimination or privileged communication is involved. Therefore the constant objections and refusals to answer, which appear all through this record, amount to an actual obstruction of the administration of justice. The fact of such refusal is to be considered against the defendants the same as any other refusal to produce evidence which was within the power of the witness. Such refusal to answer is competent evidence against the witness. *Andreus v. Frye*, 104 Mass. 234; 29 Am. & Eng. Enc. Law, p. 846. But, notwithstanding the difficulties thrown in the way of eliciting evidence by these objections and refusals to answer, the record contains sufficient testimony to set aside the transfer made of the property of the American Glucose Company, as the same is above detailed.

Many points are made by counsel for Joseph Firmenich and George Firmenich in their arguments in support of their demurrer to the bill. But in view of the disposition of the case, so far as the Firmenichs are concerned, which is hereinafter made, it is unnecessary to notice these points. Allegations of the bill which concern the Firmenichs are few and meager. Counsel for plaintiffs in error consents in his brief that the bill may be dismissed as to the Firmenichs. So far as the Illinois Trust & Savings Bank is concerned, it claims to have no interest in the transaction, except as a repository and holder in escrow of the papers of all the parties concerned. Therefore we are inclined to think that whatever error the circuit court committed in sustaining the demurrers of the Firmenichs and of the bank is not sufficient to justify a reversal and remandment of the cause for the purpose of allowing them to answer the bill.

The decree of the court below dismissing the bill is reversed, and the cause is remanded to the Circuit Court of Peoria County, with instructions to dismiss the bill as to Joseph Firmenich and George Firmenich and the Illinois Trust & Savings Bank, and to enter a decree setting aside the deed of the American Glucose Company to Edwin L. Johnson, and the deed executed by Edwin L. Johnson to the Glucose Sugar Refining Company, and all the contracts, assignments, and other instruments accompanying the delivery of those deeds, so far as the American Glucose Company and its directors and officers and stockholders are concerned, and to grant such other and further relief as is consistent with the prayer of the

bill and as is sustained by the evidence already in the record.

Rehearing denied December 19, 1899.

Writ of error dismissed by Supreme Court of United States October 14, 1902.

PEOPLE of the State of Illinois, *Appt.*,
v.

R. Hall McCORMICK *et al.*

(208 Ill. 437.)

1. The succession tax cannot be assessed at the death of the testator upon the corpus of the estate when property is devised in trust which shall continue for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and, if they are not alive, among persons whom they shall appoint and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or expectation, to any property or income thereof," where the tax rate differs according to the relationship to the testator of the person who ultimately becomes entitled to the property.
2. A present succession tax cannot be assessed upon a remainder when it cannot be determined who will ultimately be entitled to it.
3. A present succession tax cannot be imposed upon each annuitant to the full extent of his proportionate share of the entire fund from which the annuity is to be paid, although by joint action of all annuitants the entire income may be divided between them, where the will limits the amount to be paid to each in the absence of such joint action, and no increase can be made without the consent of all.

(February 17, 1904.)

APPPEAL by the State from a judgment of the Cook County Court fixing the tax on the succession to the estate of Leander J. McCormick, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. E. M. Ashcraft, with **Mr. H. J. Hamlin**, Attorney General, for appellant:

Under the will of Leander J. McCormick each legatee became beneficially entitled, in

possession or expectation, to an estate or interest that could be valued and presently taxed.

Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Ayers v. Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318; *Tiedeman, Real Prop.* §§ 397, 532; 2 Washb. Real Prop. ** 228, 229; Jarman, Wills, 5th Am. ed. pp. 417, 424; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Grimmer v. Friederich*, 164 Ill. 245, 45 N. E. 498; *Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94; *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543; *Hinrichsen v. Hinrichsen*, 172 Ill. 462, 50 N. E. 135; *Re Cogswell*, 4 Dem. 248; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401; *Re Sherman*, 30 Misc. 547, 63 N. Y. Supp. 957; *Re Davis*, 149 N. Y. 530, 44 N. E. 185; *Re Gibson*, 157 N. Y. 680, 51 N. E. 1090; *Billings v. People*, 189 Ill. 472, 59 L. R. A. 807, 59 N. E. 798.

On petition for rehearing.

The fifth and sixth clauses of testator's will attempt to vest the title of his property in the trustee therein named for a period of twenty years, and the first clause of the sixth section provides: "Upon the termination of such trust by lapse of time, as aforesaid, I give, devise, and bequeath all the rest, residue, and remainder of my estate, with the accumulation thereof, so held in trust, to my three children, R. Hall McCormick, Leander Hamilton McCormick, and Nettie L. Goodhart, share and share alike." A fair construction of this will would be to hold that the trustee took a chattel interest, and that the beneficiaries named took the remainder in fee, and that the other clauses of the will, attempting to provide for contingencies which may never arise, are void as being repugnant to the clause vesting the fee in the beneficiaries named.

Burton v. Gagnon, 180 Ill. 345, 54 N. E. 279; *Wilson v. Turner*, 164 Ill. 398, 45 N. E. 820; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Jones v. Port Huron Engine & Threshing Co.* 171 Ill. 502, 49 N. E. 700; *Bowen v. John*, 201 Ill. 296, 66 N. E. 357; *Dalrymple v. Leach*, 192 Ill. 51, 61 N. E. 443.

The statute provides for assessing an inheritance tax on all property in this state which shall pass by will, by which any person "shall become beneficially entitled in possession or expectation," and § 2 of the act provides that, when any person shall become "beneficially" interested, he may give bond, and not pay the tax until he comes into the actual possession or enjoyment of

NOTE.—As to taxation of future contingent interests under inheritance tax laws, see also, in this series, *Re Romaine*, 12 L. R. A. 401, and note; *Re Stewart*, 14 L. R. A. 836; *Howe v. Howe*, 55 L. R. A. 626; *Billings v. People*, 59 L. R. A. 807.

As to taxation of vested remainder, see *Re Pell*, 37 L. R. A. 530.

As to inheritance tax on residuary estate generally, see *Re Swift*, 18 L. R. A. 709, 64 L. R. A.

the property. As the beneficiaries are permitted to take by reason of the statute authorizing the making of a will, the state is in position to prescribe the terms.

Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

An estate "in expectancy" is presently taxable under this statute.

Messrs. Pence & Carpenter, for appellees:

It is the right to inherit, and the amount of property inherited, which are to be taxed under the statute, and not the amount of the estate of the testator.

Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Billings v. People*, 189 Ill. 486, 59 L. R. A. 807, 59 N. E. 798; *Re Hoffman*, 143 N. Y. 330, 38 N. E. 311; *Re Curtis*, 142 N. Y. 219, 36 N. E. 887; *Dos Passos*, Inheritance Tax Law, 1270.

The residuary estate under the McCormick will cannot be taxed for the reason that it is not vested, but contingent.

Hove v. Hodge, 152 Ill. 266, 38 N. E. 1083; *McCartney v. Osburn*, 118 Ill. 420, 9 N. E. 210; *Nicoll v. Scott*, 99 Ill. 540; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. ed. 869.

The person who makes an appointment by will, under a power conferred upon him by a preceding will, does not himself confer the estate, but it is treated as the estate of the original testator; and the rule regarding taxation will be regulated by the original will, by which the power was conferred. The estate of the appointee is necessarily contingent.

Dos Passos, Inheritance Tax Law, 250; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *Doe ex dem. Wigan v. Jones*, 10 Barn. & C. 459, 8 L. J. K. B. 214; *Gray*, Perpetuities, §§ 473, 515, 523; 4 Kent, Com. ** 337, 338.

In administering the inheritance tax law, it is necessary to postpone the assessing and collecting of the tax upon such remote or contingent interests as are incapable of present valuation, or upon which the proper exemptions cannot be determined, owing to uncertainty as to the parties in whom the estate in remainder may vest.

Billings v. People, 189 Ill. 472, 59 L. R. A. 807, 59 N. E. 798; *Re Hoffman*, 143 N. Y. 330, 38 N. E. 311; *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Curtis*, 142 N. Y. 219, 36 N. E. 887; *Re Phipp*, 143 N. Y. 641, 37 N. E. 823. 64 L. R. A.

Even where an estate is presently vested, but subject to a condition of defeasance which may cast the beneficial interest upon another, the inheritance tax cannot be ascertained and collected at the present time.

Re Docs, 167 N. Y. 233, 52 L. R. A. 433, 60 N. E. 439; *Abbott v. Abbott*, 189 Ill. 489, 82 Am. St. Rep. 470, 59 N. E. 958; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Curtis*, 142 N. Y. 219, 36 N. E. 887; *Re Howell*, 34 Misc. 432, 60 N. Y. Supp. 1016; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401; *Re Sloane*, 154 N. Y. 109, 47 N. E. 978.

Scott, J., delivered the opinion of the court:

This was a proceeding in the county court of Cook county to fix the inheritance tax in the matter of the estate of Leander J. McCormick who died testate on February 20, 1900, leaving an estate, the market value of which was fixed in this proceeding in the county court, after making all proper deductions on account of indebtedness and expenses of administration, at \$3,548,680.67. Leander J. McCormick left no widow, and his only heirs at law are his three children, Nettie L. Goodhart, R. Hall McCormick, and Leander H. McCormick. The will is quite lengthy, and provides for many contingencies that may arise in the twenty years next succeeding the death of the testator. A proper understanding of the questions involved requires that the substance of several of its paragraphs be stated at some length.

The third clause of the will gives to the daughter the sum of \$75,000 to procure for herself a home, the title to be vested in her for life, and after her death in her issue then living, *per stirpes*. If she should not desire to own a residence, then the testator's trustee is directed to invest the fund and pay the income to her until she should desire a home, or until the expiration of twenty years after his decease. In case the home should not be purchased within the twenty years, then this fund is to become the property of the daughter provided she survive the twenty years, and, if the home is not procured and the daughter does not survive the twenty years, then the income for the remainder of the twenty years is to be paid to her surviving issue for the balance of the twenty years, when the principal of the fund is to be distributed to her surviving issue *per stirpes*. In case she dies without issue prior to the lapse of twenty years after the death of the testator, or leaving issue who die prior to the lapse of the said last-mentioned period of twenty years, then the proceeds arising from the sale of the residence, if one shall have been procured, or the principal of the fund if a residence shall

not have been procured, is to be distributed, one fourth as the daughter may by her last will appoint, and the remaining three fourths to fall into the residue of McCormick's estate; and, if the daughter does not appoint any person to take the one fourth then it also falls into the residue of his estate.

The fifth clause devised to the son R. Hall McCormick, as trustee, and to his successors in trust, the residue of the estate of the testator, the same to be invested, managed, and controlled for a term of twenty years after the testator's death, and directs that from the net income of the estate an annuity of \$20,000 shall be paid throughout said period of twenty years to each of the three children, with a provision that if all the children shall agree, in writing, thereto, a larger sum than \$20,000 per annum shall be paid to each of them from the net income of his estate, provided such larger sum can be advanced without prejudice to the general interest of the estate. In case of the death of either of the children prior to the expiration of twenty years, then three fourths of the annuity shall be paid to the issue of such child in such manner as such child shall by will appoint, and the other one fourth of the annuity shall be paid to any person whom such child by last will may appoint, and, failing such appointment as to either portion, respectively, the same to pass to the issue of the deceased child *per stirpes*, any increase in the amount of the annuity made in the manner aforesaid to take the same course, in the event of the decease of either child, as is provided for the annuity of \$20,000 fixed by the will.

By the sixth clause it is provided: "It is my intention that up to the date of the full expiration of the twenty years after my decease . . . that none of the beneficiaries hereinafter mentioned are to take any interest in any of said property [referring to the residue of the estate] except the annuity and bequests hereinbefore mentioned prior to the expiration of said twenty years." It is then provided that the trust shall terminate at the end of the twenty-year period and upon such termination the residue of the estate, with accumulations, is devised, share and share alike, to the three children. In case R. Hall McCormick is deceased at the termination of the twenty-year period, with issue who survive that period, his portion of the residue is to be distributed among such persons as he may by his last will appoint, and, if no such appointment is made, then it is to be distributed equally among his children then surviving and the issue of any deceased child, such issue taking the share that the parent would take if living. In case Leander H. McCormick shall die prior to the expiration of the 64 L. R. A.

twenty-year period, his portion of the residue, except the sum of \$100,000, shall be paid to and vested in his children then surviving and the issue of any deceased child of his as he may by his last will appoint; and the said sum of \$100,000 shall be paid to and vested in any person appointed by the last will of said Leander H. McCormick; and failing any such appointment as to either portion, respectively, of such share of Leander H. McCormick, that portion shall be paid to and vested in the child or children of Leander H. McCormick then surviving, share and share alike, and to the issue of any deceased child such issue taking the share that the parent would if living. The same disposition is made of the portion of the residue devised to Nettie L. Goodhart, in case she dies prior to the expiration of the twenty-year period, as is made of the portion devised to Leander H. McCormick in the event of his death prior to the expiration of that period.

The seventh clause provides for the contingency of each of the children dying prior to the expiration of the twenty-year period without issue, or leaving issue none of whom survive the twenty-year period. If R. Hall McCormick shall die under such circumstances, he is given a power of appointment by his will, whereby he may designate the person or persons who shall become entitled to and in whom shall vest in fee one fourth of his portion of the residue, the remaining three fourths of his portion of the residue to pass to the surviving children of the testator, and the issue of such as are deceased. If he does not exercise the power of appointment as to the one fourth, then that is to pass with the three fourths. The same provision is made in reference to Leander H. McCormick and Nettie L. Goodhart, except that each has the power of appointment as to \$100,000, only, of his or her portion of the residue.

The county court treated the interest of Nettie L. Goodhart in the \$75,000 fund as a life estate, ascertained the present worth of such life estate, and fixed the tax upon such present worth, and ascertained also the present worth of the interest of each of the three children in the annuity of \$20,000 per annum, and fixed the tax on the sum so ascertained. That portion of the estate which is to pass into the possession of the three children of the testator at the expiration of the twenty-year period was appraised at \$2,903,506.67. The court below did not fix any tax against this remainder, for the reason, as stated in the order of the court, that the amount of the tax thereon is not now ascertainable, because it is impossible to determine who may be the beneficiaries of this portion of the estate, and what

if any, relation they may bear to the testator, or the amounts which they will take, respectively, at the termination of the trust provided for in the will; and the order recites that the determination of the amount of the tax on that portion of the estate is deferred until such time as the uncertainties are removed. It was shown by stipulation that the net annual income from the portion of the estate devised to the trustee is at least \$100,000.

An appeal has been prosecuted to this court by the people of the state of Illinois, and upon the errors assigned it is contended: First, that a tax should have been fixed upon that portion of the estate which is to be distributed at the end of the twenty-year period, on the theory that each of the three children took such an interest therein as was presently ascertainable and taxable under the statute; second, that a tax should have been fixed on the full amount of the \$75,000 fund bequeathed for the use of Nettie L. Goodhart, instead of upon the present value of a life estate for her therein; third, that a tax should have been assessed upon the present value of the full amount of the net income of the estate of Leander J. McCormick for the period of twenty years from his death, on the basis that one third thereof passed to each of his children.

It will be seen by an inspection of § 366 of chapter 120, Hurd's Rev. Stat. 1901, that the tax is to be imposed where the beneficial interest in property has passed to the person taxed, and such tax may be imposed against any person who "shall become beneficially entitled in possession or expectation to any property or income thereof." It has been said that the terms "beneficially entitled" and "beneficially interested," as used in statutes providing for a tax of this character, when considered with regard to the time when the beneficiary becomes so entitled or interested, are construed to refer to the time when the beneficiary has the title to the property or is entitled to the possession thereof, or when a contingent interest vests, or when a defeasible interest becomes indefeasible (2 Woerner, Am. Law of Administration, 2d ed. p. 601a); while a "beneficial interest," when considered as a designation of the character of an estate, is such an interest as a devisee takes solely for his own use or benefit, and not as the mere holder of the title for the use of another (*Re Seaman*, 147 N. Y. 69, 41 N. E. 401).

It will be observed from this section of the statute that where the property passes to certain persons related to the testator by consanguinity or affinity an exemption is permitted; that the exemption is greater and the rate of taxation lower in case of those most nearly akin while the exemption

is less and the rate higher in case of those farther removed; that in case of the stranger who is a beneficiary the rate of taxation is graduated according to the amount of property received, up to the sum of \$50,000; in all cases where the succession exceeds that amount and passes to a stranger, the rate is the same. It is therefore obvious that the amount of tax cannot be fixed until it is certainly known who the beneficiaries are, and what portion of the property each will take.

It is contended on the part of appellant that each of the three children of the testator takes a vested interest in the property that is to pass from the trustee at the termination of the twenty-year period, while the view of counsel for appellees is that the interests devised in that property, which are to vest in possession at the end of that period, are contingent remainders. We will not indulge in any nice distinctions for the purpose of determining whether or not the interest in this residuary estate, into the possession of which each of the children of the testator is to enter at the end of the twenty-year period, is, in the technical meaning of the term, a "vested estate." If it can be said to be vested, it is subject to a condition of defeasance, because, if either of the children of the testator dies prior to the expiration of the period, his or her title to this property will thereby be defeated. Nothing is left but a power of appointment, which may or may not be exercised, and it is therefore wholly uncertain at this time who will, when the twenty years shall have elapsed, possess the beneficial interest in this property, or in what proportion this property will be divided among the persons who succeed to the beneficial ownership thereof.

The condition contemplated by our statute as that which should authorize the imposition of the tax is one of practical and actual ownership,—the possession of a title to something that can be conveyed. If either of the children of the testator, in this case, should convey, by deed, his or her interest in the remainder, and die before the expiration of the twenty years, the purchaser would take nothing; and, under such circumstances, to impose a tax upon either of the children of the testator on account of the right to succeed to the interest in the residuary estate would be to tax the shadow, and not the substance. It would result in taxing appellees upon their right to succeed to property, when, so far as any beneficial ownership is concerned, there never was a right of succession. The right to succeed, under such circumstances, is, for all practical purposes, a myth. Taxation to the taxpayer is intensely real. It should not be levied upon that which is unreal. If the es-

tates now under consideration are contingent, they cannot be taxed until they are vested. If they are now vested, they are subject to an estate for years and subject to defeasance, and cannot be taxed until they become indefeasible. If they be executory devises, they cannot be taxed until the persons who will some time be beneficially entitled thereto are ascertained. Who can tell now whether R. Hall McCormick will die prior to the expiration of the twenty years? If so, will his issue survive that period? If he does not survive that period, will he or will he not exercise the power of appointment? It is impossible now to tell who will succeed to this portion of the residue of this estate. The situation is equally uncertain so far as each of the other children of the testator is concerned.

The right to tax is based upon the right to succeed. The amount of the tax is fixed by the amount of the property which, as a result of the right to succeed, passes to the beneficiary. The tax is levied on the succession, and not on the property as such. The rate must be determined by the amount of the succession where the beneficiary is a stranger, and the exemption, if any, must be determined by the identity of the person who succeeds. When the basis of the tax, the rate, and the exemption, if any, cannot be fixed, the tax itself cannot be fixed. No other course is left open, in the practical administration of the statute, than to postpone the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation, and as to which the rate and the exemptions cannot be determined. *Billings v. People*, 189 Ill. 472, 59 L. R. A. 807, 59 N. E. 798; *Re Hoffman*, 143 N. Y. 327, 38 N. E. 311; *Re Roosevelt*, 143 N. Y. 120, 25 L. R. A. 695, 38 N. E. 281; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Curtis*, 142 N. Y. 219, 36 N. E. 887; *Re Seaman*, 147 N. Y. 69, 41 N. E. 401; *Re Dow*, 167 N. Y. 233, 52 L. R. A. 433, 88 Am. St. Rep. 509, 60 N. E. 439; *Re Sloane*, 154 N. Y. 109, 47 N. E. 978. As is suggested by Mr. Justice Finch in the *Hoffman Case*, 143 N. Y. 327, 38 N. E. 311, "the state will get its tax when the legatees get their property."

An ordinary vested remainder, not subject to any condition or contingency, as where the property is given to A for life with remainder to B, is, under the statute, immediately taxable as the property of B upon the death of the testator, because there the estate is immediately vested in interest in the remainderman, his heirs and assigns. Nothing can defeat it. B's right is absolute; his deed will transfer the property; an execution against him and sale thereunder will convey it; his death cannot affect

it; he is beneficially entitled to it "in expectation." This term "expectation," as used in our statute, has reference only to possession. The language is, "by reason whereof any person . . . shall become beneficially entitled, in possession or expectation, to any property or income thereof." The term "expectation" is used, not to denote an expectation of becoming vested both with the title and the possession where neither is now vested but to denote a condition where the title is vested and the possession is deferred. The term "in expectation" is used in contradistinction to "in possession." Both contemplate a title vested and indefeasible, but in one instance the right of enjoyment is immediate, "in possession;" in the other it is postponed, "in expectation." As used in this statute, these words last quoted refer to the future possession of an estate now vested, and which is subject to the immediate enjoyment of another. It is true that in the case of *Ayers v. Chicago Title & T. Co.* 187 Ill. 42, 58 N. E. 318, this court said that, whether or not the remainders under consideration there were vested or contingent was not material, for the reason that they were "expectancies," within the meaning of the statute, and presently taxable as such. That language was unnecessary to the decision of that case so far as it referred to contingent remainders, because, as appears from a discussion of the subject found on page 60, 187 Ill., page 325, 58 N. E., the remainders in that case were vested remainders.

A brief consideration of a very common contingent remainder will show the fallacy of the doctrine that such a remainder is taxable immediately upon the death of the testator. Suppose A devises \$100,000 to his son B for life, with the remainder to his son C in case C survives B; if not, then to a stranger; and that the appraised value of the remainder exceeds \$50,000. If the remainder goes to the son, \$20,000 of it is exempt, and the rate of tax is \$1 on every \$100, while if the remainder passes to the stranger there is no exemption and the rate is \$6 on the \$100. It is apparent that in such an instance the tax should not be fixed until the remainder vests.

As we have heretofore said, however, the right to impose the tax presently depends, not upon the character of the estate devised, with reference to its being a contingent or vested remainder, but upon the question whether the person who is now, or will ultimately be, entitled to a beneficial interest in the remainder, can be now identified, and whether the proportion thereof to which he will succeed can be now determined. What we have said in reference to the residuary estate disposes of the question presented in

regard to the \$75,000 fund. It cannot now be known who will be entitled to succeed to this fund, under the will, at the end of the twenty-year period. The interest which the daughter takes therein will be defeated by her death, should it occur before the lapse of that time. It would not have been proper to have treated her as the absolute owner of this fund in fixing the tax.

So far as the tax on the income is concerned, it is apparent that the income of each of the children can be increased, provided all consent, in writing, to the increase, and such increase will not embarrass the administration of the fund, and the position of appellant is that, as the children have the power to increase this fund until the aggregate amount of the annuity will equal the net income from the estate, subject to the condition just suggested, each must be held to be the owner of one third of such net income. No authority is cited on this proposition. It has seemed to us, on reflection, that the theory of the counsel for the people is wrong in this respect, for the reason that the three devisees under consideration are not taxed jointly. If either one of them had the power to have his or her annuity increased to one third of the net income of the estate, then we think each should be taxed upon the basis that he or she is the owner of one third of the net income; but, before either is entitled to any portion of the income above the sum of \$20,-

000 per annum, the written consent of the other two must be obtained, and one or both of the others may never consent, in which event each of the children would be taxed upon an increase which they do not receive. If such written document should at any time be executed, the sum added to the income of each would become taxable, and, as suggested by the written opinion of the learned jurist who determined this matter in the county court, it would be entirely proper at any time, upon the motion of those representing the people of the state of Illinois, to cite the trustee and the children to appear in that court for the purpose of ascertaining whether such an instrument has been executed and the income of each increased accordingly.

At the expiration of the twenty-year period it will be certainly known who is beneficially entitled to the residuary estate and the remainder in the \$75,000 fund. All doubts now existing will then be resolved. The exemptions and the rate can then be fixed without uncertainty. Then the legatee will get his property and "the state will get its tax." The imposition of the tax is properly deferred until that time.

The order of the County Court will be affirmed.

Petition for rehearing denied April 12, 1904.

INDIANA SUPREME COURT.

BOARD OF COMMISSIONERS OF CLINTON COUNTY, *Appt.*,

v.

Robert DAVIS.

(.....Ind.....)

1. One seeking to recover a reward offered by a public statute need not allege that he rendered his services with the knowledge that the reward was offered, or with intention to earn the same.
2. The vote buyer cannot claim the reward offered by a statute providing that a person who furnishes information resulting in the conviction of a person for selling his vote shall be entitled to a reward.
3. That a paragraph of an answer alleging facts sufficient to constitute a defense to the action purports to be only a partial answer does not render it insufficient as to such part.

(January 27, 1904.)

NOTE.—For the principle involved in the case above, that no person shall take advantage of his own wrong, see, in this series, *Riggs v. Palmer*, 5 L. R. A. 340, and other 64 L. R. A.

A PPEAL by defendant from a judgment of the Superior Court for Tippecanoe County in favor of plaintiff in an action brought to recover a reward. *Reversed.*

The facts are stated in the opinion.

Messrs. J. Frank Hanly, Will R. Wood, and Benjamin Crane, with Mr. Harry C. Sheridan, for appellant:

This action is based upon contract.

Everman v. Hyman, 26 Ind. App. 165, 84 Am. St. Rep. 284, 28 N. E. 1022; *Vitty v. Eley*, 51 App. Div. 44, 64 N. Y. Supp. 398; 18 Enc. Pl. & Pr. p. 1155; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65.

In construing a statute it is proper to look to other statutes, to the rule of the common law, to sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to

cases illustrating the general principle in the note to that case on page 344. See also cases cited in brief in 48 L. R. A. 295

the condition of affairs existing when the statute was adopted.

Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788.

If the natural import of the words of a statute are repugnant to the acknowledged principles of justice and sound public policy, they ought to be enlarged or restrained so as to comport with these principles.

Dixon v. Western U. Teleg. Co. 68 Fed. 630; *Opinion of the Justices*, 7 Mass. 523; *Hittinger v. Westford*, 135 Mass. 258.

It is not to be presumed that the legislature, in passing the act offering the reward, intended to enable one who induced the voter to sell his vote, and thus to commit the offense, to profit by his iniquity.

Riggs v. Palmer, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 599, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L. R. A. 206, 37 N. E. 158.

In construing a statute it is proper to look to its effects.

Donnell v. State, 2 Ind. 658; 1 Bl. Com. p. 91.

A public officer, acting within the lines of his official duty, is not entitled to a reward offered to anyone who shall pursue and apprehend a horse thief, as statutory rewards are not intended for those who are merely acting within the lines of their official duty.

Com. v. Edwards, 6 Lack. Legal News, 44, 14 York Legal Record, 22; *Com. v. Riker*, 6 Lack. Legal News, 46, 14 York Legal Record, 24; *Miller v. Hogeboom*, 56 Neb. 434, 76 N. W. 888; *Means v. Hendershott*, 24 Iowa, 78; *Warner v. Grace*, 14 Minn. 487, Gil. 384; *Pool v. Boston*, 5 Cush. 219; *Davies v. Burns*, 5 Allen, 349; *Lees v. Colgan*, 120 Cal. 262, 40 L. R. A. 355, 52 Pac. 502; *Hogan v. Stophlet*, 179 Ill. 150, 44 L. R. A. 309, 53 N. E. 604; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

A director of a bank cannot claim a reward offered by the bank for the discovery of a robber of the bank and the recovery of the money stolen.

Stacy v. State Bank, 5 Ill. 91.

A party who is connected with an alleged theft, either as a participator in the felonious taking, or in the concealing of the stolen goods, cannot recover a reward offered for the return of the stolen property.

Jenkins v. Kelren, 12 Gray, 332, 74 Am. Dec. 596; *Hasson v. Doe*, 38 Me. 45; *Vitty v. Eley*, 51 App. Div. 44, 64 N. Y. Supp. 397.

Neither the beneficiary in a benefit certificate of insurance, nor the person in whose favor the life of another is insured, who murders the person whose life is insured, can recover the amount of the benefit or policy.

64 L. R. A.

Mutual L. Ins. Co. v. Armstrong, 117 U. S. 599, 29 L. ed. 1000, 6 Sup. Ct. Rep. 877; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, 34 Cent. L. J. 109; *Schreiner v. High Court, C. O. of F.* 35 Ill. App. 576; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Names v. Dwelling House Ins. Co.* 95 Iowa, 642, 64 N. W. 628; *Ritter v. Mutual L. Ins. Co.* 169 U. S. 154, 42 L. ed. 698, 18 Sup. Ct. Rep. 300; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *Schmidt v. Northern Life Asso.* 112 Iowa, 41, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800.

That construction of a statute which will result in violating the well-known and long-recognized maxims of the common law will not be given, unless the statute, by its terms, indicates a clear intention to do away with such principles.

Dixon v. Western U. Teleg. Co. 68 Fed. 633; *Riggs v. Palmer*, 115 N. Y. 510, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188.

Bribery at an election was a crime at common law, and, in the absence of a statute to that effect, a person who has obtained his election by bribery will be denied the right to hold the office upon a contest.

Rea v. Pitt, 3 Burr. 1335; 1 Russell, Crimes, 1551; Cushing, Law & Practice of Legislative Assemblies, 189.

If the service was not performed with a view to claiming the reward, then the appellee is not entitled to recover; and it was error for the court to refuse to permit the appellee to answer a question on cross-examination asking him if he performed the service with the intention of claiming the reward.

Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654.

Mr. D. S. Holman also for appellant.

Messrs. Stuart, Hammond, & Simms and *Finley P. Mount*, with *Messrs. Palmer & Palmer*, for appellee:

Appellee gave the first information to the prosecuting attorney, and set the machinery of the law in motion. This resulted in the conviction of the nine men for whose conviction the rewards are now claimed. Hence, appellee is entitled to the nine rewards.

Acts 1899, p. 381, §§ 1, 2; Horner's Anno. Stat. 1901, § 4734h; Burns's Rev. Stat. 1901, § 2330; *Besse v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747; *United States v. 100 Barrels Distilled Spirits*, 1 Low. Dec. 248, Fed. Cas. No. 15,946; *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185; 16 Am. & Eng. Enc. Law, 2d ed. p. 325, and note; 21 Am. & Eng. Enc. Law, pp. 396, 399, and notes.

A person performing the service for which a reward was offered is entitled to the reward, although he did not know at the time of the performance that it had been offered, and, of course, was not actuated by it.

Daukins v. Sappington, 26 Ind. 199; *Monroe County v. Wood*, 39 Ind. 345; *Harson v. Pike*, 16 Ind. 140; *Hayden v. Souger*, 26 Am. Rep. 14, note, 56 Ind. 42; *Everman v. Hyman*, 28 Ind. App. 165, 84 Am. St. Rep. 284, 28 N. E. 1022; *The Auditor v. Ballard*, 9 Bush, 572, 15 Am. Rep. 728; *Russell v. Stewart*, 44 Vt. 170; *Eagle v. Smith*, 4 Houst. (Del.) 293.

If a promise is made to anyone who will do a certain thing the person doing it is entitled to the benefit of the promise.

Everman v. Hyman, 3 Ind. App. 459, 29 N. E. 1140; *Harson v. Pike*, 16 Ind. 140; *Bull v. Taloot*, 2 Root, 119, 1 Am. Dec. 62.

If knowledge of the offer was necessary, then the law of the state of Indiana made the offer, and every citizen is conclusively presumed to know the law.

Platt v. Scott, 6 Blackf. 389, 39 Am. Dec. 436; *State v. Portsmouth Sav. Bank*, 106 Ind. 436, 7 N. E. 379; 22 Am. & Eng. Enc. Law, 2d ed. p. 1234, § 2.

A remedial statute is to be so construed as to suppress the mischief and advance the remedy.

1 Bl. Com. *87; *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775, 30 Am. St. Rep. 254, 30 N. E. 790; *Heydon's Case*, 3 Coke, 7; *State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 21 L. R. A. 767, 35 N. E. 119; *Thompson v. State*, 16 Ind. App. 84, 44 N. E. 763.

Appellee was guilty of no illegal act if he was present when it was arranged for others to buy the votes. The purpose of this statute must be to tempt the buyers and those who have knowledge of vote selling to inform.

17 Am. & Eng. Enc. Law, 2d ed. p. 346; *Ruter v. State*, 49 Ind. 509; *Baum v. State*, 157 Ind. 282, 55 L. R. A. 250, 61 N. E. 672.

The crime committed by the convicted persons was committed voluntarily. The offense was in selling, not in buying, votes.

Ruter v. State, 49 Ind. 509; *Com. v. Murphy*, 155 Mass. 284, 29 N. E. 469; *Evanston v. Meyers*, 172 Ill. 266, 50 N. E. 204; *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470.

The legislature is supreme in its sphere of legislation, and, when it has spoken as to the public policy of the state by the passage of a statute, that becomes the public policy of the state, and the courts have nothing to say except to enforce the statute as passed.

State ex rel. Beedle v. Schoonover, 135 Ind. 526, 701, 21 L. R. A. 767, 35 N. E. 119; 64 L. R. A.

State ex rel. Smith v. McClelland, 138 Ind. 395, 37 N. E. 799; *State ex rel. Duensing v. Roby*, 142 Ind. 168, 33 L. R. A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; *Praigg v. Western Paving & Supply Co.* 143 Ind. 359, 42 N. E. 750; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Baum v. State*, 157 Ind. 282, 55 L. R. A. 250, 61 N. E. 672.

Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what it has plainly expressed, and, consequently, no room is left for construction.

Case v. Wildridge, 4 Ind. 51; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *United States Sav. Fund & Invest. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *James v. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794; *Deem v. Millikin*, 6 Ohio C. C. 357; *Kent v. Mahaffey*, 10 Ohio St. 204; *Woodbury v. Berry*, 18 Ohio St. 456; *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637; *Cloud v. Bruce*, 61 Ind. 171; *Runkle v. Gates*, 11 Ind. 95.

Monks, J., delivered the opinion of the court:

This action was brought by appellee, under § 2 of the act of March 4, 1899 (Acts 1899, chap. 166, p. 381, being § 2330, Burns's Rev. Stat. 1901), to recover nine separate rewards for furnishing information which secured the conviction of nine persons for a violation of § 1 of said act; being § 2329, Burns's Rev. Stat. 1901. It is provided by § 1 of said act of 1899 (being § 2329, *supra*) that "anyone who sells, barter, or offers to sell or barter, his vote, or offers to refrain from voting for any candidate or candidates at any general, special, or primary elections or convention, . . . or who shall accept any money, property, or thing of value with the promise or pretense of voting for or refraining from voting for any candidate or candidates, shall, upon conviction therefor, be," etc. The 2d section (being § 2330, *supra*) provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish, or cause to be procured or furnished, the testimony necessary to secure a conviction of the person or persons violating the same, shall be entitled to a reward of \$100.00 payable out of the treasury of the county in which such conviction shall be had, and the right to such reward shall be a valid claim against such county." Appellant's demurrer

for want of facts to each of the nine paragraphs of complaint was overruled. Appellant filed an answer in five paragraphs, the first of which was a general denial. The court sustained appellee's demurrer for want of facts to each paragraph of answer, except the first. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment, in favor of appellee. The court's rulings on the demurrers, and the action of the court in overruling appellant's motion for a new trial, are called in question by the assignment of errors.

It is claimed by appellee that the pleadings are not in the record, and that for this reason the judgment must be affirmed. The reasons urged by appellee to sustain this contention are the same as those set forth in *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886, and *Perry, M.-B. Stone Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183; and, upon the authority of those cases, we hold that the pleadings are properly in the record.

The objection urged against each paragraph of the complaint is that it is not averred that appellee "rendered the services with a knowledge that the reward was offered, or with the intention to recover the same." Such allegations are unnecessary in this state at least, when the reward is offered in a public statute. *Dawkins v. Sappington*, 26 Ind. 199, 200; *Monroe County v. Wood*, 39 Ind. 345, 351; *Everman v. Hyman*, 26 Ind. App. 165, 167-169, 84 Am. St. Rep. 284, 28 N. E. 1022, and cases cited. See also *Auditor v. Ballard*, 9 Bush, 572, 15 Am. Rep. 728; *Eagle v. Smith*, 4 Houst. (Del.) 293.

It appears from the allegations of the second, third, fourth, and fifth paragraphs of answer that appellee procured each person named in the nine paragraphs of complaint to violate § 2329, Burns's Rev. Stat. 1901, to sell his vote; that he induced each of said persons to commit said crime; and in some of said paragraphs of answer it is alleged that he induced them to commit said crime with the intention of furnishing the testimony necessary to secure a conviction, and, when convicted, to recover from the county the reward provided by § 2330, Burns's Rev. Stat. 1901. Said paragraphs of answer proceed upon the theory that, while the law offers a reward to any person who shall procure and furnish, or cause to be procured or furnished, the testimony necessary to secure a conviction of the offender, it was not intended to reward the person who bought the vote, or who procured the same to be done, or in any way aided or abetted therein. Appellee insists that the vote buyer comes within the terms of the statute, and for that reason the demurrer 64 L. R. A.

for want of facts was properly sustained to said paragraphs of answer. Said § 2330, *supra*, provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish, or cause to be procured or furnished, the testimony, . . . shall be entitled to a reward." As counsel for the parties do not challenge the validity of said section, we may, without considering that question, determine its proper interpretation. *Lewis v. Albertson*, 152 Ind. 693, 49 N. E. 34; *Williams v. Citizens' Enterprise Co.* 153 Ind. 496, 55 N. E. 425; *Boyd v. Brazil Block Coal Co.* 152 Ind. 543, 544, 49 N. E. 797. The language employed is broad enough to include, not only the vote buyer, as contended by appellee, but also the vote seller. Was this the legislative intent? The natural import of the words of a statute according to their common use, when applied to the subject-matter is to be considered as expressing the legislative intent, unless it is repugnant to the acknowledged principles of justice and sound public policy, in which case the words ought to be restrained or enlarged so as to comport with those principles, unless the intention of the legislature is clearly and manifestly expressed to the contrary. This is because it will not be presumed that the legislature will violate principles of public policy, but, if such intention is clearly expressed, and is not obnoxious to any provision of the Constitution, it must have the force of law. *Opinion of the Justices*, 7 Mass. 523-526; *Hittinger v. Westford*, 135 Mass. 258, 259; *Dixon v. Western U. Teleg. Co.* 68 Fed. 630, 634, 635; *Mawcull v. Collins*, 8 Ind. 38; Black, Constr. & Interpretation of Laws, pp. 107, 108.

The Constitution of Massachusetts provided that the elector of a senator must be an inhabitant of the senatorial district in which he votes, and the elector for representative must have resided one year in the town before he could there be a voter. It was held in *Opinion of Justices*, 7 Mass. 524-526, that, while the words "inhabitants" and "residents" may comprehend aliens, they must be restrained to such inhabitants or residents as are citizens. The justices said at page 526: "This construction given to the Constitution is analogous to that given to several statutes. Creditors may levy their execution on the lands of the debtors, and hold them in fee simple, unless redeemed. Although the words of the statute are general, yet they are not deemed to include alien creditors. If they were so deemed, then, under color of a judgment and execution, the rule of the common law prohibiting an alien from holding lands against the commonwealth would be defeat-

ed. So a general provision is made for dower of widows; yet it is not supposed that a woman who is an alien can claim and have assigned to her dower in the lands of her deceased husband." For this reason, it is held that a statute should not be so construed as to authorize or permit a man to be a judge in his own case, or to determine his right to an office of trust or profit, unless the act so declares in express words. *Day v. Savadge*, Hobart, 85; *Queen v. Owens*, 2 El. & Bl. 86, 91-93, 28 L. J. Q. B. N. S. 316, 5 Jur. N. S. 764, 7 Week. Rep. 566; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, 110, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; *Com. v. M'Closkey*, 2 Rawle, 369, 372-376; Black, Constr. & Interpretation of Laws, p. 107; 1 Bl. Com. *91; Broom, Legal Maxims, pp. 116, 121. It was said in 1 Bl. Com. *91: "Thus, if an act of Parliament gives a man power to try all causes that arise in his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. But if we could conceive it possible for the Parliament to enact that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no."

It has been held upon grounds of public policy, that public corporations, such as counties, townships, cities, towns, school corporations, and public officers, are not subject to garnishment under a law providing that "all persons and corporations are subject to garnishment." To make such corporations and officers subject to garnishment, the act must so provide in express words. *Wallace v. Lawyer*, 54 Ind. 501, 505-509, 23 Am. Rep. 661, and cases cited; *Switzer v. Wellington*, 40 Kan. 250, 10 Am. St. Rep. 196, and note, 19 Pac. 620; *First Nat. Bank v. Ottawa*, 43 Kan. 295, 23 Pac. 485; *School Dist. No. 4 v. Gage*, 39 Mich. 484, 33 Am. Rep. 421; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Dotterer v. Bowe*, 84 Ga. 769, 11 S. E. 896; *Baltimore v. Root*, 63 Am. Dec. 696, and note (8 Md. 95); *Rood, Garnishment*, §§ 18, 19, 25-27; 2 Shinn, Attachment & Garnishment, §§ 500, 505.

It is also held upon grounds of public policy, that a law which provides that "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building . . . may have a lien separately or jointly upon the building which they may have constructed or repaired 64 L. R. A.

. . . and on the interest of the owner in the lot or land on which it stands," does not authorize such lien upon public property devoted to public use. *Parke County v. O'Connor*, 86 Ind. 531, 535-538, 44 Am. Rep. 338, and cases cited; *Fatout v. School Comrs.*, 102 Ind. 223, 231, 232, 1 N. E. 389; *Louise v. Howard County*, 94 Ind. 553, and cases cited; *Secrist v. Delaware County*, 100 Ind. 59; 2 Dill. Mun. Corp. § 577. It was said by this court in *Parke County v. O'Connor*, 86 Ind. 536, 44 Am. Rep. 338: "It is true that the statute of this state provides, in terms, for the acquisition and enforcement of a mechanic's lien upon and against 'any building;' but, broad and comprehensive as are the provisions of the statute, it must be construed in such manner as will not contravene settled principles of public policy. . . . There is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use, and, in the absence of such a provision, we must hold . . . that such a lien can neither be acquired nor enforced upon or against such property held for such use."

Courts, in construing offers of reward made for the apprehension of persons charged with crime, have uniformly held that a ministerial officer, who, in the performance of his duties as such, apprehends the criminal, is not entitled to the reward. And in cases where rewards have been offered for the return of stolen property, it has been held that a sheriff or other peace officer who secured the property and returned it to the owner is not entitled to the reward, even though the offer was general to all persons. This is upon the ground that it is against public policy to allow a public officer for the discharge of his duties any compensation except that fixed by law. *Davies v. Burns*, 5 Allen, 349, 353; *Pool v. Boston*, 5 Cush. 219, 220, 221; *Warner v. Grace*, 14 Minn. 487, Gil. 364; *Day v. Putnam Ins. Co.* 16 Minn. 408, Gil. 365; *Hutch v. Mann*, 15 Wend. 44; *Smith v. Whildin*, 10 Pa. 39, 49 Am. Dec. 572; *Gilmore v. Lewis*, 12 Ohio, 281; *Hogan v. Stophlet*, 179 Ill. 150, 156-160, 44 L. R. A. 809, 53 N. E. 604, and cases cited; *Stacy v. State Bank*, 5 Ill. 91; *Ring v. Devlin*, 68 Wis. 384, 32 N. W. 121; *Brown v. Godfrey*, 33 Vt. 120; *Lees v. Colgan*, 120 Cal. 262, 40 L. R. A. 355, 52 Pac. 502, and cases cited; *St. Louis, I. M. & S. R. Co. v. Grafton*, 51 Ark. 504, 14 Am. St. Rep. 66, 11 S. W. 702; *Re Russell*, 51 Conn. 577, 50 Am. Rep. 55; *Smith v. Gentry*, 20 Ky. L. Rep. 171, 42 L. R. A. 302, 45 S. W. 515; *Miller v. Hogeboom*, 56 Neb. 434, 437, 76 N. W. 888; *Morrell v. Quarles*, 35 Ala. 544; *Hayden v.*

Souger, 26 Am. Rep. 1, and note, pp. 5-10, 56 Ind. 42.

It is a maxim of the law that no man shall be permitted to profit by, or take advantage of, his own wrong, or to found any claim upon his own iniquity. Broom, *Legal Maxims*, pp. 279-297. Under this maxim, it has been uniformly held that a person who is connected with an alleged theft, either as a participator in the felonious taking, or in the concealing of the stolen goods, cannot recover a reward offered for their return. *Jenkins v. Kelren*, 12 Gray, 330, 332, 74 Am. Dec. 596. It is also held that any person who aids or abets in the commission of a crime, or advises or procures it to be committed, cannot recover a reward offered for the apprehension of the person who committed the same. *Hassan v. Doe*, 38 Me. 45; *Jenkins v. Kelren*, 12 Gray, 330, 332, 74 Am. Dec. 596. Under this maxim, it is held that one who sets fire to his own building cannot recover the insurance thereon, and that a beneficiary in a life insurance policy, who murders the person insured, cannot recover on such policy. *Schmidt v. Northern Life Assn.* 112 Iowa, 41, 44, 51 L. R. A. 141, 84 Am. St. Rep. 323, 83 N. W. 800, and cases cited; 51 Cent. L. J. 465, and note, 469, 470; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877.

It is true that in this case there was no statute making the purchase of votes a crime, and that we have no crimes in this state except those provided by statute; but bribery at elections was a crime at common law, as to the bribe giver and the bribe taker. *Rea v. Pitt*, 3 Burr. 1335, 1338-1340; 1 Russell, *Crimes*, 6th ed. 444; *Cushing, Law & Practice of Legislative Assemblies*, p. 70, § 189; *Baum v. State*, 157 Ind. 282, 285, 286, 55 L. R. A. 250, 61 N. E. 672, and authorities cited. While the one who buys or advises, aids, or abets in, vote buying, or procures the same to be done, is not guilty of the crime of bribery, under § 2329, *supra*, such conduct is wrong and immoral. One who buys a vote commits a wrongful, immoral, and iniquitous act,—a public wrong, because it affects the whole commu-

nity. Public policy forbids that the vote buyer or vote seller should profit by such wrongful act, or found any claim upon such iniquity, whether made a crime by statute or not. Broad, therefore, as are the terms of said § 2330, *supra*, it must be construed so as not to contravene the principles of public policy. As said, § 2330, *supra*, contains no express provision to the effect that the vote buyer and vote seller are entitled to the benefit thereof, it is clear, from what we have said, and the authorities cited, that neither can recover said reward, although he furnished the testimony which secured the conviction of the vote seller. *State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 21 L. R. A. 767, 35 N. E. 119, is cited by appellee as supporting the construction of § 2330, *supra*,—that the vote buyer comes within its provisions. In that case the vote seller brought an action, under the act of 1889 (Acts 1889, chap. 200, pp. 360-363, §§ 6325-6339, Burns's Rev. Stat. 1894), to recover \$300 and attorneys' fees from the person who bought his vote. That act, however, provided in express terms that the vote buyer, and those "aiding, abetting, counseling, encouraging, or advising such acts [vote buying, etc.], shall thereby become liable jointly and severally to the vote seller in the sum of \$300, and reasonable attorneys' fees," in an action to be brought in the name of the state on the relation of the said vote seller. Said act was held constitutional, and the recovery by the vote seller thereunder against the vote buyer was sustained. Nothing that we have said or held in this case is in conflict with what was decided in *State ex rel. Beedle v. Schoonover*, 135 Ind. 526, 21 L. R. A. 767, 35 N. E. 119.

It is clear that the said paragraphs of answer were sufficient to withstand the demurrer for want of facts. As the fourth paragraph of answer alleges facts sufficient to constitute a defense to the action, the mere fact that it purports to be only a partial answer does not render it insufficient as to such part.

Judgment reversed, with instructions to overrule the demurrer to the second, third, fourth, and fifth paragraphs of answer.

KANSAS SUPREME COURT.

S. W. KIMMEL, *Plff. in Err.*,

v.

R. T. BEAN *et al.*

(.....Kan.....)

*A bank which receives from an agent

*Headnote by MASON, J.

for deposit in his own name the money of his principal, without notice of the agency, is protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent, either expressly or by

NOTE.—As to bank's right to appropriate to debt of administrator check payable to him as such, see, in this series, *American Trust & Bkg. Co. v. Boone*, 40 L. R. A. 250.

As to application of trust deposit to individual debt of trustee, see *Sayre v. Well*, 15 L. R. A. 544.

legal implication; and such authority ordinarily arises from the making of a deposit, without other directions, where the debt to which it is applied is an overdraft.

(March 12, 1904.)

ERROR to the District Court for Sedgewick County to review a judgment in favor of defendants in an action brought to recover money which had been deposited in the defendant bank and applied to the account of the other defendants, although it was alleged to belong to the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Adams & Adams, for plaintiff in error:

The factor or agent cannot acquire title to the funds of his principal by simply depositing them in the bank to his own credit. Before the bank can justify the withholding or retention of funds from the principal when so deposited, it must, by proper pleading, specifically set forth its defense, and must prove affirmatively the defense or justification for withholding or appropriating the trust funds. Having traced the money into the appellant's possession, it is presumed to be there still.

Third Nat. Bank v. Stillwater Gas Co. 36 Minn. 75, 30 N. W. 440; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906; *Burnett v. First Nat. Bank*, 38 Mich. 630; *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926; *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 633; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452.

There is ample evidence in the record showing that the bank had knowledge of the character of the fund it received, and could have known, and should have known, by the exercise of ordinary diligence, that the check so appropriated by the bank was not the property of the commission company, but the property of another whose stock the commission company had sold.

Notice to the bank is sufficiently shown if it appears from the evidence that, by the exercise of ordinary diligence and prudence, it could have known or discovered the character of the fund.

Union Stock Yards Nat. Bank v. Moore, 25 C. C. A. 150, 49 U. S. App. 153, 79 Fed. 705; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Davis v. Panhandle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926; *Burnett v. First Nat. Bank*, 38 Mich. 630; *Union Stock Yards Na-* 64 L. R. A.

tional Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *People's Nat. Bank v. Myers*, 65 Kan. 123, 69 Pac. 164; *Third Nat. Bank v. Stillwater Gas Co.* 36 Minn. 75, 30 N. W. 440.

Messrs. Houston & Brooks, for defendants in error:

Checks are negotiable instruments, governed by the same rules of law as are applicable to other negotiable instruments.

Dan. Neg. Inst. 4th ed. § 1651; *Riverside Bank v. Woodhaven Junction Land Co.* 34 App. Div. 359, 54 N. Y. Supp. 266.

The bank was a bona fide purchaser for value, and entitled to all the protection which the law affords to such a purchaser.

Draper v. Cowles, 27 Kan. 484; *Mann v. Second Nat. Bank*, 30 Kan. 422, 1 Pac. 579; *Heitman v. Griffith*, 43 Kan. 557, 23 Pac. 589; *Mann v. Second Nat. Bank*, 34 Kan. 755, 10 Pac. 150; *Lee v. Johnson*, 110 Ga. 286, 34 S. E. 568; *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. 18; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366.

The bank had no notice or knowledge of any facts or circumstances that would destroy its right to the protection accorded to a bona fide purchaser.

Martin v. Kansas Nat. Bank, 66 Kan. 655, 72 Pac. 218; *Fox v. Bank of Kansas City*, 30 Kan. 446, 1 Pac. 789; *Atlas Nat. Bank v. Holm*, 19 C. C. A. 94, 34 U. S. App. 472, 71 Fed. 489; *Lane v. Evans*, 49 Iowa, 156; *Mayer v. Robinson*, 93 Mo. 122, 5 S. W. 611; *Kitchen v. Loudenback*, 48 Ohio St. 177, 29 Am. St. Rep. 540, 26 N. E. 979; *Second Nat. Bank v. Morgan*, 165 Pa. 199, 44 Am. St. Rep. 652, 30 Atl. 957; *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59; *Smith v. Lirington*, 111 Mass. 342; *Hamilton v. Vought*, 34 N. J. L. 187; *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077.

If it were true that the money was received by the bank under circumstances to constitute it a trust fund, the bank would still be justified in applying it to the payment of a pre-existing debt, and would be protected in such application.

Smith v. Des Moines Nat. Bank, 107 Iowa. 320, 78 N. W. 239; *Pom. Eq. Jur.* § 1048; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 41 N. E. 403; *Hutchinson v. Manhattan Co.* 150 N. Y. 250, 43 N. E. 775; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Holly v. Missionary Soc.* 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395; *Smith v. Crawford County State Bank*, 99 Iowa, 282, 61 N. W. 378, 68 N. W. 690.

The burden rested upon the plaintiff to prove that the bank was not a bona fide pur-

chaser for value of the check; and the presumption is that it purchased it for value in good faith, without notice of any rights or interest of third persons.

Rahm v. King Wrought-Iron Bridge Manufactory, 16 Kan. 530; *Ecton v. Harlan*, 20 Kan. 452; *Reynolds v. Thomas*, 28 Kan. 813; *Lyon v. Martin*, 31 Kan. 411, 2 Pac. 790; *Mann v. Second Nat. Bank*, 34 Kan. 746, 10 Pac. 150; *First Nat. Bank v. Elliott*, 46 Kan. 32, 26 Pac. 487; *First Nat. Bank v. Emmitt*, 52 Kan. 603, 35 Pac. 213; *Chaliss v. Woodburn*, 2 Kan. App. 662, 43 Pac. 792; *Morrison v. Farmers' & M. Bank*, 9 Okla. 697, 60 Pac. 273; *Dreilling v. First Nat. Bank*, 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Halbert v. Ellwood*, 1 Kan. App. 95, 41 Pac. 67; *Clark v. Skeen*, 61 Kan. 532, 49 L. R. A. 190, 78 Am. St. Rep. 337, 60 Pac. 327; *Anderson v. Walker* (Tex. Civ. App.) 49 S. W. 937; *Chamberlain v. Chamberlain Banking House* (Neb.) 93 N. W. 1021; *School District v. First Nat. Bank*, 102 Mass. 174.

Mason, J., delivered the opinion of the court:

On April 20, 1900, S. W. Kimmel, of Garber, Oklahoma, shipped to a Wichita commission firm known as the "Wichita Live Stock Commission Company" a car load of hogs, with directions to sell and send him the net proceeds by draft. The hogs were sold to Jacob Dold & Son on April 25th, and the commission company at once mailed to Kimmel its personal check upon the Kansas National Bank of Wichita, where it had had an account for several years, for \$1,016.16, being the amount for which the sale was made, less the commission and expenses. Dold & Son paid for the hogs, April 26th, with a check made payable to the order of the commission company, drawn upon another Wichita bank. The company at once indorsed the check and deposited it in its bank, receiving credit upon its deposit account, and it was paid on the same day. Kimmel deposited the check sent him by the commission company with his local banker, and it was forwarded for collection through the ordinary banking channels, reaching Wichita May 1st, when it was presented to the bank on which it was drawn, which refused payment. Kimmel then sued the bank for the amount of the check, alleging that the deposit of the proceeds of the sale of the hogs was made without his authority and in violation of his instructions, and that the bank knew all the circumstances connected with the transaction. The bank answered, denying knowledge of the relations of plaintiff and the commission company, and alleging that when the Dold check was deposited

the company's account was overdrawn by more than that amount, that the overdraft had been permitted upon an agreement that it should forthwith be made good by deposits, and that the check when deposited was applied to such overdraft, without notice of plaintiff's claim. Plaintiff replied with a general denial. Upon the trial the court sustained a demurrer to plaintiff's evidence, and rendered judgment accordingly, which plaintiff now seeks to reverse.

The evidence was mainly directed to the question of the bank's knowledge of the commission company's business. Substantially the same facts were shown in this regard as in *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 218, which grew out of a similar claim against the same bank made by another shipper. Here, as in that case, an effort was made to show such intimacy of dealing between the bank and the commission company as to justify charging the former with actual or constructive notice of plaintiff's interest in the check deposited by the latter. In fact, however, little more was shown than that the bank knew that the company was engaged in the commission business, and that its account was sometimes overdrawn. The evidence on this point, being stated in some detail in the *Martin Case*, will not be further reviewed. Following the conclusion reached in that case, we hold that the bank must be deemed not to have had notice of the relation of the commission company to the shipper. Plaintiff claims that the record does not show that the account of the commission company was overdrawn to the amount of the Dold check at the time it was deposited. The evidence in this regard is not as full as might be desired, but we think that upon the consideration of the entire testimony it sufficiently appears that such was the fact. Indeed, it is perhaps to be inferred that the overdraft was allowed to be created in virtue of a statement by the commission company that it had funds ready to deposit against it, having reference to this very check. The question incidentally suggested in *Martin v. Kansas Nat. Bank*, 66 Kan. 655, 72 Pac. 218, is therefore fairly presented: Can a bank be held to account to the owner of a fund which has been deposited by an agent in his own name and applied upon the agent's overdraft, the bank having no knowledge of the agency? The strongest case cited in support of the contention of plaintiff in error for an affirmative answer to this question is that of *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906, 49 Neb. 125, 68 N. W. 358. The third paragraph of the syllabus reads: "F., a commission merchant, deposited in bank money realized from the sale of live stock consigned to him

by C., his account with the bank being at the time largely overdrawn. Held, regardless of the question of notice, that the bank is accountable to C., and that it cannot apply the money so deposited in satisfaction of F.'s indebtedness." Under the evidence in that case, as stated in the opinion, it might well have been said that the bank was chargeable with notice, but no account was taken of this fact as a basis for the conclusion reached. In the opinion a number of cases are cited, one of which, *Davis v. Pan-handle Nat. Bank* (Tex. Civ. App.) 29 S. W. 926, seems to be entirely in point, holding that, where an agent deposits the money of his principal in his own name, the bank cannot hold it for the debt of the agent, although it has no knowledge of the agency, unless it would otherwise lose its claim. No authorities are cited or arguments presented in support of this conclusion, the opinion merely stating that the court did not see upon what principle the bank should be allowed to retain the money, and that it was perfectly manifest that it had no right to do so. A brief review of the other cases cited will show that they do not go so far as the Nebraska decision. In *Pennell v. Deffell*, 4 De G. M. & G. 372, 23 L. J. Ch. N. S. 115, 18 Jur. 273, 1 Week. Rep. 499, 1 Eq. Rep. 579, it was held that trust funds deposited by a trustee in his own name, together with money of his own, could be followed by the beneficiary; but the controversy was between the beneficiary and the executors of the trustee, the bank making no claim. In *Van Allen v. American Nat. Bank*, 52 N. Y. 1, the bank likewise made no claim to the money in controversy, and it was held that it could be required to pay it to the real owner, although it was deposited in the name of another, who gave the real owner a check for it. The questions discussed were purely technical. In *Burnett v. First Nat. Bank*, 38 Mich. 630, an agent deposited funds of his principal in his own name. Some six months later he died, and the bank then attempted to apply the deposit to a debt of the decedent, the character of which is not shown in the reported decision. It was held that this could not be done, the case turning upon the fact that the agent never authorized the money to be applied to his debt. In *Third Nat. Bank v. Stillwater Gas. Co.* 36 Minn. 75, 30 N. W. 440, it was merely held that money obtained by a bank by fraud could be recovered by the real owner, although it had passed through several hands. In *Peak v. Elliscott*, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499, the money involved was not paid to the bank as a deposit, but for a specific purpose, and, as this was not performed, it was held that on the insolvency of the bank it should go to the owner 64 L. R. A.

and not to the general creditors. In *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, 2 N. E. 452, it was held that a bank, having notice of the trust character of a fund deposited by a firm in its own name, with the addition of the word "agents," could not apply it to the debt of the firm. In *Whitley v. Foy*, 59 N. C. 34, 78 Am. Dec. 236, the bank had actual notice that money deposited in the name of one person was owned by another; moreover, the controversy was between the real owners and the administrators of the depositor. In *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693, and *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118, the facts were held to give the banks notice of the trust character of the deposits involved. *First Nat. Bank v. Hummel*, 14 Colo. 259, 8 L. R. A. 788, 20 Am. St. Rep. 257, 23 Pac. 986, cited on rehearing in *Cady v. South Omaha Nat. Bank*, 49 Neb. 125, 68 N. W. 358, was another controversy between the beneficial owner of a trust fund and the administrators of the trustee. In *Hutchinson v. Manhattan Co.* 9 Misc. 343, 29 N. Y. Supp. 1103, a check was deposited by an agent for collection only, and it was held that the bank could not hold it for the debt of the agent, because this was contrary to the intention of all the other parties in interest, including the agent. The decision, moreover, was reversed by the court of appeals. See 150 N. Y. 250, 44 N. E. 775. In *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728, the bank knew of the trust character of the deposit. These are all the cases cited on this branch of the case by the Nebraska court. The same doctrine is announced in 2 Morse, Banks & Banking, § 590, citing this case, that of *Burnett v. First Nat. Bank*, 38 Mich. 630, which has already been commented upon, and *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933, which only declares the right of the real owner of property to hold it against the trustees in bankruptcy of one to whose care it had been confided.

Plaintiff in error also cites *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 633. Expressions are found in the opinion in that case favorable to his contention, but the decision turned largely upon the fact that the money sought to be held by the bank did not reach it by any act of its debtor, or even with his knowledge, but was deposited in his name by his attorney through mistake.

A conclusion different from that of the Nebraska court is reached in *Smith v. Des Moines Nat. Bank*, 107 Iowa, 620, 78 N. W. 238, where the authorities bearing upon the matter are collected and reviewed. The

scope of the opinion is indicated by a paragraph of the syllabus, reading as follows: "A *cestui que trust* cannot recover trust moneys which were deposited in a bank by the trustee in his own name, and which, without notice of their trust character, the bank applied to a matured individual note of the trustee, surrendering the note to the latter." We think this decision is in accordance with the weight of authority and with the better reason. The facts there presented differed in no material respect from those now under consideration, except that the depositor expressly agreed that the bank might apply the deposit to his debt, and the bank surrendered the note which evidenced it. Where a depositor carries an account with a bank as a part of his usual business, continually drawing checks and making deposits, sometimes having a balance to his credit and sometimes being overdrawn, it seems clear that the mere act of making a deposit is equivalent to an agreement that it shall apply against any overdraft that may exist at the time. Presumptively that would seem to be the very purpose of the deposit. "It has long been settled that a banker who has advanced money to another has a general lien, on all securities of the latter which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement limiting their application." *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366. "When a depositor opens an account in a bank, that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect." *Meyers v. New York County Nat. Bank*, 36 App. Div. 482, 55 N. Y. Supp. 504, 506. But if the general rule were otherwise, the circumstances of this case, already stated, would amount to an authority to the bank from its customer to apply the deposit to the overdraft. And there seems no just ground for making a distinction, for any purpose here involved, between the payment of a past-due debt that is evidenced by a note and the payment of one that is a mere matter of book account. No such distinction is made where the question relates to the consideration for the transfer of negotiable paper. *Draper v. Cowles*, 27 Kan. 484; *Mann v. Second Nat. Bank*, 30 Kan. 422, 1 Pac. 579. Indeed, the very principle of protection to the innocent purchaser of commercial paper is invoked by defendant in error. The check deposited in this case was a negotiable instrument. The substantial controversy is as to its ownership. The bank acquired it from one who

had the apparent title, without notice of any other claim. The argument that these considerations are sufficient to sustain the defendant's position seems sound. But the business was conducted as a cash transaction. The commission firm might have collected the Dold check themselves and deposited the cash in the bank, and the question presented would not have been materially different. The principle upon which transfers of negotiable instruments in payment of, and even as security for, existing debts are upheld, is the desirability of promoting their currency. *Birket v. Elward* (Kan.) 74 Pac. 1100. Surely no greater currency should be given to notes and bills than to actual money.

"The rule has been settled, by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it bona fide and for a valuable consideration in due course of business. . . . It is said that the case is to be governed by the doctrine, established in this state, that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business, and in good faith, upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world." *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511.

"If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor, who has no notice of the breach of trust, or that the money is subject to the

trust, in such a manner that the money is received as a general payment, and not as a distinct and separate fund, then the money becomes free from the trust, and cannot be followed by the beneficiary into the hands of the creditor, although, in general, an antecedent debt does not constitute a valuable consideration." Pom. Eq. Jur. § 1048.

In addition to the authorities cited in *Smith v. Des Moines Nat. Bank*, see *First Nat. Bank v. Valley State Bank*, 60 Kan. 621, 57 Pac. 510; *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Holly v. Missionary Society*, 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395; and *Meyers v. New York County Nat. Bank*, 55 N. Y. Supp. 504, 506, 36 App. Div. 482. The syllabus in the last-named case reads: "A bank, having previous authority to apply a customer's deposit to his debt, can appropriate it to the debt, though the deposit was, in part, money of the depositor's ward, the bank having no knowledge of the fact."

We think that a bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected by applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his check, whenever such application is authorized by the agent, either expressly or by legal implication, and that such authority ordinarily arises from the making of a deposit upon an overdrawn account, when no other directions are given.

The judgment is affirmed.

All the Justices concur.

John F. HANSON, *Plff. in Err.*,

v.

William J. KREHBIEL.

(.....Kan.....)

*1. Chapter 37b, Gen. Stat. 1901 (chap. 249, p. 439, Laws 1901), relating to libel, is unconstitutional and void, being in conflict with § 18 of the Bill of Rights, in this: That it denies the right in certain cases to one injured in his reputation to have remedy therefor by due course of law.

2. "Remedy by due course of law," as used in § 18 of the Bill of Rights, means the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure, after a fair hearing.

*Headnotes by CUNNINGHAM, J.

NOTE.—For other cases in this series as to validity of statutes limiting recovery against newspaper proprietor for libel to actual damages where retraction is made, see *Park v. Detroit Free Press Co.* 1 L. R. A. 599, and *Allen v. Pioneer Press Co.* 3 L. R. A. 532, 64 L. R. A.

3. The right to a remedy by due course of law is not satisfied by the requirement contained in a statute to make specific reparation for the injury done, which reparation is the same in all cases, and bears no relation to the injury suffered, nor has been decreed by a tribunal after ascertainment of the extent of such injury.

4. While one part of a statute may be unconstitutional and void, and another part good, this is the case only where the portions are clearly separable and susceptible of separate enforcement; but when it is apparent that the entire faulty enactment is designed to constitute a complete whole, and that one part would not have been enacted except in connection with the other, if a part is found to be bad the entire statute must fall.

5. A false publication, charging that one had been arrested accused of an assault, and, in attempting to collect a bill, he threatened violence with a pistol, is libelous *per se*, and the libeled one may have general damages, without alleging or proving specific injury.

(March 12, 1904.)

ERROR to the District Court for McPherson County to review a judgment in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Mr. John F. Hanson, in propria persona:

The libel law is unconstitutional because preventing a remedy for injury to reputation.

Park v. Detroit Free Press Co. 72 Mich. 560, 1 L. R. A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005; *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21.

The libel law is class legislation. It seems to be wholly arbitrary, unjust, and without good reasons. There are other publications that deserve protection more than newspapers, if it is proper to give it in any instances. Take, for instance, a commercial agency whose business it is to rate business firms. Such an agency, though exercising the greatest care and vigilance, and actuated by the best motives, is liable, even if it makes an honest mistake (*Sunderlin v. Bradstreet* 46 N. Y. 188, 7 Am. Rep. 322; *Taylor v. Church*, 8 N. Y. 452; *Bradstreet Co. v. Gill*, 72 Tex. 115, 2 L. R. A. 405, 13 Am. St. Rep. 768, 9 S. W. 753; *Erber v. Dun*, 4 McCrary, 160, 12 Fed. 526; *King v. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622, 9 Atl. 705; *Johnson v. Bradstreet Co.* 77 Ga. 172, 4 Am. St. Rep. 77); while a newspaper commenting on a firm's financial standing under similar circumstances, with the possible exception that it is less com-

petent to do so and has less facilities for information, goes "Scott free."

If the law is constitutional, the petition need not allege notice in order to state a cause of action for the recovery of damages on account of want of good faith.

Bannister v. Carroll, 43 Kan. 66, 22 Pac. 1012; *Moore v. Stevenson*, 27 Conn. 14; *Hotchkiss v. Porter*, 30 Conn. 414.

Court records are not privileged.

Sheckell v. Jackson, 10 Cush. 25; *McAlister v. Detroit Free Press Co.* 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431.

When there is injury there is malice.

Townshend, *Slander & Libel*, 2d ed p. 123, note 4.

To change the basic principle of libel so as to prevent a remedy for injury to reputation, which really exists, as it is presumed to and does in all instances of libel, is the same as to deny, point-blank, that remedy for injury to reputation.

Townshend, *Slander & Libel*, 2d ed. p. 185, note 3.

Mr. P. J. Galle, for defendant in error:

The statute provides a mode of procedure that must be followed before a petition can be filed. It does not deprive the party injured of a remedy by due course of law, but lays down certain rules of procedure that must be followed; and, if retraction is made, and the article was published in good faith, etc., only actual damages can be collected. Retraction of a libel was always admissible in mitigation of damages; so this statute only extends the rule of evidence so as to admit intention and good faith.

Allen v. Pioneer Press Co. 40 Minn. 117, 3 L. R. A. 534, 12 Am. St. Rep. 707, 41 N. W. 936; 18 Am. & Eng. Enc. Law, p. 1084; *Hotchkiss v. Porter*, 30 Conn. 414; *Moore v. Stevenson*, 27 Conn. 14.

The action of the lawmaking power must in all cases be upheld, unless its action is manifestly in contravention of the Constitution.

State v. Barrett, 27 Kan. 213; *Cherokee County v. State*, 36 Kan. 337, 13 Pac. 558; *State ex rel. Johnson v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *State v. Ewing*, 22 Kan. 708; *Norton County v. Shoemaker*, 27 Kan. 77; *Weyand v. Stover*, 35 Kan. 545, 11 Pac. 355.

A law may be limited to a certain class of people if it operates generally alike on that class, and still not be unconstitutional.

Allen v. Pioneer Press Co. 40 Minn. 117, 3 L. R. A. 533, 12 Am. St. Rep. 707, 41 N. W. 936; *Kansas City v. Union P. R. Co.* 59 Kan. 427, 52 L. R. A. 321, 53 Pac. 468.

The court will uphold the constitutional part of the law.

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State ex rel. Godard v. Johnson, 61 Kan. 834, 49 L. R. A. 662, 60 Pac. 1068.

The article does not charge a crime, and is, therefore, not libelous *per se*; nor does it contain any other elements that make it libelous *per se*.

Townshend, *Slander & Libel*, § 176; 18 Am. & Eng. Enc. Law, p. 868.

The article published by defendant in error is privileged.

State v. Wait, 44 Kan. 314, 24 Pac. 354.

Cunningham, J., delivered the opinion of the court:

Plaintiff's action was for the recovery of damages occasioned by the publication of an alleged libel. The question of greatest moment involved is as to the constitutional validity of chapter 57b, Gen. Stat. 1901, being chap. 249, p. 439, Session Laws 1901, which reads as follows:

"Section 1. That before any civil action shall be brought for the publication or circulation of a libel in any newspaper in this state, the plaintiff shall, at least three days before filing the petition in such action, serve notice on the publisher or publishers of such newspaper, at the principal office of publication, specifying the statement in said article which is alleged to be false or defamatory. If it shall appear on the trial of such action that said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein contained alleged to be erroneous was published in the next regular issue of said newspaper, if a weekly or monthly, or, in case of a daily paper, within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages: Provided, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state unless the retraction is made editorially, in a conspicuous manner, at least ten days before election, in case such libelous article was published in a daily paper, and in case such libelous article was published in a weekly or monthly paper, at least fifteen days before the election: Provided further, that nothing in this act shall be held to apply to any libel published of or concerning any female person.

"Sec. 2. The words 'actual damages,' in the foregoing section, shall be construed to include all damages which the plaintiff shall show he has suffered in respect to his prop-

erty, business, trade, profession, or occupation, and no other damages whatever."

This is assailed as being violative of § 18 of the Bill of Rights, which is: "All persons for injuries suffered in person, reputation, or property shall have remedy by due course of law, and justice administered without delay.

It will be noted that the questioned statute limits the right of recovery in cases of libel to actual damages, where, after service of the notice provided in the 1st section, the publisher of the newspaper in which the libelous matter has appeared shall make a full and fair retraction of the libelous matter, coupled with a showing upon the trial that the same was published in good faith, under the misapprehension of the facts; and defines that class of damages to be such as the plaintiff has suffered in respect to his property, business, trade, profession, or occupation. So that in such cases the libeled party may not recover all his damage, but he is confined to the narrow class designated and defined in the act as "actual damages." The common law recognizes two classes of damages in libel cases,—general and special. General damages are those which the law presumes must naturally, proximately, and necessarily result from the publication of the libelous matter. They arise by inference of law, and are not required to be proved by evidence. They are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss had in fact resulted; and are designed to compensate for that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation, consequent upon the malicious publication of the false and libelous matter. The injury for which this class of damages is allowed is something more than merely speculative. While not susceptible of being accurately measured in dollars and cents, it is a real one, and more often than otherwise more substantial and real than those designated as actual, and measured accurately by the dollar standard. In short, it is such an injury to the reputation as was contemplated in the Bill of Rights. The law presumes that this class of injuries resulted necessarily from the publication of the libelous matter, and the damages therefore were recoverable without special assignment. Special damages were also recoverable when properly pleaded and shown, and were such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in the statute re-

ferred to. This was the condition of the law at the time of the adoption of our Constitution, and is now, and these the injuries to reputation for which it provided that there should be "remedy by due course of law."

It requires no argument to demonstrate that the act in question does deny remedy for a portion of these injuries. Unless the one libeled has suffered in the particular manner pointed out in the statute, he is remediless. For that other large class of persons and still larger class of injuries no remedy is found. From the writings of the world's wisest man we have the assurance "that a good name is rather to be chosen than great riches." Yet the possessor of this thing of greatest value, being despoiled of it, is left entirely without remedy for its loss by the statute in question, except in such rare cases as he shall be able to show some exact financial injury in the particulars named. We could not excuse ourselves for holding that reputation is less valuable than property, or that it is less protected from spoliation by the quoted provision of the Bill of Rights:

It is suggested, however, that the retraction required by the act to be published is a fair compensation for the injury done, and a reinvestment of the libeled one with his good name. This being done, all has been accomplished that would be by a verdict of a jury, and hence that the retraction required by the legislative enactment is, if not "due course of law," an ample substitute for it. It is not an easy task to deduce either from reason or the authorities a satisfactory definition of "law of the land" or "due course of law." We feel safe, however, from either standpoint, in saying these terms do not mean any act that the legislature may have passed if such act does not give to one opportunity to be heard before being deprived of property, liberty, or reputation, or, having been deprived of either, does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one "shall have remedy,"—that is, proper and adequate remedy,—thus to be ascertained. To refuse hearing and remedy for injury after its infliction is small remove from infliction of penalty before and without hearing.

In *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 15, 25 Am. Dec. 677, Chief Justice Ruffin, in speaking to this point, says:

"Those terms 'law of the land' [or 'due course of law'] do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be 'taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and his life' without crime? Yet all this he may suffer if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution." Mr. Webster, in the *Dartmouth College Case*, has this definition: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. . . . Everything which may pass under the form of an enactment is not, therefore, considered to be the law of the land." *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. ed. 630. See, for other definitions, *People ex rel. Witherbee v. Essex County*, 70 N. Y. 228; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 524; *Burdick v. People*, 149 Ill. 600, 24 L. R. A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557, 66 N. W. 624.

The retraction required by the act in question may or may not be full reparation for the injury suffered. It might the rather aggravate the injury already inflicted than mollify it. It is sufficient to say, however, that all these are questions for the courts upon proper notice to all parties, and may not be determined arbitrarily by an act of the legislature.

We find that courts of last resort in two states have passed upon the constitutionality of acts like the one here discussed. In *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599, 16 Am. St. Rep. 544, 40 N. W. 731, the supreme court of Michigan, holding against the constitutionality, says: "We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would 64 L. R. A.

be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is, under this law, usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been specifically approved by the same court in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21, where the court holds: "The right to recover in an action of libel for damages to reputation cannot be abridged by statute." A contrary view was adopted by a divided court in *Allen v. Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532, 12 Am. St. Rep. 707, 41 N. W. 936. The conclusion of the court in this case is based largely upon the reasoning that the retraction being required, as it is, to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than would be a judgment for damages. This, however, is merely an assumpt-

tion, and may or may not be true; but, even if true, this would not be "remedy by due course of law," as contemplated in the Constitution, as we have already determined. We are well persuaded that the criticised act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and hence is invalid under the quoted constitutional provision.

The questions in this case arise upon the sustaining of defendant's general demurrer to plaintiff's petition. That petition contained no statement of the service of the notice as provided in the criticised act, and it is now claimed, admitting the constitutional invalidity of this act, because it denies remedy by due course of law, still the legislature would have a right to require the service as a step in the procedure in prosecuting an action for the recovery of damages occasioned by libel; this in order to give the publisher opportunity of retraction for the purpose of mitigating general damages and relieving himself from punitive damages. We do not deny that the legislature might do this. It seems to us, however, that such was not its purpose and object, but rather that the service of this notice was but a step in the procedure to relieve publishers from all general damages. That object having been found unconstitutional, these ancillary matters must go with it.

It is further suggested that the subject-matter of the alleged libel was not libelous *per se*, and hence that the demurrer was properly sustained, the petition containing no allegation of special damage. The libelous matter set out was in the following language: "A second case was called late this afternoon, in which John F. Hanson, of Marquette, is accused of assault on M. A. Fosberg and Louise Fosberg. It is claimed that in attempting to collect a bill he threatened violence with a pistol. The latter parties are the complaining witnesses. The decision of the case will be announced later." A libel, in order to be actionable *per se*, and permit a recovery without allegation and proof of special damages, must contain imputations which tend to subject the libeled one to disgrace, ridicule, or contempt. We are of the opinion that the words here counted upon are such. To threaten violence with a pistol might fairly be held to be a charge at least of an assault, maybe of a crime of greater gravity.

We find that the court was in error in sustaining defendant's demurrer; hence direct that this ruling be reversed, and the case remanded for further proceedings.

All the Justices concur.
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Sallie WILLIAMS, *Plff. in Err.*,
v.
METROPOLITAN STREET RAILWAY
COMPANY.

(.....Kan.....)

*A foreign corporation is "out of the state," within the meaning of § 21 of the Code, and, for that reason, cannot avail itself of the statute of limitations of this state.

(December 12, 1903.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Smith, J.:

The agreed statement of facts on which this cause was tried in the court below was as follows:

"2d. It is agreed that the plaintiff is a widow of the age of forty-five years, and that on the 15th day of July, 1894, the plaintiff was thirty-eight years of age, and was of sound mind, and ever since has been of sound mind, and under no legal disability.

"3d. That plaintiff, on the 15th day of July, 1894, was, ever since has been, and now is, a resident and citizen of Wyandotte county, Kansas.

"4th. That the accident, cause of action, and injury for which this action is brought, occurred and accrued in the county of Wyandotte and state of Kansas on the 15th day of July, 1894.

"5th. That the injury and cause of action for which this action is brought is in tort for personal injuries received by the plaintiff on the 15th day of July, 1894, by reason of the negligent starting of a passenger car of the defendant by its employees, while the plaintiff, who was a passenger on such car, was alighting therefrom, whereby the plaintiff was thrown down and injured.

*Headnote by SMITH, J.

†After the original opinion was handed down in this case a petition for rehearing was filed, and the court thereupon made some few additions to the original petition, and the opinion published herewith is in its corrected form.

NOTE.—As to right of foreign corporation to plead statute of limitations, see also, in this series, *Winney v. Sandwich Mfg. Co.* 18 L. R. A. 524, and note; *Pierce v. Southern P. Co.* 40 L. R. A. 350; *Turcott v. Yazoo & M. Valley R. Co.* 40 L. R. A. 768; *Travelers' Ina. Co. v. Fricke*, 41 L. R. A. 557.

"6th. It is further agreed that the plaintiff, by being thrown down and injured as stated in paragraph 5 hereof, was damaged in the sum of \$150.

"7th. It is further agreed that the defendant is, and was at all times herein mentioned, a corporation, organized under the laws of the state of Missouri, and has its principal office in Jackson county, state of Missouri, where the board of directors meet and the president, vice president, secretary, and treasurer, chairman of the board of directors, and general superintendent reside, and have their offices. That all employees, both for the line in Kansas and Missouri, are hired in Missouri, and all supplies are purchased, and all contracts therefor are made, and all funds of the company are kept there.

"8th. That the defendant was, on the 15th day of July, 1894, ever since has been, and now is, a street railway company, engaged in carrying passengers from Kansas City, in the state of Missouri, into and through Kansas City, Argentine, and Rosedale, in Wyandotte county, Kansas, and from Kansas City, Argentine, and Rosedale, in Wyandotte county, Kansas, to Kansas City, Jackson county, Missouri.

"9th. That a large percentage, to wit, about 33¼ per cent, of all the business of said defendant company was, on the 15th day of July, 1894, ever since, has been, and now is, transacted in the county of Wyandotte and state of Kansas.

"10th. That on the 15th day of July, 1894, and for a long time prior thereto, ever since said date, and now, the defendant has owned, and every day since said 15th day of July, 1894, has regularly operated its cars over, 15 miles of double-track street railway upon and along the streets of Kansas City, Argentine, and Rosedale, in Wyandotte county, Kansas.

"11th. That the defendant's railway tracks, so laid in the streets of Kansas City, Kansas, Argentine, and Rosedale, and the operation of its cars thereon are authorized by and pursuant to contracts and stipulations contained in ordinances and franchises granted to said defendants by the cities of Kansas City, Argentine, and Rosedale, all cities of Wyandotte county, Kansas.

"12th. That on the 15th day of July, 1894, and at all times since said date, the defendant has owned, occupied, and maintained car barns and offices at the northeast corner of 10th street and Minnesota avenue, and at the northeast corner of 11th street and Osage avenue, in Kansas City, Wyandotte county, Kansas.

"13th. That upon the 15th day of July, 1894, and constantly ever since said date, the defendant has had in charge of its car

barns and offices mentioned in paragraph 12 hereof, a division superintendent and assistant division superintendent, both day and night.

"14th. That the division superintendent and the assistant division superintendent, mentioned in paragraph 13 hereof, have at all times mentioned herein had charge of all property of the defendant in Wyandotte county, and have had offices in said car barns where the employees engaged in the operation of the defendant company's cars on the divisions of which they are division superintendents, report each day to said division superintendent, and by him are directed in the management and operation of said cars in Kansas, and in which also has been and is transacted by said division superintendents all business transacted in Wyandotte county, Kansas, relative to the management and operation of said railway and the maintenance of said company's cars and lines of railway in said county and state, subject to the general supervision and control of their superior officers in Kansas City, Missouri.

"15th. That this action was commenced in said court on the 1st day of June, 1901, and service in this cause was made upon the assistant division superintendent in charge of the station and office of the defendant at 10th street and Minnesota avenue, mentioned in paragraph 12 hereof."

Judgment was entered in favor of the defendant. Plaintiff in error has come to this court by proceedings in error.

Messrs. Getty, Hutchings, & Dean, for plaintiff in error:

The running of the statute of limitations depends, not on the residence or nonresidence of the party who invokes it, but on his presence in, or absence from, the state.

Lane v. National Bank, 6 Kan. 74; *Investment Securities Co. v. Bergthold*, 60 Kan. 813, 58 Pac. 469.

A corporation can have no legal existence outside of the state where it is created.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. ed. 354; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Clarke v. Bank of Mississippi*, 10 Ark. 523, 52 Am. Dec. 248; *Land Grant R. & Trust Co. v. Coffey County*, 6 Kan. 245.

In view of the decisions establishing beyond question that a corporation cannot leave the state of its creation, how could the defendant in error, a Missouri corporation, be present in the state of Kansas? It is settled that it cannot.

North Missouri R. Co. v. Akers, 4 Kan.

453, 96 Am. Dec. 183; *Ætna L. Ins. Co. v. Koons*, 26 Kan. 215.

The statute of limitations does not run in favor of a foreign corporation.

Olcott v. Tioga R. Co. 20 N. Y. 210, 75 Am. Dec. 393; *Rathbun v. Northern C. R. Co.* 50 N. Y. 656; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 184; *Larson v. Aultman & T. Co.* 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915; *State v. National Acci. Soc.* 103 Wis. 208, 79 N. W. 220; *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *State v. Central P. R. Co.* 10 Nev. 47; *Robinson v. Imperial Silver Min. Co.* 5 Nev. 44; *Barstow v. Union Consol. Silver Min. Co.* 10 Nev. 386; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.* 19 Nev. 121, 7 Pac. 271; *Wood, Limitation of Actions*, § 250; *Clarke v. Bank of Mississippi*, 10 Ark. 523, 52 Am. Dec. 248.

In many of the states the running of the statute depends on the residence of the party invoking it; in others it depends on whether service could be obtained on such party. In this state neither of these facts is material.

Lane v. National Bank, 6 Kan. 74; *Hoggett v. Emerson*, 8 Kan. 262; *Investment Securities Co. v. Berghthold*, 60 Kan. 817, 58 Pac. 469.

A corporation does not leave the state of its creation by doing business in another state.

Foster-Cherry Commission Co. v. Caskey, 60 Kan. 600, 72 Pac. 268; *Com. v. Standard Oil Co.* 101 Pa. 119.

Messrs. Miller, Buchan, & Morris, for defendant in error:

A corporation is a citizen of the state of its incorporation, but it is present in any state, and can be present or absent from any state, only as its agents, officers, and business are present or absent therefrom.

Lane v. National Bank, 6 Kan. 74; *Hoggett v. Emerson*, 8 Kan. 262; *Coale v. Campbell*, 58 Kan. 484, 49 Pac. 604.

The fact that the defendant is a nonresident of Kansas is unimportant, and the whole question is, Can a corporation organized under the laws of another state be present in Kansas within the meaning of our limitation statute?

A foreign corporation which has acquired a domicile in the state for the purpose of litigation is not a nonresident so as to suspend the operation of limitation.

Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372, 78 N. W. 407; 6 Thomp. Corp. § 7841.

The full object and purpose of our law have been subserved when a plaintiff for the full period of limitation has been in a po-

sition to sue upon his claim and recover a personal judgment against the defendant.

Personal service and binding personal judgments can be had upon any foreign corporation doing business in this state, so long as it has agents and places of business here.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Reno, Nonresidents*, § 48, and note, and § 206, pp. 243, 244; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 20 N. E. 318; *Société Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Gillespie v. Commercial Mut. Marine Ins. Co.* 12 Gray, 201, 71 Am. Dec. 743; *Gibson v. Manufacturers' F. & M. Ins. Co.* 144 Mass. 81, 10 N. E. 729.

If, under the laws of the domestic state, the corporation has placed itself in such position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations.

13 Am. & Eng. Enc. Law, p. 904; *United States Exp. Co. v. Ware*, 20 Wall. 543, 22 L. ed. 422; *McCabe v. Illinois C. R. Co.* 4 McCrary, 492, 13 Fed. 827; *Huss v. Central R. & Bkg. Co.* 66 Ala. 472; *Waterman v. A. & W. Sprague Mfg. Co.* 55 Com. 554, 12 Atl. 240; *Bank of North America v. Chicago, D. & V. R. Co.* 82 Ill. 493; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Hubbard v. United States Mortg. Co.* 14 Ill. App. 40; *Bristol v. Chicago & A. R. Co.* 15 Ill. 436; *Wall v. Chicago & N. W. R. Co.* 69 Iowa, 498, 29 N. W. 427; *Koons v. Chicago & N. W. R. Co.* 23 Iowa, 493; *Oobb v. Illinois C. R. Co.* 38 Iowa, 601; *Winney v. Sandwrick Mfg. Co.* 86 Iowa, 608, 18 L. R. A. 524, 53 N. W. 421; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183; *King v. National Min. & Exploring Co.* 4 Mont. 1, 1 Pac. 727; *Hall v. Vermont & M. R. Co.* 28 Vt. 401; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. 640; *Omaha & F. Land & T. Co. v. Parker*, 33 Neb. 775, 29 Am. St. Rep. 506, 51 N. W. 139; *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411; *Blodgett v. Utley*, 4 Neb. 25; *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 109, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067; *Thompson v. Texas Land & Cattle Co.* (Tex. Civ. App.) 24 S. W. 856.

On rehearing.

The decision is in conflict with the decisions in *State v. Bogardus*, 63 Kan. 259, 65 Pac. 251, and *Bristol v. Chicago & A. R. Co.* 15 Ill. 436.

It is also in conflict with an express statute.

Gen. Stat. 1901, § 1267.

It is in conflict with the principle necessarily deducible from *J. B. Watkins Land Mortg. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385, 62 Pac. 1004.

Smith, J., delivered the opinion of the court:

The sole question involved is, whether a foreign corporation transacting business in this state can plead the statute of limitations in bar of a cause of action originating here in favor of a resident plaintiff. The statutory language applicable to the case is as follows: "If, when a cause of action accrues against a person, he be out of the state, . . . the period limited for the commencement of the action shall not begin to run until he comes into the state; . . . and if, after a cause of action accrues, he depart from the state, . . . the time of his absence . . . shall not be computed as any part of the period within which the action must be brought." Gen. Stat. 1901, § 4449.

By the 13th paragraph of § 7342 it is provided that the word "person" may be extended to corporate bodies.

It is the contention of counsel for defendant in error that, because, at the time of the injury to plaintiff below, the street railway company was doing business in Kansas, and had a superintendent here on whom process could be served, and so continued to transact business and maintain an office in this state until the action was begun, for the purpose of invoking the bar of the statute of limitations it cannot be held that the corporation was out of the state during said time.

In *Lane v. National Bank*, 6 Kan. 74, it was held that the personal absence of the debtor from the state, even if he retained a residence here at which process against him might be served, was sufficient to take the case out of the statute. This case has been reaffirmed repeatedly. *Hoggett v. Emerson*, 8 Kan. 262; *Morrell v. Ingle*, 23 Kan. 32; *Conlon v. Lamphear*, 37 Kan. 431, 15 Pac. 600; *Anent v. Lovenikall*, 52 Kan. 706, 35 Pac. 804; *Coale v. Campbell*, 58 Kan. 480, 484, 49 Pac. 604; *Investment Securities Co. v. Bergthold*, 60 Kan. 813, 58 Pac. 469.

In the early case of *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, 307, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty of which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corpora-

tion can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Counsel for the street railway company are in error when they assert that this case has been overruled by *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354. The last decision went no farther than to hold that an Illinois corporation could not be subject to a judgment *in personam* in Michigan, unless at the time of service of summons it was doing business in the latter state.

In *Shaw v. Quincy Min. Co.* 145 U. S. 444, 450, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935, Mr. Justice Gray, after quoting the above language of Chief Justice Taney, says: "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship, of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it." In the same opinion the words of Mr. Justice Curtis in *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451, are approved, where he said: "This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that state." See *Clark & M. Priv. Corp.* p. 356.

In *Land Grant R. & Trust Co. v. Coffey County*, 6 Kan. 245, 253, Mr. Justice Valentine, speaking for the court, said: "A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the state which creates it. It may send agents into other states to do business, but it cannot migrate in a body. If it attempts to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its own state, the only recognition that other states will give to it is such as the rules of courtesy and comity between states require.

The corporation sued in this action, like all others, is, in the words of Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law."

In *State ex rel. Godard v. Topeka Water Co.* 61 Kan. 547, 558, 60 Pac. 337, it is said: "A corporation exists by the will of a sovereign power. To this superior authority it owes an allegiance which it cannot abjure."

If the Metropolitan Street Railway Com-

pany was, in contemplation of law, present in this state from May, 1894, until June, 1901, then the action was barred. The corporation was sued. It is not contended that the body corporate moves itself into this state, but that, having agents here, their presence, while transacting business in its behalf, amounted to the presence of the corporation itself within the meaning of the statutes of limitation above set out. If, as stated by Chief Justice Taney, a corporation cannot migrate from one state to another, then the intangible body which was sued in this action was at all times absent from this state and present in the state of Missouri. In *Tioga R. Co. v. Blossburg & C. R. Co.* 20 Wall. 137, 149, 22 L. ed. 331, 337, Mr. Justice Hunt said: "We do not say that a corporation cannot run its cars in a state other than that where it is incorporated and where it is domiciled, nor that it cannot by its lawful agents make contracts and do other business in such state. We assume that it can. In doing these things it does not lose its residence in the former state, nor become a resident of the latter. It still resides in the state where it is incorporated, and does not depart therefrom."

The language above quoted was used when the court was considering the effect of a section of the New York statute of limitations exactly like ours. It is true, as counsel state, that in the case last referred to it was held by a majority of the court that in New York no personal judgment can be obtained against a foreign corporation by service on its officers or agents, although it may be doing business in that state. We do not conclude, however, that a different result would have been reached had the law there permitted a valid personal judgment to be rendered, based on service on the corporation's agents in New York.

In the brief of counsel for the street railway company it is said: "The full object and purpose of our law have been subverted when a plaintiff for the full period of limitation has been in a position to sue upon his claim and recover a personal judgment against the defendant." The same argument was made in behalf of Senator Lane in 6 Kan. 74, *supra*, who maintained a residence at Lawrence, in this state, where personal service could have been had by leaving a copy of the summons under § 64 of the Code, and a personal judgment obtained thereon, which would be good everywhere. The court, however, held that the statute of limitations, which excludes the time during which the debtor is absent from the state, should receive the natural meaning the words used import. The plaintiff in the *Lane Case* was in no wise obstructed

or delayed in bringing his action by the absence of the debtor in Washington, for, during the whole time of such absence, he could have obtained service of summons as valid in all respects as if had personally on Mr. Lane in this state.

North Missouri R. Co. v. Akers, 4 Kan. 453, 475, 96 Am. Dec. 183, was an action against a Missouri railroad corporation for breach of contract. The latter pleaded the statute of limitations. The court said: "The reply to the plea of the statute of limitations was that the defendant was a foreign corporation, created and existing under the laws of Missouri, and having no corporate existence under the laws of Kansas. And there was testimony absolutely proving these allegations. So that the assumption of fact in the instruction is hardly sustained by the record. But we have already attempted to show that a corporation is a person under the Code, and, within the meaning of § 28,—an artificial being, a corporate body, confined to the state of Missouri, where it remained, until this suit was brought, for aught that appears from the record,—and is subject to the exceptions enumerated in § 28 of the Code. To hold otherwise would be to say that the legislature intended to discriminate in favor of a foreign corporation without any just grounds for such a conclusion. We think the principle of this instruction was settled by the court in the case of *Bonifant v. Doniphan*, 3 Kan. 35, and against the plaintiff in error."

There was no showing, however, in the case referred to that the foreign corporation had at any time transacted business in this state. The court based its decision on the authority of *Bonifant v. Doniphan*, 3 Kan. 26, which first adopted the construction of the limitation statute afterwards adhered to in the *Lane Case* and others cited above. It will be noted that the court applied the language of § 4449 of the present statute, *supra*, to an artificial being,—a corporate body, and gave it the same effect as if an absent individual was defendant in the action. The same application of the statute was made in *Etina L. Ins. Co. v. Koons*, 26 Kan. 215, the third paragraph of the syllabus reading: "Where the petition alleges that the defendant is a foreign insurance corporation, created and existing under the laws of Connecticut, with its principal office in the city of Hartford, in that state, it sufficiently appears therefrom that the defendant is a nonresident, and not present in the state, and an objection upon the ground that the cause of action therein set forth is barred by the statute of limitations, is not well taken, because the exceptions enumerated in § 21 of the Code apply."

A corporation must be thought of without reference to the members who compose it. The latter may die, but the body corporate does not. While a valid judgment may be taken against a corporation in this state by service here on its officers or agents transacting business for it, yet such fact does not compel us to hold that within the meaning of our limitation law it is personally present in the state when served. In the *Case of Senator Lane* a valid personal judgment could have been obtained against him by his creditor by service of summons left at his usual place of residence in Kansas, although at the time he was temporarily absent in Washington in discharge of his official duties. In *Foster-Cherry Commission Co. v. Caskey*, 66 Kan. 600, 72 Pac. 268, it was held that, although the principal business of a foreign corporation was transacted in this state, such fact did not authorize the taxation of its capital stock here. The case of *Com. v. Standard Oil Co.* 101 Pa. 119, 146, is quoted from: "The domicile of the Standard Oil Company is in the state of Ohio. Being a corporation, it is an invisible, artificial, and intangible thing. When it sent its agents to this state to transact business, it no more entered the state in point of fact than any other foreign corporation, firm, or individual who sends an agent here to open an office or branch house."

Wisconsin has a limitation statute like ours. The clause relevant here reads: "If, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms respectively limited (six years) after such person shall return or remove to this state." This provision was held to apply to the temporary absence of a resident of the state, although during such absence a summons might have been served by leaving it at his usual place of abode. *Parker v. Kelly*, 61 Wis. 552, 555, 21 N. W. 539. Following this, in *Larson v. Aultman & T. Co.* 86 Wis. 281, 286, 39 Am. St. Rep. 893, 56 N. W. 915, it was decided that a foreign corporation came within the purview of the limitation statute above quoted. The court said that, the word "person" being applicable to corporations as well as to individuals, it was obvious that when the cause of action accrued the corporation was "out of the state." In *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372, 78 N. W. 407, the case of *Larson v. Aultman & T. Co.* 86 Wis. 281, 286, 39 Am. St. Rep. 893, 56 N. W. 915, was followed. On a motion for rehearing, it was said: "The appellant argued that . . . a foreign cor-

poration which has acquired a domicile in this state for the purpose of litigation is not a nonresident in such sense as to suspend the operation of the statute of limitations against it. 6 Thomp. Corp. § 7841. The motion was denied."

In most of the cases cited by counsel for defendant in error the right of a foreign corporation to plead the statute of limitations is made to depend on whether valid service could be had on it in the state where sued. See *Winney v. Sandvick Mfg. Co.* 86 Iowa, 608, 18 L. R. A. 524, 53 N. W. 421; *Turcott v. Yazoo & M. Valley R. Co.* 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067. As we have shown, such is not the test in this state. The last case cited expressly recognizes that the doctrine contended for by defendant in error does not obtain in Kansas. It may be said that a foreign corporation doing business in this state through agents is constructively present here for the purposes of valid service of summons on it, although it is actually out of the state. *Merchants' Mfg. Co. v. Grand Trunk R. Co.* 21 Blatchf. 109, 13 Fed. 358.

The constructive presence of Senator Lane in Kansas at his place of abode in Lawrence, where valid service might have been had, did not avail him during his actual absence from the state.

An examination of the decisions of different states on the subject in hand will disclose that in almost all of them, where it has been held that a foreign corporation situated like defendant in error may invoke the limitation laws of the jurisdiction where it is sued, statutory provisions differing from ours exist. A notable exception, however, is found in Nebraska, where, under a statute like Gen. Stat. 1901 § 4449, *supra*, the doctrine of the *Lane Case* and others cited above is denied. In *Bauserman v. Blunt*, 147 U. S. 647, 657, 37 L. ed. 316, 13 Sup. Ct. Rep. 466, the court said: "But what may be the law of Nebraska is immaterial. The case at bar is governed by the law of Kansas, and the duty of this court to follow, as a rule of decision, the settled construction by the highest court of Kansas of a statute of that state is not affected by the adoption of a different construction of a similar statute in Nebraska, or in any other state." On the question involved, see also *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157, and cases cited; *State v. National Acci. Soc.* 103 Wis. 208, 79 N. W. 220; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Barstow v. Union Consol. Silver Min. Co.* 10 Nev. 386; *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248.

Whether foreign corporations which have purchased or leased railroads in this state, as provided in Gen. Stat. 1901, § 5871, are affected by the principle involved in this case, we do not decide.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the Justices concur.

MARYLAND COURT OF APPEALS.

Sody SALABES, *Appt.*,
v.
Jacob CASTELBERG *et al.*
(.....Md.....)

1. A ring for the finger, although an article of personal adornment, is a proper subject for a chattel mortgage.
2. A sufficient description of a diamond ring for the purpose of a chattel mortgage is effected by specifying the weight of the stone, the style of setting, and the house where the owner resides and the ring is to be kept.
3. A statute requiring a mortgagee to warrant that he will not require the mortgagor to pay the tax imposed by statute upon the interest payable under the mortgage is not applicable to a mortgage under which no interest is payable, either directly or indirectly.
4. A promise by a chattel mortgagee, who has a right to possession of the mortgaged property because of the default of the mortgagor, that, in case the mortgagor will surrender a pawn ticket representing the property, the mortgagee will redeem the property, cancel the mortgage, and consider the transaction closed, is without avail to the one who issued the pawn ticket with constructive notice of the rights of the mortgagee; since, having the exclusive right to the possession of the property, his promise is without consideration, and it is the duty of the pawnee, and not that of the mortgagee, to protect his interest by redemption.
5. A party cannot complain of the granting of prayers for his opponent which did not authorize a recovery of anything more than might be recovered under prayers offered by himself.

(February 19, 1904.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiffs in an action brought to recover damages for the conversion of a ring alleged to belong to plaintiffs. *Affirmed.*

The facts are stated in the opinion.

Mr. Benjamin Rosenheim, for appellant:

The description of the ring was indefinite and uncertain.

NOTE.—The objection made in the case above to the validity of a chattel mortgage on the ground that the property mortgaged was an article worn on the person presents a somewhat novel question, on which this decision seems to be one of first impression.
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Fernser v. Bradley, 87 Md. 489, 40 Atl. 58; *Montgomery v. Wight*, 8 Mich. 143; *Herman, Chat. Mortg.* p. 83; *Golden v. Cockril*, 1 Kan. 259, 81 Am. Dec. 510; *McCord v. Cooper*, 30 Ind. 9; *Stewart v. Jaques*, 77 Ga. 365, 4 Am. St. Rep. 86, 2 S. E. 283.

An article of wearing apparel, or an ornament which adorns the person, and which attends the person in his daily walks of life, is not the subject of a chattel mortgage.

Leiris v. Stevenson, 2 Hall, 63.

The mortgage is invalid as to third persons because of the absence of an affidavit of the mortgagee, indorsed thereon, that the mortgagor was not required to pay the tax levied upon the interest.

Art. 81, § 146, Code Supp. pp. 553, 554; *Cockey v. Milne*, 16 Md. 200; *Reiff v. Eshleman*, 52 Md. 582; Code, art. 21, § 49, p. 264.

Having, in fact, received from Linthicum the pawn ticket, which was by its terms transferable upon the faith of their promise to redeem the pledge, and to cancel the mortgage from them to Linthicum, the appellees thereby became liable to the appellant for the advances from the appellant to Linthicum, and, at the same time, ratified the pledge.

George v. Andrews, 60 Md. 33, 45 Am. Rep. 706; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. 846.

There was a waiver, and such waiver may be shown by parol.

Herzog v. Sawyer, 61 Md. 344.

The appellees are estopped from asserting any claim against the appellant without first tendering the full amount advanced by him to Linthicum.

Acker v. Bender, 33 Ala. 230; *Burns v. Campbell*, 71 Ala. 271; *Phelps v. Hendrick*, 105 Mass. 106; *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653; *Moore v. Hill*, 85 N. C. 213.

The mortgagees (appellees) having received the sum of \$68 from Linthicum on account of the purchase money for the ring, and also the pawn ticket, or receipt, with the express understanding that they were to pay to the appellant the amount of the advance, and the mortgage was to be considered extinguished, ought not, in equity and good conscience, to be permitted to violate their agreement.

McFadden v. O'Donnell, 18 Cal. 160; *Her-*

zog v. Sawyer, 61 Md. 344; *Ackla v. Ackla*, 6 Pa. 228; *Wallis v. Long*, 16 Ala. 738.

A waiver takes place where a party dispenses with the performance of something which he has a right to exact.

Herman, Estoppel, § 825, p. 954; *First Nat. Bank v. Foster*, 9 Wyo. 159, 54 L. R. A. 550, 61 Pac. 466, 63 Pac. 1056; *Cole v. Hines*, 81 Md. 476, 32 L. R. A. 455, 32 Atl. 190.

Messrs. Martin Lehmayr and Louis N. Frank, for appellees:

The description of the diamond ring is full and complete, and amply sufficient to identify it.

5 Am. & Eng. Enc. Law, 2d ed. pp. 956, 957; *Harris v. Woodard*, 96 N. C. 232, 1 S. E. 544; *Jones, Chat. Mortg.* 4th ed. 53, 54, 64, 65, 78.

The recording of the chattel mortgage within the time prescribed by law, under art. 21 §§ 44, 45, Md. Code Pub. Gen. Laws, charges the appellant with full notice of all its terms and conditions.

Kreuzer v. Cooney, 45 Md. 583; *Oahoon v. Miers*, 67 Md. 573, 11 Atl. 278; *Hambleton v. Hayncard*, 4 Harr. & J. 443.

Any personal property which is capable of being sold may be mortgaged.

5 Am. & Eng. Enc. Law, 2d ed. p. 974; *Jones, Chat. Mortg.* 4th ed. § 114, pp. 126, 127; 6 *Lawson, Rights, Rem. & Pr.* § 3079, p. 4998; *Herman, Chat. Mortg.* § 36, p. 70.

Recording had the same effect in transferring the title as if the mortgagee had been put in possession of the mortgaged property, and the law presumes notice of the mortgage and of its legal effect; and all persons dealing with the mortgagor with respect to such property, whether as purchasers or creditors, are charged with such notice.

Cahoon v. Miers, 67 Md. 573, 11 Atl. 278; *Kreuzer v. Cooney*, 45 Md. 583.

The alleged agreement to redeem was a *nudum pactum*.

6 Am. & Eng. Enc. Law, 2d ed. pp. 750, 752, 756; *Anson, Contr. Knowlton's* 2d Am. ed. 1887, p. 106; *Hammon, Contr.* §§ 330-332, p. 662; *Wald's Pollock*, Contr. 2d Am. ed. p. 177, and notes; *Abbott v. Doane*, 34 L. R. A. 33, note; 8 *Harvard Law Rev.* pp. 27-38; *Wendover v. Baker*, 121 Mo. 273, 25 S. W. 918; *Crosby v. Wood*, 6 N. Y. 369; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Hamer v. Sidway*, 124 N. Y. 538, 12 L. R. A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Hill v. Beebe*, 13 N. Y. 556; *Withers v. Ewing*, 40 Ohio St. 400; *Esterly Harvesting Mach. Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804; *Allen v. Plasmeyere* (Neb.) 90 N. W. 1125; *Lingenfelder v. Wainwright Brewing Co.* 103 Mo. 578, 15 S. W. 844; *Conover v. Stillwell*, 34 N. J. L. 54; *Ritenour v. Math-*

eus, 42 Ind. 7; *Schuler v. Myton*, 48 Kan. 282, 20 Pac. 103; *Wescott v. Mitchell*, 95 Me. 377, 50 Atl. 21; *Ayres v. Chicago, R. I. & P. R. Co.* 52 Iowa, 478, 3 N. W. 522; *Martin v. Armstrong* (Tex. Civ. App.) 62 S. W. 83; *Holmes v. Boyd*, 90 Ind. 332; *Morgan v. Hodges*, 89 Mich. 404, 15 L. R. A. 438, 50 N. W. 876; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75.

Linthicum was in default. If the Castlebergs had then taken possession or the ring, *Linthicum* could not have successfully sued them in an action at law.

Jamieson v. Bruce, 6 Gill & J. 72, 73, 26 Am. Rep. 557; *Mayhew v. Hardesty*, 8 Md. 479.

By a mortgage the legal estate becomes vested in the mortgagee, defeasible at law, upon the performance of the conditions and payment of the money at the time stipulated; but, upon default of the mortgagor, it becomes indefeasible at law, and defeasible only in equity.

Erans v. Merriken, 8 Gill & J. 39; *Mayhew v. Hardesty*, 8 Md. 479; *Bank of Commerce v. Lanahan*, 45 Md. 396; *Cahoon v. Miers*, 67 Md. 573, 11 Atl. 278; *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026; *Allen v. National State Bank*, 92 Md. 509, 52 L. R. A. 760, 84 Am. St. Rep. 517, 48 Atl. 78.

The surrender of an instrument wrongfully obtained and held formed no consideration for a premise.

Crosby v. Wood, 6 N. Y. 369; *Wendover v. Baker*, 121 Mo. 273, 25 S. W. 918; *Hamer v. Sidway*, 124 N. Y. 548, 12 L. R. A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; *Withers v. Ewing*, 40 Ohio St. 400; *Esterly Harvesting Mach. Co. v. Pringle*, 41 Neb. 265, 59 N. W. 804; *Lingenfelder v. Wainwright Brewing Co.* 103 Mo. 578, 15 S. W. 844; *Allen v. Plasmeyere* (Neb.) 90 N. W. 1125; *Martin v. Armstrong* (Tex. Civ. App.) 62 S. W. 83; *Hill v. Beebe*, 13 N. Y. 556.

A debt cannot be discharged by a contract to pay a portion of a sum due in satisfaction of the whole.

Jones v. Ricketts, 7 Md. 108; *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383, 1 Am. St. Rep. 396, 10 Atl. 233; *Geiser v. Kershner*, 4 Gill & J. 305, 23 Am. Dec. 566; *Ingersoll v. Martin*, 58 Md. 74, 42 Am. Rep. 322; *Oberndorff v. Union Bank*, 31 Md. 130, 1 Am. Rep. 31; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411.

The evidence sought to be admitted under the proposed proffer would have contradicted and varied the mortgage, which is an instrument under seal.

Harvey v. McAdams, 32 Mich. 472; *State use of Barnard v. Gott*, 44 Md. 342; *Zihlman v. Cumberland Glass Co.* 74 Md. 303,

22 Atl. 271; *Conner v. Groh*, 90 Md. 674. 45 Atl. 1024; *Dixon v. Clayville*, 44 Md. 573; *Nally v. Long*, 71 Md. 585, 17 Am. St. Rep. 547, 18 Atl. 811; *Abbott v. Gatch*, 13 Md. 315, 71 Am. Dec. 635; *Patchin v. Pierce*, 12 Wend. 61; *Jones, Chat. Mortg.* 4th ed. §§ 64, 67-91; *Farrow v. Hayes*, 51 Md. 498; *Cas-sard v. McGlannan*, 88 Md. 168, 40 Atl. 711; *Blakistone v. German Bank*, 87 Md. 302, 39 Atl. 855.

Salabes, the appellant, was not a party to the agreement set out in the proffer, and there is no privity between Salabes and the appellees, and there never was any duty or obligation whatsoever, owing by the appellees to the appellant.

Small v. Schaefer, 24 Md. 144; *Carnegie v. Morrison*, 2 Met. 402; *Brewer v. Dyer*, 7 Cush. 340; *Owings v. Owings*, 1 Harr. & G. 484; *Exchange Bank v. Rice*, 107 Mass. 41, 9 Am. Rep. 1; 8 Harvard Law Rev. pp. 93-106; *Constable v. National S. S. Co.* 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062.

Salabes could not have sued the appellees under the alleged agreement.

Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; *Hammon, Contr.* § 332, p. 674; *Brantly, Contr.* chap. 8; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Mellen v. Whipple*, 1 Gray, 317.

The appellees were entitled to the full value of the ring, even though such value was greater than the balance due on their claim.

Harker v. Dement, 9 Gill, 13, 52 Am. Dec. 670; *Jones, Chat. Mortg.* 4th ed. § 448, p. 512; *White v. Webb*, 15 Conn. 302; *Adamson v. Petersen*, 35 Minn. 529, 29 N. W. 321; *Stevenson v. Lord*, 15 Colo. 131, 25 Pac. 313; *Hanly v. Davis*, 166 Mass. 1, 43 N. E. 523; *Stirling v. Garrites*, 18 Md. 469.

Boyd, J., delivered the opinion of the court:

The appellees sued the appellant in trover for the conversion to his own use of a diamond ring, which one William B. Linthicum had mortgaged to them. The mortgage is dated the 27th of October, 1900, and was given to secure the sum of \$120, payable in weekly instalments of \$2 per week. Linthicum had paid the appellees \$68, and the verdict was for only \$52, being the balance due. On the 11th of December, 1900, Linthicum obtained \$65 on the ring from the appellant, who was a pawnbroker, and on September 20, 1901, a new ticket was issued for that sum, which was payable in six months. There are six bills of exception in the record, the first five presenting rulings of the court below on the admissibility of testimony, and the sixth embracing the prayers.

1. The first was to the ruling of the court 64 L. R. A.

in admitting the mortgage in evidence, to which the defendant objected because (a) the description of the property in the mortgage is too indefinite and uncertain; (b) a ring, being an article of personal adornment, cannot be the subject of a chattel mortgage; (c) there was not annexed to the mortgage an affidavit of the mortgagees that they did not require the mortgagor to pay the tax levied upon the interest, etc. These objections were based on the theory that the appellant claimed to be (and the record does not show the contrary) in the position of an innocent purchaser for value, without actual notice of the mortgage; and he does not contend that the mortgage would not be valid between the parties. We must therefore consider the question from the standpoint of an innocent third person who had no notice of the mortgage, except such constructive notice as results from the recording of it. If the appellant is right in his position that a ring cannot be the subject of a chattel mortgage, that will end the controversy, and we will therefore first consider it.

The general rule is that all personal property capable of being sold, can be mortgaged. 5 Am. & Eng. Enc. Law, 2d ed. p. 974; 6 Cyc. Law & Proc. p. 1037. Our testamentary law contemplates jewelry being included in the appraisalment of a decedent's estate (Code Pub. Gen. Laws, art. 93, § 217), and we have no statute that in any wise interferes with the owner mortgaging or making other disposition of it. A "chattel" is defined in Bouvier's Law Dictionary to be "every species of property, movable or immovable, which is less than a freehold;" and the same definition is given, in substance, in *Devocmon v. Devocmon*, 43 Md. 347. In Bouvier it is also said that "personal chattels are properly things movable, which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another." As a diamond ring is manifestly within the definition of a chattel, there would seem to be no valid reason, in the absence of a statute prohibiting it, why such property cannot be the subject of a chattel mortgage. Under our statute a mortgage of personal property must be recorded in the county or city where the mortgagor resides within twenty days from its date, or, if he resides out of the state, it must be recorded in the county or city where the property is located (Code Pub. Gen. Laws, art. 21, §§ 44, 45), and the statute was complied with in that respect in this case. Anyone dealing with that class of property takes more or less risk, but he can protect himself to some extent by making inquiries of the owner and examining the records where he lives, etc.

So, without further extending the discussion of that question, we are of the opinion that a diamond ring may be the subject of a chattel mortgage.

The description given in the mortgage is: "The following property and chattels: One single stone diamond ring, Tiffany setting, diamond weighing 7-8 1-64 Karats 6583 lahs." It also provided "that the aforesaid chattels shall until default be retained by the mortgagor in the city of Baltimore, state of Maryland, at No. 703 Portland street, and they shall not be removed without the written consent of the mortgagees." In 6 Cyc. Law & Proc. p. 1022, it is said, in an article by Mr. Jones, the well-known author on this and other subjects, that "as against third persons the mortgage must point out the subject-matter so that the third person may identify the property covered by the aid of such inquiries as the instrument itself suggests;" and many cases are cited in the notes. In 5 Am. & Eng. Enc. Law, 2d ed. p. 956, the rule is stated thus: "If the description in a chattel mortgage is such as will enable third persons to identify the property, aided by the inquiries which the mortgage itself indicates and directs, the mortgage, when recorded, is constructive notice to parties purchasing in good faith and for a valuable consideration." The description of this ring, as given in the mortgage, was certainly "such as will enable third persons to identify the property, aided by the inquiries which the mortgage itself indicates and directs." The appellant testified that there were no marks of identification on the ring, and that the only way he could determine the weight would be to remove the stone from the setting, and weigh it on a diamond scale; that any other judgment would be only guesswork. He also explained that by Tiffany setting is meant one that was first made by Mr. Tiffany of New York, and it had taken its name from him; "but every jeweler in the United States manufactures that setting." That was perhaps rather a broad statement, but, if it be correct, it would seem to be difficult to describe a ring like this more accurately than was done in this mortgage. In answer to a question by the court as to whether a witness, who was a clerk of the appellant, could suggest any way by which a fuller description could be made, he replied: "I think the ring could have been distinguished as a Tiffany setting, giving the weight of the thing complete as it was, and giving the finger size of the ring, which would be a more accurate description. Even that would not be sufficient to identify the ring after it had been away probably three months from the original owner." The means of identification suggested by this witness do not seem

to be much, if any, more accurate than those adopted by the appellees; indeed, when it is remembered that the number of the residence of the mortgagor on Portland street, in the city of Baltimore, is given, together with the other description, it would be difficult to make it more accurate. The record does not explain the meaning of "6583 lahs," but it was shown that the ring pawned by Linthicum is the same one that was purchased from the appellees, and if the appellant had examined the records he would have received such information as to put him on inquiry to further identify the ring. This case differs materially from that of *Fesener v. Bradley*, 87 Md. 488, 40 Atl. 58. There the bill of sale simply described the property as "one-half interest in eight horses," without saying where they were or giving any other description of them. We said: "Property of that character should be described with at least reasonable certainty. The age, color, name, some distinctive mark, or something by which the animal could be to some extent identified, should be given." And so the vehicles there referred to were capable of more definite description than was given. But in this case, as the only description that could reasonably be expected was given, and that was ample to put persons dealing with the ring on inquiry, the mortgagees should not be made to suffer. It is not pretended that the appellant was misled by the description that was given, and if he had read the mortgage, and had seen that Wm. B. Linthicum, who lived at 703 Portland street, in the city of Baltimore, had undertaken to secure the appellees by mortgaging a ring such as is described, it would have been utterly inexcusable in him to accept such a ring from the same Wm. B. Linthicum. Any person of ordinary intelligence would be warned by the information given in the mortgage not to accept such a ring as is therein described from Linthicum, and, after all, that is the great object in recording chattel mortgages. Pawnbrokers might protect themselves, as well as owners of property and mortgagees, from the fraudulent conduct of those pawning goods by making more thorough inquiries than seem to have been made in this case. The ticket issued by the appellant, which is made transferable on its face, gives a much more indefinite description than is found in the mortgage. We are of the opinion that the description was sufficient, and the recording of the mortgage was constructive notice to the appellant.

Nor do we think that the failure to annex to the mortgage an affidavit of the mortgagees that they did not require the mortgagor to pay the tax levied upon the interest, etc., invalidates it. There is no cove-

nant to pay any interest in the mortgage. It was given to secure the payment of the purchase money, which was payable in instalments. Section 146A of article 81 (Acts 1898, chap. 313, p. 885), requires mortgagees to "annually pay a tax of 8 per centum upon the gross amount of interest covenanted to be paid each year to said mortgagee or his assigns by the mortgagor." Section 146D of that article (Acts 1898, chap. 275, p. 819), as in force when the mortgage was given, provided for any person lending money on mortgage upon property in this state making affidavit "to the effect that he has not required the mortgagor, his agent or attorney, or any person for the said mortgagor, to pay the tax levied upon the interest warranted to be paid in advance, nor will he require the same to be paid by the mortgagor or any person for him during the existence of said mortgage." The word "warranted" was evidently intended to be "covenanted," and this section, as amended by act 1902, chap. 26, p. 33, uses the latter term. There was no interest provided for in this mortgage, and hence the provision requiring the affidavit is not applicable. We do not mean to say that, if interest was included in these payments, the statute could not be applied merely because the parties covered it up by putting it in the form of principal, although it was in fact interest: but there is no evidence of that, and, so far as the case is presented by the record, it was simply a mortgage to secure the purchase money, payable in instalments, and does not provide for the payment of any interest. It is therefore unnecessary to consider Acts 1902, chap. 102, p. 124, which is "An Act to Make Valid Mortgages and Assignments of Mortgages Defectively Sworn to and Recorded since the Tenth day of April, in the Year Nineteen Hundred," or other questions affecting this branch of the case.

2. The second and fourth bills of exception can be considered together. The defendant offered to prove by Linthicum, the mortgagor, that in June, 1901, one of the mortgagees agreed with him that if he would give them the pawn ticket for the ring they would pay the amount advanced thereon by the defendant, that the mortgage should be considered settled, the transaction extinguished, and that he (Linthicum) did in fact give the pawn ticket to one of the mortgagees. The same testimony was offered to be proven by Mrs. Linthicum, and on objection the court refused to allow that evidence to be given, and its rulings are presented by these two bills of exception. It is difficult to understand upon what theory that testimony could have been admissible under the circumstances of this case. There
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can be no doubt that at that time Linthicum was in default under the terms of the mortgage, and the appellees were entitled to the possession of the ring. It was clearly the duty of Linthicum to surrender the pawn ticket if that in any way interfered with the appellees getting possession of it. The mortgage provided that on default of payment of any instalment, "or if the mortgagor shall sell or assign said chattels or any part thereof, then the whole debt shall, at the option of the mortgagees, without notice of said option to anyone, and without demand, become at once due and payable, and the said mortgagees shall thereupon have the right, without any demand whatsoever, to take possession of said property," etc. After providing for a sale of the property, paying all costs and charges, etc., it concludes: "No stipulation herein contained shall be deemed rescinded as against said mortgagee, unless such rescission is in writing and signed by said mortgagee." Linthicum was expressly prohibited from selling or assigning the ring, and therefore the appellant had no right to accept it from him, and if he chose to do so in opposition to the terms of the mortgage, of which we have said he had constructive notice, he must take the consequences, at least in a suit at law. It is true that Linthicum had an equity of redemption, and the appellant as his assignee could likewise have redeemed the ring, but he could not have done that without paying the appellees the balance due them on the mortgage. Although this is a suit at law, the appellees have only demanded of the appellant what he would have been required to do in equity, and therefore he is not injured by the verdict.

3. In view of what we have already said, it would be useless to discuss the third and fifth exceptions, and it is only necessary to say that the court was right in those rulings. The appellant has no reason to complain of the prayers granted for the plaintiffs, which limited the right of recovery to the principal still due the mortgagees, and then only provided the jury found that that amount did not exceed the value of the ring. The prayer offered by the defendant himself contained everything that was necessary to enable the plaintiffs to recover what they did. It instructed the jury that, if they found that the plaintiffs sold the ring to Linthicum for \$120, and to secure the purchase money Linthicum executed and delivered the mortgage, and that he had paid \$68 on account of the purchase money, "then the plaintiffs are entitled to recover, and, in estimating the damage or amount to which the said plaintiffs shall be entitled, they shall deduct from the amount of said one

hundred and twenty dollars (\$120) the amount paid by the said William B. Linthicum on account thereof." That is precisely what the jury did, and did not even allow interest.

It is unnecessary to discuss the other questions suggested by counsel, although

they have shown great industry and ability in presenting them. Under our view of the case they need not be determined, and the judgment will be affirmed for the reasons we have given.

Judgment affirmed, the appellants to pay the costs.

MISSISSIPPI SUPREME COURT.

Town of HAZLEHURST, *Appt.*,
v.

Myra B. MAYES.

(.....Miss.....)

The owner of trees in a highway has no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality, which has full authority to establish the same, and full jurisdiction over the highway within its limits.

(March 7, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Copiah County in plaintiff's favor in an action brought to recover damages for the alleged wrongful cutting of plaintiff's trees. *Reversed*.

The facts are stated in the opinion.

Mr. J. S. Sexton, for appellant:

Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them, and may, therefore, destroy them, when necessary, in the progress of constructing a sidewalk.

Mt. Carmel v. Shaw, 155 Ill. 37, 27 L. R. A. 580, 40 Am. St. Rep. 311, 39 N. E. 584; *Hyde Park v. Dunham*, 85 Ill. 569; *Chase v. Oshkosh*, 29 Am. St. Rep. 898, and note, 81 Wis. 313, 15 L. R. A. 553, 51 N. W. 560; *Western U. Teleg. Co. v. Williams*, 86 Va. 690, 8 L. R. A. 429, 19 Am. St. Rep. 908, 11 S. E. 106; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735, 14 Am. St. Rep. 564, 6 So. 230; *Smith, Modern Law of Mun. Corp.* § 1311; *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380; *Blackwell v. Hill*, 76 Mo. App. 46.

Mrs. Mayes has sued the wrong party, and should have sued the contractor if she had a right to sue anybody.

McAllister v. Albany, 18 Or. 426, 23 Pac. 845; *Dill. Mun. Corp.* 1029; *Smith v. Milwaukee Builders' & T. Exchange*, 91 Wis. 360, 30 L. R. A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; *Powell v. Virginia Constr. Co.* 88 Tenn. 692, 17 Am. St. Rep. 925,

13 S. W. 691; *New Orleans, B. R. V. & M. R. Co. v. Norwood*, 62 Miss. 567, 52 Am. Rep. 191; *Arasmith v. Temple*, 11 Ill. App. 50; *Stalder v. Huntington*, 153 Ind. 354, 55 N. E. 88; *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696, 12 N. E. 296; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Congreve v. Morgan*, 5 Duer, 495; *New York v. Furze*, 3 Hill, 616; *St. Paul Water Co. v. Ware*, 16 Wall. 506, 21 L. ed. 485; *Dyggert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Vanderpool v. Hussion*, 28 Barb. 196; *Matheny v. Wolffs*, 2 Duv. 137; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Bowers v. Peate*, L. R. 1 Q. B. Div. 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321; *Ellis v. Sheffield Gas Consumers' Co.* 23 L. J. Q. B. N. S. 42, 2 C. L. R. 249, 2 El. & Bl. 767, 18 Jur. 146, 2 Week. Rep. 19.

Mr. R. N. Miller for appellee.

Truly, J., delivered the opinion of the court:

The town of Hazlehurst, through its board of mayor and aldermen, decided to construct a municipal waterworks and electric-light system. In the construction of this plant it became necessary to establish and locate a system of posts and wires over the streets of the town. In the course of this work the contractor who was installing the plant found that the wires were interfered with by shade trees planted along the sidewalks of the public streets. The difficulty being reported to the municipal authorities, permission was granted the contractor and his employees to trim, whenever necessary, all trees which were on the line of the electric-light wires. In so doing five shade and ornamental trees located between the sidewalk and the public street in front of appellee's residence were, contrary to her wishes, trimmed,

NOTE.—As to the cutting of trees in highway to make way for telephone wires, see, in this series, *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280; *Southern Bell Teleph. & Teleg. Co. v. Francis*, 31 L. R. A. 193; *Wyant v. Central Teleph. Co.* 47 L. R. A. 64.

A. 497; and *Bronson v. Albion Teleph. Co.* 60 L. R. A. 426.

As to right of street railway company to remove shade trees in the construction of its road, see *Miller v. Detroit, Y. & A. A. Ry.* 51 L. R. A. 955.

and in consequence thereof their symmetry was marred, and their value as shade trees diminished. For this damage appellee sued, and the jury awarded her a verdict in the sum of \$125. The appellant defended on two grounds: First, that the cutting was inflicted by the employees of an independent contractor, and that, therefore, the town was not liable: second, that this was a legitimate exercise of the power of the municipality in pursuance of the authority and jurisdiction granted it by law over the public streets of the town. Appellant asked that these two phases of its defense be presented to the jury by appropriate instructions, but these were by the court refused, and the case was at last submitted to the jury on the sole question of what amount of compensatory damages the appellee was entitled to recover.

The second contention presents the question of prime importance. By § 2947 of the Revised Code of 1892 all municipalities in this state operating thereunder are granted authority "to exercise full jurisdiction in the matter of streets, . . . to open and lay out and construct the same; to repair, maintain, pave, sprinkle, adorn, and light the same;" and by § 2964 the additional power is granted to towns "to provide for the lighting of streets, parks, and public grounds, and the erection of lamps and lamp-posts." The power of municipalities over the streets within their limits has been the subject of repeated judicial inquiry. In this state it has been decided that the rule was the same whether the fee in the highway was vested in the municipality or in the abutting owner, and in either event the rights of the abutting owner in reference thereto were protected. It has also been held that the abutting owner was entitled to recover compensation for any additional servitude which might be placed on his property by the use of the highway. In *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735, 14 Am. St. Rep. 564, 6 So. 230, the supreme court said that the establishment of a steam railroad upon the street was such an additional servitude as entitled the abutting owner in front of whose property the railroad was constructed to recover damages, and the application of the same rule has been announced in reference to both telegraph and telephone companies. *Stowers v. Postal Teleg. Cable Co.* 68 Miss. 562, 12 L. R. A. 864, 24 Am. St. Rep. 290, 9 So. 356; *Cumberland Teleph. & Teleg. Co. v. Cassidy*, 78 Miss. 668, 29 So. 762. The real rule of right in the premises, as we understand it, is this: Whether the fee be or not in the abutting owner, he is entitled to free ingress and egress to his property, and to the customary use of the

street, and has the right to be compensated for any additional servitude which may be placed on his property by any use of the highway not incidental or necessary to its full enjoyment as such by the public. This brings up for decision the question of what is and what is not a necessary equipment for the public convenience. In *Gulf Coast Ice & Mfg. Co. v. Bowers*, 80 Miss. 581, 32 So. 114, in an admirably clear and lucid opinion, Terral, J., after a full collation of all the authorities, announced that lighting of the streets by the municipality was a reasonable and legitimate exercise of municipal authority, and that the abutting owner was not entitled to recover for the inconvenience or damage occasioned by the location in front of his property of the necessary poles and wires of an electric light company which had been contracted with by the municipality for public lighting. We cannot do better than to quote, as applicable to this case, and to a great degree controlling it, the following language from that opinion: "The authorities are quite uniform that a city or town may light its streets as a means of making them more safe and convenient for public travel. The right to light the town is presumed to have been acquired and paid for, as incident to the right of public passage, when the property was condemned or dedicated for public use. In other words, the taking of the land for use as a street includes, not only the right of passage, but of securing a convenient and safe passage; to light it, if you please, for that purpose. It is not a new taking of property for public use, but a completing to that extent of the uses of the first taking by adding appliances included within it, and now constructed by reason of the public need. . . . While the lighting of the streets of a city may be a great convenience to the traveling public, especially under some conditions, the poles, wires, and other necessary appliances for so doing are often a positive inconvenience to the abutting landowner, considered merely as such. But the proprietary rights of the landowner, whether the fee or a mere easement thereon be in the public . . . are greatly modified by the rights of the public, which is entitled to a free passage over the streets, and to the benefit of lights constructed and operated for that end." It should be noted that the language of the charter there under review was not so broad in its grant of authority as are the statutory provisions hereinbefore quoted, and under which the town of Hazlehurst operated. The reason for the distinction thus clearly drawn between electric-light wires and telephone and telegraph wires, though the equipment in each instance is practically the same, is obvious. Lights are convenient,

often necessary, to insure the full and complete use by the public of the streets as highways. Lighting is incidental to their use, and therefore the abutting owner is held to have been fully compensated when the highway was originally acquired. But telephone and telegraph systems, while often public conveniences, are not incidental to the use of the streets as highways, and the enjoyment and use of the street as such is not increased by such equipment. All such equipments constitute a diversion of the highway from the purposes for which it was originally designed, and hence are an additional burden on the easement. As said in *Stowers v. Postal Tele. Cable Co.* 68 Miss. 562, 12 L. R. A. 864, 24 Am. St. Rep. 290, 9 So. 356, they "form no part of the equipment of a public street, but are foreign to its use." For any diversion from the original purpose, for any additional servitude imposed by an equipment foreign to its use, for any new or additional taking for public use, or for consequential damages inflicted by an improper use, the abutting owner is entitled to full compensation, because such rights are not presumed to have been acquired by the original taking. But, as the public use is the dominant and controlling interest, the streets may be devoted to any proper use incident to a public thoroughfare, and the adjacent owner must suffer the resulting injury or inconvenience. So that the authorities of a municipality may, when its charter powers permit, on its streets dig drains lay gas pipes or water mains, construct sewers, or erect posts and wires for lights, because such things and other incidental uses are within the contemplated scope of the dedication of the highways to the public use. Briefly stated, the municipality has the power to make such legitimate use of the highway as is for the benefit of the community at large, and may, without additional compensation to the abutting owner, place any equipments or appliances in the streets which are necessary, convenient, or incidental to their full use and enjoyment as such. *Gulf Coast Ice & Mfg. Co. v. Bowers*, and authorities there cited; Elliott, *Roads & Streets*, 2d ed. § 707; Dill. Mun. Corp. 4th ed. § 697. If, then, it be true that a municipality having proper charter power is authorized to establish an electric light plant without being liable to the abutting owners for any damages consequent upon such construction and subsequent maintenance, it necessarily follows that it is vested with authority to remove from the streets any obstruction of any kind which interferes with the construction of such equipment. And this rule is also based upon the fundamental principle that the rights of the adjacent owners are subordinate to 64 L. R. A.

the public interest. As the municipality has the right to establish the electric-light wires and posts, the citizen's right to maintain trees upon the highways is subordinate, and must yield thereto. *Keasbey, Electric Wires*, 2d ed. § 106; Smith, *Modern Law of Mun. Corp.* § 1311; *Wyant v. Central Teleph. Co.* 123 Mich. 51, 47 L. R. A. 497, 81 Am. St. Rep. 155, 81 N. W. 928; *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 19 S. E. 767; *Wilson v. Simmons*, 89 Me. 242, 36 S. E. 380; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 267, 45 Pac. 266. Cases might arise when, on account of malicious and unnecessary destruction of trees on the sidewalk, the abutting owner could maintain an action for damages against the municipal authorities; but such case is not presented here by either the pleadings or the proof. The whole question has been repeatedly discussed before many tribunals, and the conclusions announced have been arrived at in the great majority of cases. Under the facts disclosed by this record the trees in question, being in front of the residence of appellee and between the public sidewalk and the public highway, in the line of and interfering with the erection of the municipal electric-light plant, the authorities of the town of Hazlehurst were vested with power to authorize the contractor to trim them to any degree that might be found necessary, and, in the absence of any charge of malice, wilful wrong, or oppression, their action in this regard will not be reviewable by the courts. It is evident that the trial judge misinterpreted the prior decisions of this court bearing on the question of municipal control over its highways, and hence committed error in refusing the instruction bearing on this point asked by appellant.

As this is decisive of the case upon its merits, we do not consider or decide the other contention presented.

Reversed and remanded.

Phil COLEMAN, Appt.,

v.

STATE of Mississippi.

(.....Miss.....)

1. Evidence of the death in another county of one mortally wounded in

NOTE.—As to jurisdiction of crime committed partly in different counties, see, in this series, *Watt v. People*, 1 L. R. A. 403, and *Graham v. People*, 47 L. R. A. 731.

As to jurisdiction of crime committed partly in different states, see *Ex parte McNeely*, 15 L. R. A. 226.

As to jurisdiction of crime committed by shooting across state boundary, see *State v. Hall*, 28 L. R. A. 59, and *note*.

the county where the trial is had is not inadmissible in aid of a prosecution for murder on the ground that there is a variance from the indictment charging the killing within the county, where the statute permits trial of the offender in either county.

2. Where a death following a fatal blow struck in one county occurs in another the commencement of a prosecution in either will bar a subsequent one in the other, where the statute provides that the jurisdiction shall be in the courts of the county "where the prosecution shall be first begun," although a *nolle prosequi* is entered before the termination of the trial.
3. Where, by reason of the fact that a crime is partly consummated in each of several counties, the courts of each have jurisdiction of the offense, the state cannot begin an action in one of them, and then, at its pleasure, dismiss that and commence another in another county, and so harass the accused in every county in which jurisdiction can be obtained.

(February 15, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Coahoma County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Denton & Cox, for appellant:

It was not proper to *nolle pros.* the indictment in Quitman county for the sole purpose of obtaining a change of venue on behalf of the state from Quitman county to Coahoma county.

State v. Pauley, 12 Wis. 538.

After the entering of the *nolle prosequi* in Quitman county, the defendant cannot be again indicted in any court. To indict him again is to place him twice in jeopardy.

State ex rel. Butler v. Moise, 35 L. R. A. 709, note, subd. V.; 10 Enc. Pl. & Pr. p. 559; *Test v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Finch v. State*, 53 Miss. 303; *Whitten v. State*, 61 Miss. 717; *Helm v. State*, 66 Miss. 537, 6 So. 322.

The state, having elected the form and forum of procedure by indicting appellant for manslaughter in Quitman county, was bound by the election of remedies, and could not thereafter indict him and prosecute him for murder in Coahoma county.

7 Enc. Pl. & Pr. p. 361; *State v. Miller*, 100 Mo. 621, 13 S. W. 832, 1051.

The indictment in this case alleges that the murder was committed in the second district of Coahoma county. It was, therefore, improper to admit testimony showing that the mortal blow only was delivered in Coahoma county, and that the death resulted therefrom in Quitman county.

10 Enc. Pl. & Pr. p. 526; *People v. Scott*, 74 Cal. 95, 15 Pac. 384; *Haskins v. People*, 16 N. Y. 344; Clark, Crim. Proc. 251; Bishop, Crim. Proc. 3d ed. § 381; *Norris v. State*, 64 L. R. A.

33 Miss. 373; *Watson v. State*, 36 Miss. 593; *Johnson v. State*, 47 Miss. 671.

Where the offense is described in an indictment with unnecessary particularity, all the circumstances of the description must be proved.

1 Greenl. Ev. 16th ed. § 65, p. 829; *Thompson v. State*, 51 Miss. 353.

Mr. J. W. Cutrer also for appellant.

Mr. J. N. Flowers for the State.

Truly, J., delivered the opinion of the court:

On the 20th day of October, 1900, in the county of Coahoma, appellant shot his wife, Ella Coleman, under circumstances not necessary to be detailed here, as the decision turns upon another point. On the 21st of October, 1900, in the county of Quitman, said Ella Coleman, as the result of such shot, died. On the 7th of March, 1901, in the county of Quitman, appellant, by the grand jury of that county, was indicted for manslaughter on account of the killing of said Ella Coleman; and as to this indictment, at the September term of the circuit court of said Quitman county, after appellant was arrested, had been arraigned, and pleaded "Not guilty," a *nolle prosequi* was entered by the district attorney, with consent of the court. On the 25th of November, 1901, appellant was by the grand jury of the county of Coahoma indicted for the murder of said Ella Coleman. The case coming on for trial at the April term of the circuit court of said Coahoma county, appellant demurred to the indictment, and this being overruled, filed a plea in abatement, setting up, among other grounds, the fact that he had once been indicted for said homicide by a court of competent jurisdiction in the county of Quitman, and by such indictment and subsequent proceedings the jurisdiction was vested in the county of Quitman, and that the entering of the *nolle prosequi* in that county, and the subsequent indictment for the same homicide in the court of another county, was, in effect, to obtain for the state a change of venue, which is not permitted by law, and that this was the real purpose and object of the dismissal of the prosecution in the county of Quitman. The demurrer of the state to this plea was sustained. During the progress of the trial, appellant objected to proof of the death of Ella Coleman as having occurred in the county of Quitman, on the ground that such proof was at variance with the indictment. The indictment in question was in the statutory form, and charged that the murder occurred in the second district of Coahoma county. This objection was by the court overruled, and the trial proceeded, resulting in the conviction of the appellant, and his being sen-

tenced to the penitentiary for life; and from that judgment he appeals, assigning numerous causes of error.

We think the demurrer to the indictment was properly overruled. The indictment was plainly and accurately drawn, and charged explicitly the commission of the offense in the second district of Coahoma county. Code 1892, § 1256.

We are of the opinion that the objection to the testimony in reference to the place of death was properly overruled. This did not constitute a variance between the proof and the indictment. It is true that in *Stoughton v. State*, 13 Smedes & M. 255, it was held that the party could only be tried for murder in the county where the death happened, but this was on account of the statute as it then existed (Poindexter's Code, chap. 56, p. 314), the terms of which required that the prosecution for the murder should be in the county where the death occurred; but that case has no application here. The cases of *Riggs v. State*, 26 Miss. 54, and *Turner v. State*, 28 Miss. 686, were decided while the same statute was in force; and, accordingly, it was held that the indictment must charge that the death occurred in the county where the indictment was preferred. Under the law as it then was, the indictment must have charged, and the evidence must have shown, that the death actually occurred in the county where the indictment was found. The jurisdiction of the court to try the cause was dependent upon the existence and proof of this fact. But this rule has been changed, and the difficulty avoided, by legislation. This is no relaxation of the rule requiring that the facts which constitute the offense charged must be definitely and precisely stated, and that the indictment must contain with certainty every material allegation necessary to show the commission of a complete offense within the jurisdiction of the court in which the indictment is presented. The indictment in the instant case complies with this requirement of the law. The facts constituting the crime charged, its commission within the jurisdiction vested by law in the court, and the nature and cause of the accusation against the defendant, are all averred with certainty and precision.

By § 1335, Code 1892, it is specially provided that where the "fatal blow" is struck in one county, and death occurs in another, the offender may be indicted and tried in either county. Therefore, as, by virtue of the statute, the circuit court of either county is vested with jurisdiction to try the offender, the indictment need only aver the commission of the offense within the jurisdiction of the court where the indictment is found, and it is not essential to charge in

the indictment all the attendant circumstances of the homicide. The only reason for the setting out of the venue in the indictment is to show that the court is clothed with jurisdiction over the crime and its prosecution.

Under similar statutes enacted to abrogate or relax the technical rules of criminal pleading in force and adhered to under the common law, the great weight of the more modern, and, in our judgment, sounder-reasoned, authorities, assume the position that it is not necessary to aver more in the indictment than what is sufficient to show the jurisdiction of the trial court, and advise the defendant of the nature and cause of the accusation against him with such certainty as to enable him to plead a conviction or acquittal thereunder in bar of another prosecution for the same offense. So, under our Code provisions, one may be indicted for homicide in either the county where the blow was inflicted, or where the death occurred, and the entire transaction may be averred as having taken place in the county where the indictment is found; and such an indictment will be sustained by proof that either the act was committed, or its effect occurred, in such county. McClain, Crim. Law, § 370; *Johnson v. State*, 47 Miss. 674; *State v. Jones*, 38 La. Ann. 792; *Territory v. Hicks*, 6 N. M. 596, 30 Pac. 872.

The demurrer to the plea in abatement should have been overruled. Section 1334, Code 1892, was designed to meet just such a contingency as arose in the instant case. Under the common law, as construed in the *Stoughton Case*, before cited, where a homicide was committed partly in one jurisdiction and partly in another, it was doubtful whether the offender could be prosecuted in either; but this is not true as the law now exists. Section 1334 provides that where an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in either county where the offense was commenced, prosecuted, or consummated, "where prosecution shall be first begun." That provision controls the case at bar. The state can begin its prosecution in any of the counties in which any of the criminal agencies operate,—anywhere that any act is committed in prosecution of the criminal design; but, having chosen the tribunal before which the party accused shall stand trial, it cannot, of its own motion, divest that court of jurisdiction, and begin another prosecution before another court in another jurisdiction. Under the ancient law, under the facts disclosed by this record, the party accused could have been prosecuted in neither jurisdiction. Under

existing statutes, he can be prosecuted in either, but it is not the law that he can be prosecuted in both. Therefore, the prosecution in the instant case having been first begun in the circuit court of Quitman county, the estate could not divest that county of its jurisdiction, and rightfully institute another prosecution in a different county. By the terms of the statute, concurrent jurisdiction was vested in the circuit courts of both counties, and the one first attaching becomes exclusive. The trial could not, on the application of the state, have been transferred to any other county, because this is not permitted by law, and the method here adopted is simply an attempt to do by indirection what cannot be done directly. *State v. Paulcy*, 12 Wis. 538; *Ex parte Baldwin*, 69 Iowa, 502, 29 N. W. 428; *State v. Chinault*, 55 Kan. 326, 40 Pac. 662; *State v. Brannon*, 6 Kan. App. 765, 50 Pac. 986; *State v. Wiliford*, 91 N. C. 529. That § 1334 applies to the case made by this record is indisputable. Here the act was committed in one county, and the effect produced in another. The crime was wholly completed in neither county, but partly in each. The mere striking of a blow is not murder. Its fatal effect must follow, to make the completed crime. To constitute murder, several essential facts must exist,—among them, the criminal act and its fatal effect,—and these may often occur in different jurisdictions. *Com. v. Parker*, 2 Pick. 550; *State v. Pauley*, 12 Wis. 538; *Robbins v. State*, 8 Ohio St. 131; *Aroher v. State*, 106 Ind. 426, 7 N. E. 225; *Ex parte McNeeley*, 36 W. Va. 84, 15 L. R. A. 226, 32 Am. St. Rep. 831, 14 S. E. 436; *State v. Jones*, 38 La. Ann. 792. Section 1334, providing that in all criminal cases, when the courts of different counties have concurrent jurisdiction, jurisdiction shall vest in the courts of that county “where prosecution shall be first begun,” is simply declaratory of a well-defined and firmly established legal doctrine. It grew out of the comity of nations, and was intended to prevent conflicts between courts of concurrent jurisdiction, whether of the same or different counties or countries, and was found necessary to insure the orderly administration of the criminal laws. But it is more than a mere rule of procedure. It is a substantial and valuable right guaranteed by the law to a party accused of crime. It insures that he shall not twice be placed in jeopardy for the same offense; that he shall be forced to undergo but one trial, and shall not be harassed by repeated indictments in different courts and different jurisdictions. In *Ex parte Baldwin*, 69 Iowa, 502, 29 N. W. 428, *supra*,—a case of murder, where the criminal agency

was placed in motion in one county, and its fatal effect occurred in another,—the supreme court of Iowa says: “Jurisdiction of the crime for which defendant is indicted rests in either Van Buren or Jefferson county. Code 1892, § 4159. It is plain that the courts of both counties cannot exercise jurisdiction by trials and judgments in the case, for the obvious reason that, if they may, defendant may be subjected to two trials and two punishments for the same offense. How shall it be determined in which county trial and punishment shall be had? The answer is ready and simple, and discloses a rule which, while securing the punishment of criminals, will assure the accused exemption from two trials and double punishment. It is this: The court first obtaining jurisdiction of the person of the accused shall retain it, to the exclusion of the court of the other county, and shall proceed to try the case and administer justice therein. The necessity for the administration of the law in criminal matters without subjecting the accused to the peril of two trials, with the possible result of being twice convicted and punished, demands the recognition of the rule. It is in accord with the familiar rule prevailing everywhere, that, where courts have concurrent jurisdiction, the court whose jurisdiction first attaches must retain the case for final disposition. Authorities need not be cited to support this familiar elementary rule. But few cases are or can be cited announcing the rule, doubtless for the reason that it is rarely, if ever, disputed or doubted.” The fact that in the instant case there is no contest between the courts of the counties of Coahoma and Quitman does not operate to vary the rule, or to deprive the appellant of his right to be proceeded against only by due course of law, and in the jurisdiction where the prosecution was first instituted. Any other rule would be attended with great inconvenience and possible hardship to the party accused of crime, and would create uncertainty and confusion in the administration of the law. The officers of law cannot begin in one county a prosecution for an offense alleged to have been partly committed therein, and then, at their pleasure, dismissing that, commence another prosecution in another county, and so harass the accused by indictment and prosecution in every court vested by law with jurisdiction of the alleged offense. Such was not the intention of the law, and such a practice cannot be countenanced or permitted. The circuit court of Quitman county, having first acquired jurisdiction of the crime with which this appellant stands charged, must maintain it throughout. The entering of the

nolle prosequi in that court does not prevent the grand jury of that county, if it so chooses, from now presenting an indictment against appellant, charging him with murder in the slaying of Ella Coleman.

The judgment is reversed, and the indict-

ment and prosecution in Coahoma county quashed and abated.

We do not consider or decide the other assignments, as they may not arise, should there be another trial of this matter.

Reversed and remanded.

NEW HAMPSHIRE SUPREME COURT.

ELI F. HEDDING *et al.*,

v.

Daniel J. GALLAGHER *et al.*

(.....N. H.....)

Teamsters have no right, either at common law or under a statute requiring railroad companies to furnish facilities for the accommodation of the public, and to furnish to all persons equal terms, facilities, and accommodations for the transportation of persons and property over their roads, and for the use of buildings and grounds in connection with such transportation, to enter upon the railroad property to solicit the privilege of carrying the baggage of passengers; but the railroad company may give such right to one of them, and exclude others from its grounds, if the reasonable requirements of passengers are thereby fully met.

(December 31, 1903.)

EXCEPTIONS by plaintiffs to a ruling of the Superior Court for Hillsborough County sustaining a demurrer to a bill filed to restrain defendants from soliciting patronage of incoming passengers upon the Boston & Maine Railroad. *Sustained.*

A demurrer to the original bill in this case was sustained in 69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96, upon the ground that the railroad company had no right to grant exclusive privileges to one teamster; and in 70 N. H. 631, 47 Atl. 614, it was held that it was immaterial that the persons seeking to enjoy the privilege of soliciting the business were setting themselves up as common carriers without legislative authority or agreement with the railroad.

Plaintiff then amended his bill by making the railroad a party plaintiff, and alleging that he had performed the duties required by his contract to the entire satisfaction of the general public; that defendants' entry

upon the railroad premises has been an annoyance to the traveling public; that the contract was made for a valuable consideration with the teamster prepared to give the best service; that the service is better performed under the contract than when it is left to indiscriminate competition; that the railroad company cannot furnish room for all persons desiring to solicit patronage upon its grounds; that the railroad had absolute title to the property. A demurrer to the amended bill having been sustained, the case was transferred to the supreme court.

Mr. Oliver E. Branch, for plaintiffs:

The railroad is under no legal obligation or duty, at common law or by statute, to furnish the defendants, who are common carriers of baggage, packages, and parcels, and "who are engaging in another and connecting branch of public service," or other common carriers who may desire to do so, the means and facilities for procuring business and the custom of arriving passengers at the Manchester station. The concession of the right to Hedding to do so for a limited time and under the circumstances disclosed did not create a new and additional public use of the railroad property, or a use which did not exist, and would not have existed, but for such contract or concession.

New York, N. H. & H. R. Co. v. Bork, 23 R. I. 218, 49 Atl. 965; *Boston & M. R. Co. v. Sullivan*, 177 Mass. 231, 83 Am. St. Rep. 275, 58 N. E. 689; *Boston & A. R. Co. v. Brown*, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189.

The railroad holds its property by a title as complete as does an individual, so long as it is engaged in the business of a common carrier. The right to use and enjoy its property is as exclusive and complete as the right of a natural person to use and enjoy his, except in so far as it is limited and qualified by those public uses to which it is

NOTE.—For conflicting decisions on the right of a carrier to discriminate between hackmen and similar solicitors of business, see *note* to *Cole v. Rowen*, 13 L. R. A. 848.

For other cases in this series in favor of such exclusive right, see *Lucas v. Herbert*, 37 L. R. A. 376; *New York, N. H. & H. R. Co. v. Scovill*, 42 L. R. A. 157; *Kates v. Atlanta Baggage & Cab Co.* 46 L. R. A. 431; *Godbout* 64 L. R. A.

v. St. Paul Union Depot Co. 47 L. R. A. 532; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* 50 L. R. A. 722; *Boston & A. R. Co. v. Brown*, 52 L. R. A. 418; *Donovan v. Pennsylvania Co.* 61 L. R. A. 140; *contra*, *Indianapolis Union R. Co. v. Dohn*, 45 L. R. A. 427; *Lindsey v. Anniston*, 27 L. R. A. 436; *State v. Reed*, 43 L. R. A. 134; and *Pennsylvania Co. v. Chicago*, 53 L. R. A. 223.

devoted or subjected by statute or common law; and in the discharge of the duties incident to those uses its rights are absolute and exclusive.

New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246.

Defendants are not seeking for "equal terms, facilities, and accommodations for the transportation" of themselves or their property, and the general public, including defendants, has no right to the use of railroad property except for such purposes. Those rights are not denied them, or impaired, until the use of the railroad property, for the purposes of transportation, is denied them, or furnished them unequally.

The contract of carriage between a passenger and a common carrier, and the relation of carrier and passenger, terminate when the passenger has alighted from the train, and has left the place where passengers are discharged, within a reasonable time.

Elliot, Railroads, § 1592; 2 Am. & Eng. Enc. Law, 1st ed. p. 744; *Clussman v. Long Island R. Co.* 73 N. Y. 606; *Com. v. Boston & M. R. Co.* 129 Mass. 500, 37 Am. Rep. 382; *Johnson v. Boston & M. R. Co.* 125 Mass. 75.

The passenger cannot, as of right, demand of the carrier the privilege of bringing his own private conveyance onto the railroad land to take him to his destination, since, if it chooses to do so, the carrier may enclose its premises.

Kates v. Atlanta Baggage & Cab Co. 107 Ga. 636, 46 L. R. A. 436, 34 S. E. 372; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529.

No one can complain of discrimination, except those who are entitled as of right to equality of treatment.

Unless all persons who wish to engage in the business of carrying baggage or passengers from the Manchester station have a right to go upon the railroad property for the purpose of obtaining or securing that kind of business, no one can complain if the privilege is denied him, or allege discrimination because he is refused the privilege, while another is accorded it. Regulation often, of necessity, involves lawful discrimination. The regulations which a railroad company can make for the conduct of its business are always such as conserve the comfort and convenience of the public which employs its services as a common carrier; and in furnishing the services which it is under a legal duty to furnish, it cannot discriminate between those to whom they are furnished.

Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L. R. A. 536, 81 N. W. 835; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; *Fluker* 64 L. R. A.

v. Georgia R. & Bkg. Co. 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547; *Hazen v. Boston & M. R. Co.* 2 Gray, 577; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Sweeney v. Boston & A. R. Co.* 128 Mass. 5; *Pittsburgh, Ft. W. & C. R. Co. v. Birmingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376, 47 N. E. 146; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69; *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *Pittsburgh, Ft. W. & C. R. Co. v. Birmingham*, 29 Ohio St. 364, 23 Am. Rep. 751; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246.

Mr. J. A. Broderick, for defendants:

The contract sought to be approved and enforced here is against public policy, and one that a court of equity cannot support. In determining the status of a contract void because against public policy, the court has to consider, not the good that has or will result, but the evil that may. Though the immediate effect is beneficial, if, as a matter of law, its tendency be injurious, it is void. By the term "public policy" is understood "that principal of law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against public good."

15 Am. & Eng. Enc. Law, 2d ed. p. 934; *People v. North River Sugar Ref. Co.* 54 Hun, 355, 2 L. R. A. 33, 3 N. Y. Supp. 401; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Maguire v. Smock*, 42 Ind. 1, 13 Am. Rep. 353; *Egerton v. Brownlow*, 4 H. L. Cas. 1, 23 L. J. Ch. N. S. 348, 18 Jur. 71; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Brown v. First Nat. Bank*, 137 Ind. 655, 24 L. R. A. 206, 37 N. E. 158; *Elkhart County Lodge v. Crary*, 98 Ind. 242, 49 Am. Rep. 746; *Fireman's Charitable Asso. v. Berghaus*, 13 La. Ann. 209; *Dreaser v. Tyrrell*, 15 Nev. 114; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Richardson v. Crandall*, 48 N. Y. 348; *Rex v. Cope*, 1 Strange, 144; *King v. De Berenger*, 3 Maule & S. 68, 15 Revised Rep. 415; *Rex v. Norris*, 2 Ld. Ken. 300; *Reg. v. Gurney*, 11 Cox C. C. 414.

Regulation is not discrimination, and a contract which so far discriminates that the

avored party pays a substantial sum for the privilege cannot be considered a regulation in any fair sense of the term.

Hedding v. Gallagher, 69 N. H. 662, 76 Am. St. Rep. 204, 45 Atl. 96; *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 18 Am. St. Rep. 745, 24 Pac. 209.

Walsh, J., delivered the opinion of the court:

The Boston & Maine Railroad, having been joined as a plaintiff by amendment, claims that, by virtue of its ownership of the station at Manchester, subject to the rights of the public to use it for the purposes of transportation, it is entitled to exclude the defendants therefrom, who come there merely for the purpose of soliciting from its passengers the carriage of their baggage to points within the city of Manchester. The defendants contend that, whatever the railroad's rights of ownership may be, it cannot deny them the privilege of entering the station grounds and building for the prosecution of their business, because it has expressly granted that privilege to Hedding; that it has no right to authorize or employ one job teamster to solicit the carriage of baggage in its station and to exclude all other job teamsters from its grounds; in short, that it cannot discriminate between carriers of that class, who seek the opportunity of soliciting from passengers alighting from the cars the privilege of transporting their trunks and parcels from the station to other parts of the city. It is not claimed in behalf of the defendants that they have any legislative or contractual right to occupy the station and its approaches, but the right is said to arise from the discriminating feature of the railroad's contract with Hedding.

In reply to this position, the railroad argues that, if the alleged discrimination against the defendants did not violate any of their antecedent and subsisting rights with reference to their occupation of the station, the discrimination was not illegal, and the contract with Hedding is immaterial, so far as its right to prosecute this suit is concerned; that the fundamental question relates to the rights of job teamsters to solicit business on the premises of the railroad after notice to desist; that, if they had that right, the contract with Hedding did not deprive them of it, and they could not be enjoined from exercising it, and, if they did not have it, the contract did not give it to them, because the discrimination was not illegal as against them.

Upon this summary of the respective contentions of the parties, the question is presented whether truckmen have at common law or by statute the right to enter upon

and occupy a railway terminal station for the purpose of soliciting business. If they have that right, the railroad cannot exclude all, or all but one of them, from its station; if they do not have it, the further question arises whether they can acquire it under, or because of, a special license granted to one of their number. The last question has been answered in the affirmative upon a former transfer of this case, before the railroad became a party (69 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96), and while the present plaintiffs may not be entitled, as a matter of right, to a rehearing of the question, and while the railroad, though made a party plaintiff, according to a more or less uniform practice might be bound by the former decision (*Amoskeag Mfg. Co. v. Head*, 59 N. H. 332, 337; *Weare v. Deering*, 60 N. H. 56), the importance of the controverted points and of a correct ascertainment of the respective rights of the parties after prolonged litigation seem to justify, if they do not require, a further consideration of the case upon its present transfer. And while little, if any, doubt could be entertained that the demurrer should be overruled upon the allegations of the recent amendment of the bill, to the effect that the presence of the defendants in the station obstructs and interferes with the public business of transportation, the practical value of such a decision would be so small that, in view of the fact that the case has been pending for a long time, and has been argued by counsel upon the broader and more fundamental question of the legal rights of the parties, both under the contract and independent of the contract, it is deemed expedient to base the decision upon a consideration of the latter question. "It shall be the duty of the proprietors of every railroad to provide suitable crossings, stations, and other facilities for the accommodation of the public." Pub. Stat. 1901, chap. 159, § 1. "The proprietors of every railroad shall furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings, and grounds in connection with such transportation, and for the interchange of such traffic at points of connection with other railroads." *Id.* chap. 160, § 1. The corporate duties thus declared by the legislature, and subject to which the corporation holds its real estate, it owes to the public having occasion to employ its facilities for the transportation of themselves or their property. It is obliged to provide reasonable accommodations at its station in Manchester for the use of the traveling public who are brought together at that point. But it owes this public duty, not to all persons

indiscriminately, but to those only who stand in some contractual relation with it as passengers. A trespasser in its station could not complain that it did not furnish suitable and reasonable means for the accommodation of its patrons, for to him it does not owe the duty of furnishing facilities for transportation. *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337. If it is conceded that it is the duty of the railroad to furnish arriving passengers with reasonable means and opportunities for removing their baggage from the station, and that such means and opportunities include the presence at the station of soliciting agents for the carriage of baggage, it would not follow that it owed the defendants the duty of affording them adequate facilities for the solicitation of business from the passengers. It cannot be assumed that the passengers' convenience under their contract of carriage over the railroad requires the presence of the defendants as independent carriers at the station on the arrival of trains. The railroad may furnish or permit adequate means for the convenience of its passengers in this respect, without the voluntary assistance of the defendants. If it is its duty to have men present on the arrival of its trains, ready, when requested, to remove the baggage of passengers from its premises, no substantial reason is suggested why it may not perform that duty through such agents as it sees fit to employ, or why it should be obliged to submit to the irresponsible interference of unemployed third parties in doing the work required of it.

Nor is it apparent how the railroad's duty to its passengers in this respect gives rise to a right in all local job teamsters to perform that duty, or any part of it. The right of its passengers to have men present to solicit the carriage of baggage, or to receive such solicitation from them upon the arrival of trains, if it exists at all, does not require the presence of independent local truckmen. Whether the soliciting agents are independent local truckmen, or whether they are men specially permitted by the railroad to perform that service in its station, is an unimportant detail in the reasonable performance of the public duty to passengers of providing adequate facilities for the transfer of baggage. "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them." *Express Cases*, 117 U. S. 1, 24, 29 L. ed. 791, 801, 6 Sup. Ct. Rep. 542, 628; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 89, 35 L. ed. 97, 101, 11 Sup. Ct. Rep. 490. Hence the railroad's duty to its passengers does not include a duty or obligation to permit all local carriers of baggage to solicit business

in its station. The right claimed by the defendants to enter and remain upon the station grounds cannot be established by that method of reasoning.

Nor do the defendants, if regarded as common carriers, owe a duty to the incoming passengers to meet them in the station and solicit their patronage. Hence it follows that when they do enter the station and solicit business they are acting in a private capacity, and not in the performance of any public duty, either to the passengers, the railroad, or anyone else. If they are common carriers when driving about the streets, they are not common carriers performing a public duty when they enter the station to solicit the carriage of baggage. Probably solicitation is no part of a common carrier's business anywhere; nor is it a part of the public duty of a local job teamster to be at any particular place to receive parcels for carriage. Hence no duty, in the absence of contract, rests upon the defendants to be present at the station on the arrival of trains. As public policy does not require their presence there, and as the obligation of the railroad to the public can be performed as well, and perhaps better, when they are not present, no substantial reason remains for the claim that the railroad is bound to furnish job teamsters facilities for carrying on their business in its stations. To say that when the ordinary job teamster happens to go into a railroad station and to ask a passenger for the privilege of carrying his trunk to the hotel, he is in the performance of an important public function as a common carrier of baggage, or that the railroad is under an imperative obligation to the public, the passenger, or the teamster to permit such solicitation in its station, is the assertion of a principle founded upon the radically erroneous assumption that the property of a railroad may be used by others without compensation, and against the protest of the corporation, for the prosecution of their private business.

But it is said that the defendants, being common carriers of baggage in Manchester, are entitled to enter the railroad station to solicit business, because the railroad has set apart or devoted that real estate to the business of the transfer of baggage to other connecting lines of public travel. But this right, if it exists, is not an original right vested in the defendants by any act of the legislature or by the common law. The legislature has not required railroad corporations to furnish all common carriers of baggage who happen to approach one of its terminal stations with the means of most conveniently and expeditiously obtaining contracts from its passengers for the car-

riage of their parcels. The right to the reasonable use of the terminal facilities of one railroad by a connecting railroad does not exist except by legislative grant or by contract. Without such permission, one corporation cannot enter upon and use the land of another. "Every railroad corporation shall, at reasonable times and for reasonable compensation, draw over its railroad the cars, passengers, and freight delivered to it by any other corporation whose railroad connects with its railroad, and which is authorized to enter on and use the same, or which is authorized to use the railroad of any corporation having such authority, and the cars, passengers, and freight destined for such connecting railroad; and it shall provide convenient and suitable depot accommodations for such passengers and freight." Pub. Stat. 1901, chap. 157, § 10. Special legislative provisions upon this subject have been deemed necessary in substantially all railroad charters granted in this state, which, recognizing the right of private ownership of railroad property, establish an equitable basis of compensation for the imposed use. "The common-law obligations of a railroad company to a connecting line are the same, as to reception, transportation, and delivery of freight, as those existing between the railroad company and an individual shipper. Whatever rights or privileges other than those belonging to a natural person, that are claimed by one railroad company against a connecting company, must be found either in the charters of the companies, or arise from contract." *Shelbyville R. Co. v. Louisville, C. & L. R. Co.* 82 Ky. 541, 545; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Concord & M. R. Co. v. Boston & M. R. Co.* 68 N. H. 519, 39 Atl. 1073.

Having no express authority for the use they make of the railroad's station, the defendants had no right to such use before the contract with Hedding, in the absence of a revocable license, unless it can be based upon or derived from the right of passengers to reasonable accommodations for the removal of their baggage from the station. But, if that duty is fully and satisfactorily performed by the railroad,—if its patrons receive reasonable, prompt, and adequate service,—the presence of the defendants at the point where they alight from the cars is unnecessary, and may be objectionable. If it is the public duty of the railroad to afford adequate facilities for the transfer and removal of baggage, and if that duty is performed to the satisfaction of its patrons, it is difficult to understand how local truckmen acquired the right, or how a duty rests upon them, to be present for the perform-

ance of that service, except so far as they have been permitted by the railroad to enter its premises; that is, except so far as the right exists under a revocable license from the railroad.

When it is said that the station has been devoted to the business of the transfer of baggage, so that all truckmen have an absolute right to prosecute their business at that point, the error in the argument is that it disregards the duty of the railroad to the traveling public, to whose convenience it has devoted its station, and assumes that its license to truckmen to assemble there has become irrevocable. But it is elementary that a mere license to enter upon land is not by lapse of time changed into an absolute right of entry. "If it be insisted that by opening the doors of their depots the company give an implied license to any and all persons to enter, it may be answered that by thus opening their doors they do prima facie give an implied license to all persons to enter, and no person is a trespasser by merely entering therein. But all such licenses are in their nature revocable, and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them by force, if necessary, using no more force than is necessary for that purpose." *Com. v. Power*, 7 Met. 596, 602, 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337. And it can make no difference that in this case the defendants are styled common carriers, for, unless the convenience of the traveling public requires their presence in the railroad's station, they are in the same legal position with reference to the railroad that a private individual occupies under the same circumstances. It is not intended to decide that it is not the legal duty of the railroad to permit local truckmen to occupy its station for the purpose of soliciting business from its passengers when the convenience of the latter may require the presence of the former; but it is sufficient for the purposes of the present argument to hold that, when the traveling public are reasonably and satisfactorily served in the matter of the transfer of their baggage, there is no occasion for the presence of an additional force of men who are ready for hire to serve the public as common carriers of parcels. If there is no occasion for such additional service, the teamster's right to render it on the railroad's premises cannot be derived from the railroad's general duty to its passengers. The conclusion seems to be inevitable on principle that any right the defendants had, before the contract with Hedding, to enter the station at Manchester in pursuit of employment, in the absence of

any public necessity therefor, was derived from a revocable license granted by the railroad as the owner of the real estate used for the purposes of a station, and that on the revocation of the license the defendants' right ceased.

It is to be noted that it is alleged in the bill that Hedding, in his permissive use of the railroad's property, fully meets the convenience of incoming passengers with reference to the removal of their baggage. This is equivalent to saying that the traveling public have no reasonable ground for complaint that the railroad has not provided or does not permit all such facilities for transportation as its duty to the public requires. If a passenger desires his baggage carried to his home or to a particular hotel, or to any other place in Manchester, Hedding, by an arrangement with the railroad, is present with the necessary teams and men to promptly and carefully perform the service for a reasonable compensation. If the service is satisfactorily performed, it is immaterial to the passenger who does it, unless he sees fit to employ his own servant or agent. But if Hedding should solicit the carriage of baggage to one hotel alone, when there were several, it might consistently be held that the railroad did not furnish or permit such reasonable, full, and adequate facilities for transportation at its terminal as the convenience of its patrons demanded. It is not difficult to suggest supposable cases of monopolistic interference with the reasonable rights and expectations of passengers upon their arrival at a railroad station, resulting from the exclusion therefrom of all but one particular truckman or cabman. Such inconvenience suffered by passengers might have a strong tendency to prove that the traveling public were not properly served, in consequence of the discriminating license granted to a single individual. But no progress is made in the discussion of this case by the multiplication of instances of apparent injustice to passengers that might follow from the grant of exclusive privileges in a railway station, because the fact is admitted by the demurrer that Hedding fully meets all the reasonable requirements of incoming passengers in the removal of their baggage, in accordance with the express terms of his agreement. The railroad requires him to accommodate the public in all respects within the sphere of his business at the station, not to infringe upon the rights of its patrons and inconvenience them in obtaining reasonable accommodations. Whether, upon a trial, this fact can be proved, and what evidence would be competent, sufficient, or conclusive upon that issue, are questions which may

arise hereafter, but which are not now pertinent.

But it is said that the defendants' right of entry and occupation arose when the railroad attempted to grant the exclusive privilege to Hedding to solicit business in its station. It is admitted that for many purposes the railroad has the same rights of ownership in its station building that private persons have in their real estate; but it is asserted that "a common carrier, who owes the duty to furnish to passengers for Manchester reasonable and equal facilities at the station there, is bound to accord equal facilities to all who come to that station for the purpose of carrying passengers or baggage beyond its line of road. The rights of the traveling public being involved, all that the road can do is to make reasonable regulations as to how these rights shall be furthered by baggage-carriers. It cannot discriminate between them." *Hedding v. Gallagher*, 89 N. H. 650, 661, 76 Am. St. Rep. 204, 45 Atl. 96. It is not apparent how the duty of the railroad to furnish equal and reasonable facilities to its passengers for the removal of baggage originates a duty on its part to local truckmen to permit them indiscriminately to occupy its station for the solicitation of the carriage of baggage. The equality of service which the law requires is an equality between persons having contractual relations with the railroad relating to transportation, and, if it furnishes the traveling public that equality in a reasonable and satisfactory manner, it is difficult to understand upon what principle its employment of one set of men to serve its patrons equally and properly gives rise to a right in another set of men to occupy its station for the performance of the same service. If the defendants had no absolute right to occupy the station before the discriminating contract was made, if the traveling public had no right to demand that they should be allowed that privilege, and if, as is admitted by the demurrer, Hedding, under the contract, furnishes adequate and reasonable facilities to the traveling public for the removal of their baggage, it would seem that the defendants' claim could only be justified by express legislation, which does not exist. The discriminating character of the contract deprived them of no essential right they possessed before, and it did not deprive the traveling public of that reasonable and equal service to which they are entitled.

Whether the contract is illegal, upon grounds of public policy, depends upon the question whether the discrimination is unreasonable as against the traveling public. Pub. Stat. 1901, chap. 160, §§ 1-3; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 451,

13 Am. Rep. 72; *State v. Concord R. Co.* 59 N. H. 85; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181. All discriminating contracts are not illegal. Indeed, it would probably be difficult to draw a contract that might not, in some sense, be said to be discriminating. When A employs B to work for him, he discriminates against C, whom he has refused to employ; but, as none of C's legal rights are infringed by the employment of B, the discrimination is valid. It is only when the discriminating contract is intended to deprive others or the public of legal rights that it is illegal. Discrimination between two parties, neither of whom has a right founded upon a public duty of the principal, is as permissible to a railroad as to an individual, and is one of the essential and inherent characteristics of the ownership of property. A railroad corporation holds its property with the same rights of proprietorship that an individual does, subject, however, to certain public uses. It has, by virtue of its ownership, the individual's right of discrimination in the enjoyment of its property, except so far as the claimed right is consistent with, or prejudicial to, the public right of user. If by a private contract it gives one an exclusive privilege, the question is, Does the discrimination interfere with or curtail a public right, or is it violative of any corporate duty to the public who seek to use the railroad as a means of transportation? If it has that effect, it is in that respect unenforceable; otherwise it is legal.

If this incident of ownership is exercised to the prejudice of the rights of the traveling public, as by providing inadequate or otherwise unsatisfactory service, or by demanding unreasonable rates for the service, the law furnishes a substantial remedy. But it is unnecessary in this case to define the limits of such remedial power, since the rights of the traveling public have not been abridged or infringed. In view of the conceded fact that under the contract the traveling public has received adequate and reasonable service, and that the discrimination complained of promotes the convenience of arriving passengers, the rights of nobody are infringed, and the discrimination is legal. *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 127, 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

It is argued, however, that, because it is provided in the contract that Hedding shall pay the railroad \$100 a year for the exclusive privilege of soliciting the carriage of baggage in the station, a monopoly is thus established which might operate to the disadvantage of passengers, by increasing the rates they are obliged to pay for the service 64 L. R. A.

rendered. To this argument it is a sufficient answer to say (1) that the case discloses no facts from which it logically follows that the rates are increased; and (2) the contract expressly provides that they shall be reasonable,—that is, for reasonable service, reasonable rates only shall be exacted; and this provision of the contract has been fully observed. "While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy." *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 127, 9 L. R. A. 689, 693, 3 Inters. Com. Rep. 319, 323, 49 Am. St. Rep. 582, 20 Atl. 383.

"It is the unreasonable and injurious character of the act that is made unlawful." *State v. Concord R. Co.* 59 N. H. 85, 87.

The right of patrons of the road to employ servants to go upon the grounds of the railroad, either to carry their baggage to, or remove it from, the station, cannot be denied, in view of the public duty of the railroad to its passengers; but it is fallacious to argue from this admitted legal principle that unemployed teamsters have an equal right to enter the station for the purpose of seeking employment. The implied right of a passenger under his contract of carriage to employ a servant or agent to carry his trunk to the baggage room, and to meet him at the station to receive his baggage on his return, is not, it would seem, analogous to the supposed right of an unemployed individual to enter the station for the purpose of seeking employment as a baggage expressman. The latter cannot justify his entry under any contractual relation with the railroad entered into by himself, or under a contract of agency of employment by any passenger arriving at the station. He is not employed by anyone to be at the station. He has not agreed to be there. He is there, not in the performance of any contractual duty, but in the pursuit of an opportunity to make a contract. Among the reasonable conveniences the railroad is bound to accord to its passengers is the removal of their baggage when delivered to them within the station by such agents as they may employ. *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415. But this evidently does not include the duty to permit strangers to solicit in its station contracts of employment from its passengers. The duty of the corporation to its passengers in 52

this respect does not establish the right claimed in third parties.

In a specific instance, the question is whether A, who is not employed by the railroad or by any of its patrons, and who is not seeking to use the means furnished by the railroad for the transportation of himself or his property, has the same right to occupy the station grounds that B has, who is especially permitted by the railroad to be there for the accommodation of the passengers, and fully meets all their wants in respect to their baggage. If the public are fully accommodated, what consideration of public policy or what principle of law gives rise to a right in A to occupy the property of the railroad? B is not there in the capacity of a patron of the road, and A does not claim to justify his presence as a patron of the road. As it is clear that the road does not owe the duty of furnishing equal facilities for transportation to people who are not seeking to avail themselves of such facilities, it follows that neither A nor B, when seeking employment,—not transportation,—can base his right upon the principle of equality. To recognize such a right would lead to most absurd results. B is there as a licensee of the road for the benefit of its patrons, and incidentally for the benefit of the road itself and his own advantage, while A is present, not by virtue of any license or authority from the road or its patrons, but in a purely private capacity, and for his own benefit alone.

If it is assumed that the defendants are in a legal sense common carriers of parcels in Manchester, as they are alleged to be in the bill, and that consequently they are under certain obligations to the public, the conclusion does not follow that they have an independent right, as carriers, to appropriate the property of the railroad for the purpose of serving the traveling public, who already receive ample service from other agencies. They cannot justify their entry upon the railroad's grounds by proving that it occasions no inconvenience to the passengers or the employees of the railroad, for the corporation does not hold its property subject to the use of other and connecting common carriers, when the public are fully served without such use. Whether, under such circumstances, it would be reasonable, if they had a right to be present, and whether that burden ought to be imposed upon the railroad, are questions of the legislative control of corporations, upon which the lawmaking body has not seen fit to take action. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 682, 28 L. ed. 291, 297, 4 Sup. Ct. Rep. 185. The railroad is under no statutory or common-law obligation, as the owner of its station, to

gratuitously permit other unemployed common carriers to use it as a place for soliciting business, merely because such use might seem to others to be reasonable. The doctrine of reasonableness in the owner's use of his property (*Franklin v. Durgee*, 71 N. H. 186, 58 L. R. A. 112, 51 Atl. 911; *Horan v. Byrnes* [N. H.] 62 L. R. A. 602, 54 Atl. 945) has not gone to the extent of holding that he must suffer such occupation of his premises by others as is not inconvenient to him and does not interfere with his practical enjoyment thereof.

Nor is the suggestion sound, that, because a truckman who is specially employed by a passenger to transport his trunk has a right to enter the station for that purpose, all common carriers seeking the carriage of trunks have a similar right of entry, derived from the public whom they are desirous of serving. In the former case the truckman represents the passenger, and is his servant or agent when he occupies the station, while in the latter case the carriers of trunks do not represent, and are not the servants or agents of, the traveling public before their employment, but are merely private individuals from whom a traveler may require transportation service; and, until such service is required, they have no duties to perform to the public, and are invested with no rights as against the railroad.

The case of *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, is claimed to be an authority for the defendants' contention. There the question related to the right of a stage driver to enter the plaintiff's inn to solicit business from travelers who while there were guests. This was a right, as Judge Parker says, "derived from the right of the traveler" while a guest in the inn. The right of a guest to receive callers while being entertained in a hotel is quite different from the right of a passenger, when alighting from a train, to be importuned by a crowd of unnecessary job teamsters. The hotel is the guest's temporary resting place or home, where he has to some extent the same right to receive callers seeking business relations with him, who conduct themselves with propriety, as he has to receive them at his permanent home; and this right of the guest includes or gives rise to the right of others to visit him while in the hotel. But because this is so, it by no means follows that every job teamster has a right, derived from the general transportation right of passengers, to meet them at the station for the purpose of soliciting the carriage of their trunks. See *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 37, 38, 9 Am. St. Rep. 661, 17 N. E. 89. A further distinction is permissible between that case and

this one, in that it did not appear that the convenience and comfort of the guests in the hotel would be promoted by the exclusion of all stage drivers but one, or that the duties of the innkeeper to his guests required such a regulation. Neither the private interests of the landlord nor the comfort of his guests would suffer by the temporary presence of stagecoach drivers in the inn, and a regulation excluding them from the inn might be unreasonable. This distinction is suggested in *State v. Steele*, 106 N. C. 766, 8 L. R. A. 516, 19 Am. St. Rep. 573, 11 S. E. 478. It was there held that where an innkeeper made a regulation that "no liveryman or agent of any transportation or baggage company . . . will be allowed in the hotel," and gave notice to the agent of a livery stable, who had been in the habit of soliciting custom at his hotel, not to come upon the hotel premises again, the innkeeper had a right to expel him without using unnecessary force, if he entered the hotel after such notice and engaged in soliciting custom, although at the time the hotel keeper had made an arrangement with another keeper of a livery stable, by which the former should receive 10 per cent of the proceeds of the business derived from the guests of the hotel. Referring to *Markham v. Brown*, the court says (p. 785, 106 N. C. p. 523, 8 L. R. A., p. 582, 19 Am. St. Rep., and p. 485, 11 S. E.): "There was no evidence in *Markham v. Brown* that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury if the agent who was expelled were successful in his solicitations; and it seems that Angell and others, who cite as authority that case, as well as *Jencks v. Coleman*, 2 Sumn. 221 [Fed. Cas. No. 7,258, and *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115], reconcile them by drawing the distinction that in the latter cases . . . the person whose expulsion was justified was doing an injury to the proprietor who had him removed, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper." Other distinctions between the legal rights and duties of innkeepers and the proprietors of railroad stations, material to the present inquiry, have been urged in argument; but those above suggested are sufficient to show that *Markham v. Brown* is not an authority of much weight in this case, and that its citation is misleading.

An examination of other cases cited in support of the defendants' claim shows that they are not directly in point, and therefore can have little weight as authorities in this case. *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 10 L. R. A. 819, 22 Am. 64 L. R. A.

St. Rep. 693, 47 N. W. 367, holds that a railroad company cannot give to one hack company the right to the use and occupancy of a portion of its station grounds, to the exclusion of others engaged in the like business of the carriage of passengers to and from its station. Little, if any, further information is derived from a reading of the opinion. It does not seem to be based upon an accurate understanding of what is meant by the railroad's duty to treat all alike. It apparently assumes that the railroad owes a duty to hackmen to allow them to occupy its premises, independent of its duty to passengers. Moreover, it did not appear that the exclusive privilege granted was for the convenience of passengers, and the case only decides that the railroad "cannot arbitrarily admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure." But it would seem that, if the discrimination had been for the benefit of the passengers, as it is in this case, the court would have reached an opposite result. In the subsequent case of *Cole v. Roucem*, 88 Mich. 219, 13 L. R. A. 848, 50 N. W. 138, it was held that a rule excluding certain hackmen from stands assigned to others, which was made to promote the public convenience, was reasonable and enforceable. *Indianapolis Union R. Co. v. Dohn*, 153 Ind. 10, 45 L. R. A. 427, 74 Am. St. Rep. 274, 53 N. E. 937, is perhaps more unsatisfactory in its reasoning than *Kalamazoo Hack & Bus Co. v. Sootsma*, and is open to the same criticism.

Oravens v. Rodgers, 101 Mo. 247, 14 S. W. 106, contains no discussion of the rights and duties of railroads and hackmen; nor did it appear that the public were fully accommodated under the discriminating contract. The decision is the result of an assumption that passengers receive the best service when there is no discrimination with reference to the presence of hackmen.

In *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 8 L. R. A. 753, 18 Am. St. Rep. 745, 24 Pac. 209, the court (p. 429, 9 Mont., p. 757, 8 L. R. A., p. 750, 18 Am. St. Rep., and p. 211, 24 Pac.) define the subject-matter of the suit as "the grant of a special privilege to Lavell Brothers to use the specified portion of plaintiff's platform at said station, and the exclusion of all others from approaching thereto to land or receive passengers." "If," the court continue, in stating the plaintiff's position, a passenger "contracts with another than Lavell Brothers . . . to bring him there and be there to receive him on his return, he must alight from his carriage or be received by it 50 feet away from said platform." In other

words, the discrimination authorized by the contract in that case was a discrimination affecting the comfort and convenience of passengers, and it was held to be a violation of the plaintiff's public duty to treat all passengers with substantial uniformity. *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, is explainable upon the same ground.

The cases of *New England Exp. Co. v. Maine O. R. Co.* 57 Me. 188, 2 Am. Rep. 31, and *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72, relate to discriminating contracts affecting rival express companies. The question determined in those cases was entirely different from the one presented here. The express companies were regarded as individuals who were seeking contractual relations with the railroads for the carriage of parcels. They were not attempting to use the property of the railroad for their own purposes, independent of a contract for the carriage of themselves and their property. The question whether express companies are to be treated as individuals having property for carriage, and so entitled to demand the services of railroads as common carriers, or whether they are merely agencies by which the public may be served, and so not entitled to railroad accommodations when the railroad provides other adequate means for the same service (*Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628), does not require discussion at this time. It is sufficient for present purposes that these cases do not sustain the proposition that, if the railroad allows one man to do a private business in its station, it must not exclude others who desire the same privilege. On the contrary, they authorize the statement that the railroad's public duty of equal treatment relates only to persons or corporations having business relations with it in the matter of railroad transportation, and not to strangers in the prosecution of their private affairs. General or broad statements of the public duty of common carriers to avoid discrimination in their service of the public are necessarily limited or qualified by the special facts of the case in view of which they are made. Serious misapprehension of the scope and effect of a judicial opinion is often likely to occur if the exact point in issue is disregarded.

On the other hand, there are numerous cases holding that a railroad may give to one hackman or one truckman the exclusive privilege to come upon its grounds for the purpose of soliciting business from passengers arriving upon its trains, provided the service thus afforded is adequate and reasonable. In *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 37, 9 Am. St. Rep. 661, 662, 17 N. E. 89, 92, in sustaining the plaintiff's 64 L. R. A.

claim, the court says: "The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff, involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads." The court considers the claim, which is urged in this case, that the railroad, having given the right or privilege to one hackman to occupy its platform, could not refuse to allow other hackmen to exercise the same right or privilege, and dispose of it, in this language (p. 38, 147 Mass., p. 664, 9 Am. St. Rep., p. 93, 17 N. E.): "The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads, as common carriers, and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. . . . The fact that the defendant, as the owner of a job wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them." If the fact that three of the seven judges sitting in the case dissented, weakened the authority of the decision, that criticism is not now important, since the opinion and ruling of the court have been approved and followed in at least two other cases arising in that jurisdiction. *Boston*

& *A. R. Co. v. Brown*, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189, and *Boston & M. R. Co. v. Sullivan*, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689, make it certain that the law of Massachusetts upon this subject is not doubtful or obscure. Corporate duty to one class of persons for one purpose is not there converted, by a resort to general and inexact expressions of equality, into corporate duty to another class of persons for another purpose.

In *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, 19 Atl. 143, it was held that a common carrier owning or controlling its terminals may exclude from them persons soliciting trade, or hacking, or expressing, without its license, but that it cannot deprive a passenger of the privilege of being carried from the terminus in a convenient and usual way, nor can it compel a passenger to take certain carriages or none. *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965, was an action of trespass by the railroad against a hackman claiming a right to occupy its premises, based upon its exclusive permission to such occupancy given to another hackman. The court, following the decision in *Griswold v. Webb*, says (p. 222, 23 R. I., and p. 966, 49 Atl.): "If the act of the defendant was such as he rightly might perform, then the exclusive grant to another is of no effect as to this defendant. If the act of the defendant was not within his legal right, it can avail him nothing that another has been permitted to do for a consideration that which has been denied as of right to him." The special discriminating contract was held to be immaterial in that case.

In *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246, it was held that a railroad company's grant of the exclusive privilege of soliciting business on the depot grounds at a station, and of "plying" the business of a carrier of passengers or luggage, and forbidding others to do such acts on the grounds, if not inconsistent with the reasonable accommodation of passengers, is a reasonable provision, such as the road, in the exercise of its right of ownership, has the right to make.

In New York a statute provides that "no preference for the transaction of the business of a common carrier upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations, or corporations competing in the same business, or in the business of transporting property for themselves or others." In *New York C. & H. R. R. Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859, it was held that this statute does not give

all the hackmen of a city the absolute right to intrude upon, or make a stand of, the premises of a railroad corporation for the purpose of soliciting business; nor does it prevent a railroad corporation, which by contract has conferred upon a transfer company the exclusive privilege of going upon its premises with hacks for the purpose of soliciting passengers, from prohibiting other hackmen, who have no contract relations with the railroad corporations or its passengers, from doing so. This ruling was adopted in *Brown v. New York C. & H. R. R. Co.* 75 Hun, 355, 27 N. Y. Supp. 69, and that case was affirmed by the court of appeals in 151 N. Y. 674, 46 N. E. 1145. The same question arose in *New York C. & H. R. R. Co. v. Sheeley*, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185, and the same result was reached in an instructive opinion, in which many of the authorities bearing upon the subject were examined, discussed, and distinguished.

In *Godbout v. St. Paul Union Depot Co.* 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835, the plaintiff's claim was the same as one position urged by the defendants in this case, and is stated by the court as follows: "Plaintiff, as a common carrier, has both the statutory and common-law right of entry to the Union depot, in common with other common carriers accorded the privilege; but if no common carrier has the legal right of entry, defendant cannot discriminate by admitting one to special privileges and excluding others." But this contention did not obtain the approval of the court. The right to make such discrimination was held to be no infringement of the rights of passengers, to whom alone the depot company owed the duty of providing reasonable facilities for leaving the station upon the completion of their railroad journey. Other cases supporting this conclusion are, *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 301, 23 Am. Rep. 115; *Smith v. New York, L. E. & W. R. Co.* 149 Pa. 249, 24 Atl. 304; *Norfolk & W. R. Co. v. Old Dominion Baggage Co.* 99 Va. 111, 50 L. R. A. 722, 37 S. E. 784; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529; *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Snyder v. Union Depot Co.* 19 Ohio C. C. 368; *The D. R. Martin*, 11 Blatchf. 235, Fed. Cas. No. 1,030; *Barker v. Midland R. Co.* 18 C. B. 46, 25 L. J. C. P. N. S. 184; *Painter v. London, B. & S. C. R. Co.* 2 C. B. N. S. 702; *Boadell v. Eastern Counties R. Co.* 2 C. B. N. S. 509, 26 L. J. C. R. N. S. 250, 5 Week. Rep. 650; *Perth General Station Committee v. Ross* [1897] A. C. 479, 66 L. J. P. C. N. S. 81,

77 L. T. N. S. 226; *Pennsylvania Co. v. Donovan*, 116 Fed. 907, 60 C. C. A. 168, 124 Fed. 1016.

From this examination of the authorities it is apparent that there is little substantial conflict of judicial opinion upon the exact question presented by the case at bar. As said by the court in the recent case last above cited, upon facts similar to those herein considered, it is "clearly established, by the great weight of authority in England and the United States, that complainant is entitled to the relief prayed for." That it is possible to discover general statements in some of the cases seemingly at variance with the views herein expressed is true; but the conflict thus suggested disappears in most of the cases, when the facts with reference to which the statements are made are given their proper qualifying effect. It is also to be noted that there is substantial unanimity expressed in the authorities, that the right of a hackman or a job teamster to enter a railroad station in the prosecution of his business, when it exists, is derived from, or is included in, the passenger's right, as against the railroad, to reasonable means of transportation for himself and baggage, and is not a right derived from any duty which the corporation owes him directly as a connecting common carrier. If it is bound to admit him to its station under any circumstances, it is so bound only when he is employed by a passenger, and hence represents the latter as his servant or agent, or when it fails to afford the passenger reasonable facilities of egress from its grounds.

As the corporation does not claim it has the right to exclude job teamsters employed by its passengers to bring baggage to the station for transportation on the cars or to meet them on their arrival, and as it is admitted that, under its contract with Hedding, its passengers will receive better service at the station, with reference to opportunities for the removal of their baggage, than could be afforded by the presence there of an unnecessary number of unemployed truckmen engaged in the solicitation of pas-

sengers for the carriage of their baggage, its right to exclude the defendants from its station when there on their private business is as broad and unlimited as that of any owner of real estate to expel persons trespassing upon his premises. If its duty to its passengers is fully and satisfactorily discharged by other instrumentalities, there is no reason, arising from considerations of public convenience or necessity, why the additional burden should be imposed upon it, as a property owner, to furnish standing room in its station for other people to render the performance of that duty less efficient and more disagreeable to the traveling public. If the public is entitled to the best service at railroad terminals, and if it provides such service, it would be a palpable absurdity to say that it must, upon grounds of public policy, permit that service to be crippled and paralyzed by the admission to its stations of large numbers of irresponsible men clamorously seeking the privilege of performing the same service. But if its duty to its passengers does not require the presence, on the arrival of trains, of soliciting agents for the transfer of baggage, it is difficult to explain why it is obliged to permit others to perform that service, or why, if it makes arrangements for such unnecessary convenience of its passengers, by engaging competent men for the work, it must also furnish facilities for others to engage in the same enterprise without compensation. An onerous duty of that character can only be imposed by legislative action.

Exceptions sustained.

Parsons, Ch. J., and Remick and Bingham, JJ., concur. **Chase, J.,** does not concur, because the questions were decided when the case was previously before the court (89 N. H. 650, 76 Am. St. Rep. 204, 45 Atl. 96, and 70 N. H. 631, 47 Atl. 614), and he is not convinced that the decision ought to be overruled.

Rehearing denied.

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LOUISIANA SUPREME COURT.

SUCCESSION OF C. J. WELSH, Deceased.

OPPOSITION OF
SOUTHERN ROCK ISLAND PLOW COM-
PANY *et al.*

to

Homologation of Provisional Account of Ad-
ministrator.

(111 La. 801.)

1. Where an order for goods is taken by a drummer in this state, subject to the approval of his principal, and is transmitted to the principal in another state, and is there approved and there filled by the segregation and shipment of the goods, the sale is a contract of the domicile of the vendor, and does not give rise to a vendor's privilege on the goods, unless such privilege exists under the laws of such other state.
2. Aliter, where the sale is consummated by the segregation of the goods from a stock of goods in this state.
3. Where the order was in writing, it evidences the contract, and its terms cannot be varied or contradicted by parol.

(February 1, 1904.)

*Headnotes by PROVOST, J.

NOTE.—Conflict of laws as to sales of personal property.

- I. Distinction between personal rights and obligations and rights in property, 828.
- II. Place of contract; distinction between executory and executed contract, 824.
- III. Personal rights and obligations under the contract.
 - a. In general; construction of contract; warranty, 825.
 - b. Laws prohibiting or regulating the sale of property, 826.
 - c. As to rescission of sale for fraud; rescutory condition, 827.
 - d. As to right to maintain action for purchase price before expiration of credit, 828.
- IV. The contract as affecting the title to, or interest in, property.
 - a. In general, 828.
 - b. Validity of sale depending upon transfer of possession generally, 829.
 - c. Vendor's lien, 831.
 - d. Conditional sale, 833.
- I. Distinction between personal rights and obligations and rights in property.

In discussing the subject of conflict of laws respecting sales of personal property, a broad distinction is to be observed between those questions that relate to the personal rights and obligations of the parties under the contract and those that relate to the title or interest transferred or reserved. Questions of the first class are to be determined upon the general principles that apply to personal contracts, and, ordinarily, the choice of laws, so far as these questions are concerned, is between the *lex*

CROSS-APPEALS from a judgment of the Judicial District Court for the Parish of Acadia settling the accounts of the administrator of C. J. Welsh, deceased; opponents appealing from so much of the judgment as rejected their claims to preference; and the administrator appealing from so much as allowed a preference in case of one of the opponents. *Modified.*

The facts are stated in the opinion.

Messrs. Robert Montgomery and Shelby Taylor for appellants.*Messrs. Story & Pugh*, for appellee:

The sale was consummated at the residence of the vendor.

G. A. Gray Co. v. Taylor Bros. Iron-Works Co. 14 C. C. A. 56, 23 U. S. App. 671, 66 Fed. 686; *Colt v. O'Callaghan*, 2 La. Ann. 984; *Whiston v. Stodder*, 8 Mart. (La.) 134, 13 Am. Dec. 281; *Loeb v. Blumm*, 25 La. Ann. 232; Civil Code, art. 2456.

To uphold vendor's privilege it must be shown to exist by the law of vendor's domicile.

Whiston v. Stodder, 8 Mart. (La.) 135, 13 Am. Dec. 281; *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Colt v. O'Callaghan*, 2 La. Ann. 984; Civil Code, art. 10; *Clafin v. Mayer*, 41 La. Ann. 1048, 7 So.

loci contractus as such (i. e., the law of the place where the contract is made) and the *lex loci solutionis* (i. e., the law of the place where the contract is performable).—questions relating to the remedy being, of course, referred to the *lex fori*. The *lex domicilii*, as such (i. e., the law of the owner's domicile), or the *lex situs*, as such (i. e., the law of the place where the property is situated), is seldom, if ever, properly applied to this class of questions. It is true that the application of the general principles by which the governing law of personal contracts in general is determined will frequently subject a contract of sale, even in the aspect of it now under consideration, to the law of the domicile of the owner, or the law of the place where the property is situated; indeed, as will subsequently be shown, the location of the property necessarily determines the place of the executed contract of sale when the executory contract does not specifically identify the property, but this fact does not militate against the proposition that the contract, considered from the point of view of the personal rights and obligations of the parties to it, is not governed by the *lex situs* as such.

Coming to the second class of questions, namely, those that relate to the title or interest transferred or reserved by the contract, it will be observed that they are frequently referred to the *lex situs*. In such case, however, the additional query arises, whether the applicatory law is that of the place where the property is located at the time of the contract, or that of the place where it is located at a time the subsequent transaction with reference to it takes place.

The justification for, and the exemplification of, the distinctions here stated will be shown in

139; *G. A. Gray Co. v. Taylor Bros. Iron-Works Co.* 14 C. C. A. 56, 23 U. S. App. 671, 66 Fed. 686.

The court will take judicial notice that the common law forms the basis of the jurisprudence of Texas.

Copley v. Sanford, 2 La. Ann. 335, 46 Am. Dec. 548; *Brent v. Shouse*, 16 La. Ann. 158, 79 Am. Dec. 573; *Whiston v. Stodder*, 8 Mart. (La.) 135; *Colt v. O'Callaghan*, 2 La. Ann. 984; *Rush v. Landers*, 107 La. 550, 57 L. R. A. 353, 32 So. 95.

When an agent of a nonresident dealer has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection, an order so transmitted is similar in every respect to an order to purchase, sent direct to

the buyer from the seller; and, when accepted and filled, and the goods delivered to the carrier and insured by the buyer, it is a contract made where said order is accepted and filled and the goods are delivered.

Clafin v. Mayer, 41 La. Ann. 1048, 7 So. 139. See *McLane v. His Creditors*, 47 La. Ann. 140, 16 So. 764; *Willey v. St. Charles Hotel Co.* 52 La. Ann. 1596, 28 So. 182.

The contract of a traveling agent, which required ratification (approval and acceptance), is deemed to have been made at the place where the ratification was given.

Shuenfeldt v. Junkermann,²⁰ Fed. 357; *Whiston v. Stodder*, 8 Mart. (La.) 111; *Oliver v. Lake*, 3 La. Ann. 78; *Tegler v. Shipman*, 32 Iowa, 194, 11 Am. Rep. 118; *Ford v. Buckeye State Ins. Co.* 6 Bush, 133,

divisions III. and IV., *infra*. In the meantime, however, it is apparent that the determination of the question, where the contract, under varying circumstances, is deemed to have been made, is important in determining the governing law in either aspect of the contract; and the next division will be devoted to the discussion of that point.

II. Place of contract; distinction between executory and executed contract.

This subdivision is confined to the single question as to where the contract is, under varying circumstances, deemed to have been made, for the purposes of the principles governing the choice of laws. The consequences dependent upon the location of the place of the making of the contract are discussed in III. and IV., *infra*.

In discussing this question, it is important to observe the distinction between the executory contract and the executed contract. When the subject of the sale is specific property, identified and appropriated at the time the executory contract is made, the distinction between the executory and executed contracts is immaterial, since they are both consummated by the same act, at the same time, and at the same place. When, however, the executory contract relates to property of a particular species or class, without identifying or appropriating to the contract any particular property of that species or class, it remains executory until there has been such an identification and appropriation; and in such case the executory contract may be made in one state, and the executed contract in another.

When the parties to the contract meet and enter into the contract in person, there is no difficulty in determining the place where the executory contract is made. The difficulty arises when the contract is made by correspondence, or through the intervention of an agent of one of the parties. When a definite proposition to buy or to sell is sent through the mail from one state or country to another, the executory contract is completed as soon as a definite and unconditional acceptance of the proposition is deposited in the mail in the latter state or country; and the executory contract is therefore deemed to have been made in that state; and, if the contract is with reference to specific property already identified, that will ordinarily be the place of the executed contract, although 64 L. R. A.

this result is, of course, controlled by the intention of the parties. *Emerson Co. v. Proctor*, 97 Me. 360, 54 Atl. 849; *Shelby Steel Tube Co. v. Burgess Gun Co.* 8 App. Div. 444, 40 N. Y. Supp. 871. This principle is supported by many cases that do not involve any question as to conflict of laws.

The question also arises as to the place where the executory contract is deemed to have been made when an order for goods not specifically identified and appropriated is taken in one state by the agent of the vendor, and filed in another where the vendor does business. If the vendor's agent is merely authorized to solicit and receive orders subject to acceptance or rejection by the principal, and does not, in fact, undertake to make a binding contract of sale, it is clear that the executory contract is made in the state in which the order is finally accepted by the vendor. *Aultman, M. & Co. v. Holder*, 68 Fed. 467. See also *note to Brown v. Wieland*, 61 L. R. A. 417, 424, div. III.

Upon the other hand, if the agent has authority to make a binding contract of sale, and undertakes to do so, it is clear that the place of the executory contract is the place where he exercises such authority, notwithstanding that the vendor does business in another state, and that the stock from which the contract is to be filled is in that state. *Penninghaus v. Jacobs*, 12 Lanc. L. Rev. 203. See also *note to Brown v. Wieland*, 61 L. R. A. 417, 424, div. III.

But it has been held that, even if the agent exceeded his authority in undertaking to make a binding contract of sale, the ratification thereof by the principal in another state relates back to the time of the making of the contract by the agent, and therefore makes the state in which the agent acted the *locus contractus* of the executory contract. *McLane v. His Creditors*, 47 La. Ann. 134, 16 So. 764; *Erman v. Lehman*, 47 La. Ann. 1651, 18 So. 650. See also *Golson v. Ebert*, 52 Mo. 260.

But a contract for the purchase of machinery from an Ohio corporation having its principal place of business in that state, signed in Michigan by a resident of that state, and also countersigned there by the vendor's agent, is an Ohio contract, where it was approved at the principal office of the corporation in Ohio pursuant to a provision that it should not be valid unless approved there; and the contract is, therefore, not within a Michigan statute re-

99 Am. Dec. 670; *Taylor v. Pickett*, 52 Iowa, 469, 3 N. W. 514.

Provosty, J., delivered the opinion of the court:

The administrator having filed his final account, with the Texas Moline Plow Company, and the Southern Rock Island Plow Company, of Dallas, Texas, and T. & H. Smith & Co., of Dakin, Illinois, as ordinary creditors thereon, these parties filed oppositions, claiming the vendor's privilege on the proceeds of goods sold by them to the deceased, and inventoried and sold with the other effects of the succession, but separately, after having been identified by them as their goods, yet unpaid for. The administrator denies the privilege, because, he says,

lating to contracts made in that state. *Aultman, M. & Co. v. Holder*, 68 Fed. 467.

Delivery of the property is generally, though not necessarily, the act by which the executory contract, when the particular property has not been previously identified and appropriated, becomes an executed contract; and therefore, in such case, the place of delivery is generally the place where the executed contract is deemed to have been made. When there is no provision in the contract as to the place of delivery, and the property, pursuant to the express or implied understanding of the parties, is delivered by the seller to a common carrier in one state to be transported to another, and there turned over to the buyer, the weight of authority holds that the former, rather than the latter, state is to be regarded as the place where the executed contract is made, in the absence of circumstances rebutting the presumption of the carrier's implied authority to receive the goods for the buyer. *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 So. 705; *Atlantic Phosphate Co. v. Ely*, 82 Ga. 488, 9 S. E. 170; *Fröhlich v. Alexander*, 36 Ill. App. 428; *Brinker v. Scheunemann*, 43 Ill. App. 639; *Kruider v. Ellison*, 47 N. Y. 86, 7 Am. Rep. 402; *Lowrey v. Ulmer*, 1 Pa. Super. Ct. 425; *Braunn v. Keally*, 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389; *Perlman v. Sartorius*, 162 Pa. 820, 42 Am. St. Rep. 834, 29 Atl. 852; *City Bank v. Easton Boot & Shoe Co.* 187 Pa. 80, 40 Atl. 1026. See also note to *Brown v. Wieland*, 61 L. R. A. 422. This rule is also supported by many cases involving no question as to conflict of laws.

The last rule, however, presupposes a valid executory contract, for, in the absence of such contract, there is no foundation for the carrier's implied agency upon which the rule rests. (See cases cited in note to *Brown v. Wieland*, 61 L. R. A. 417, 422, under heading, *Statute of frauds*.)

Of course, if the terms of the contract, or the circumstances of the transaction, are such as to show that the parties did not intend the title to pass until actual delivery to the purchaser by the carrier, the executed contract is consummated in the state in which that act is done, and not in the state in which the property is delivered to the carrier. (See, upon this point, note to *Brown v. Wieland*, 61 L. R. A. 417, 421, 422, where the principle and its limitations and qualifications are applied to contracts relating to the sale of intoxicating liquors.)

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the sales were made at the domicile of the opponents in other states, and are governed by the laws of those states, which do not recognize the privilege in question.

In their brief the counsel for the administrator say that "the question in their several oppositions to be determined by this court is whether the contracts sued on are Louisiana contracts." We are not called upon, therefore, to look into the facts of the case, except in connection with this question.

In each of the cases the goods were sold through a drummer. The drummer took from the deceased, Welsh, who was a going merchant at Crowley, Louisiana, an unconditional written order for the goods, accepting same subject to approval by his prin-

A sale of goods by sample, to be shipped from Illinois to Michigan, is not made a Michigan contract, subject to the Michigan statute of frauds, by the buyer's reservation of a right to reject them after examination in Michigan if not like the samples; but the sale is complete, and title passes upon delivery to the carrier in Illinois. *Kuppenheimer v. Werthelmer*, 107 Mich. 77, 61 Am. St. Rep. 317, 64 N. W. 952.

A contract for the conditional sale of machinery, negotiated in a foreign state by citizens thereof, and contemplating a delivery therein, is deemed to have been made therein, and is governed by the law thereof, although the seller agrees to send a man to set up the machinery at a place within New Hampshire. *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20.

III. Personal rights and obligations under the contract.

a. In general; construction of contract; warranty.

The Indiana statute regulating sales of patent rights applies to sales, made in that state, of rights to be exercised in another state. *Robertson v. Cooper*, 1 Ind. App. 78, 27 N. E. 104.

The words "cured meat," in a contract of sale made by a broker with a merchant at Memphis, to which point the meat was to be shipped, are to be interpreted according to the understanding of the trade at Memphis, and not according to that of the place where the seller resides, and where, by the terms of the contract, the meat was to be delivered on board the cars. *Treadwell v. Anglo-American Packing Co.* 13 Fed. 22.

But the merchantable quality of goods is to be determined by the law of the place where the goods are to be delivered. *Ladd v. Dulany*, 1 Cranch C. C. 583, Fed. Cas. No. 7,971.

The question whether there is an implied warranty against hidden defects upon the sale of a vessel in New Orleans is to be determined by the law of Louisiana, rather than by the law of New York, although the vendors resided in the latter state. *Bulkeley v. Honold*, 19 How. 390, 15 L. ed. 663. The decision is upon the ground that the contract was made and to be performed in Louisiana.

The question as to the existence of an implied warranty upon a sale of personal property is to be determined by the law of Pennsyl-

incipal, and the goods were shipped in due course. One of the shipments by the Texas Moline Plow Company was made from Gueydan, Louisiana, and will be considered later separately.

The case is undistinguishable from that of *Claffin v. Mayer*, 41 La. Ann. 1048, 7 So. 139, and under the doctrine of that case the privilege is denied.

In each of the cases it was sought to be proved by parol evidence that the traveling agent had full power to bind the principal, and that the stipulation touching approval by the principal was a mere empty or accidental and meaningless formality. But this parol evidence was properly objected to as contradicting or varying the written contract.

The lower court accorded a privilege to the Texas Moline Plow Company, and rejected the two other oppositions. Doubtless this privilege was thus accorded on the strength of the testimony of the traveling agent of the opponent company to the effect that the consignee, Welsh, refused to accept

the goods, and that thereupon an arrangement was made by which he kept them as goods belonging to the Texas Moline Plow Company, to be paid for when sold; and that later in the fall, after some of the wagons and one of the buggies had been sold, and a settlement being asked for them, Welsh proposed that, if certain discounts were made, he would take the goods, and give his notes for the price, and that this was done.

Counsel for the administrator says that, as against a dead man, whose lips are sealed, this testimony must be taken *cum grano salis*, and the situation impresses us in the same way. The written contract stipulated that the order was not subject to revocation except upon payment of 20 per cent of the net amount of the goods. The order was a considerable one,—\$1,219. The goods had been shipped from another state, and the consignee was a merchant in regular business. The manager, the assistant manager, and the adjuster of the company seem to have known nothing of this taking back

vania if the sale was made and perfected in that state. *Snow v. Schomacker Mfg. Co.* 69 Ala. 111, 44 Am. Rep. 506. The only conflict in this case seems to have been between the *lex loci contractus* and *lex fori*.

The law of Massachusetts giving the vendee, in a conditional sale of personal property, a right to redeem, becomes a part of such a contract made in that state, and will be applied by a court of Maine in a controversy between the vendor and creditors of the vendee who attached the property after its removal to Maine. *Gross v. Jordan*, 83 Me. 380, 22 Atl. 250. The decision is upon the broad ground that the law of the place where a contract is made determines its meaning and validity.

The requirement of Mo. Rev. Stat. 1889, § 5181, as a condition precedent to the right of a vendor of personal property, who reserves title until payment of the purchase price, to sue for the recovery of the property, that he shall refund the purchase money already received less 25 per cent, pertains to the remedy, and is, therefore, inapplicable in an action in Arkansas founded on a sale in Missouri. *Public Parks Amusement Co. v. Embree-McLean Carriage Co.* 64 Ark. 29, 40 S. W. 582.

b. Laws prohibiting or regulating the sale of property.

The principles governing this branch of the subject are fully set forth and illustrated by the cases cited in the note to *Brown v. Wieland*, 61 L. R. A. 417, upon the subject of *Conflict of laws as to sales of intoxicating liquor*. The same principles have been applied in several cases involving statutes regulating the sale of fertilizers. Thus:

Where a contract for the sale of fertilizers, though dated in Georgia, was in fact signed by both parties in Alabama, and the notes for the purchase price were also signed there and payable at a bank there, upon the delivery of the fertilizers there, the transaction is an Alabama transaction, and the notes are void if the requirements of the Alabama statute with ref-

erence to the sale of fertilizers were not complied with. *Johnson v. Hanover Nat. Bank*. 88 Ala. 271, 6 So. 909, 90 Ala. 549, 8 So. 42.

The statutes of Georgia touching the inspection of fertilizers, which relate solely to such as are "offered for sale or distribution in this state," do not affect the validity of notes given for the purchase price of fertilizers which a farmer, residing in Georgia, ordered by letter, written in that state, to be sent him from South Carolina by a dealer in the latter state, the goods to be shipped by railroad. *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, 9 S. E. 170. The decision is upon the ground that the contract of sale was a South Carolina contract, being consummated by the acceptance of the order in South Carolina and compliance therewith by putting the goods on board the cars consigned, as directed, to the purchaser in Georgia. The note in this case was executed in Georgia upon the receipt of the goods there, and, so far as appears, was also payable in Georgia; but it will be observed that the decision turns entirely upon the question where the contract of sale was made, and not upon the question where the note itself was made or payable.

Martin v. Upshur Guano Co. 77 Ga. 257, is to the same effect as the preceding case, except that the purchaser was a retailer.

So, an action will lie in Pennsylvania to recover the purchase price of oleomargarine, furnished under a contract made in Illinois and delivered to a carrier there, to be shipped into Pennsylvania, the purchaser paying the freight, notwithstanding that the seller knew that the purchaser intended to sell the goods contrary to the statute of Pennsylvania declaring void contracts for the sale of oleomargarine. *Braunn v. Keally*, 146 Pa. 519, 28 Am. St. Rep. 811, 23 Atl. 389. The decision is upon the ground that the sale was completed by delivery of the oleomargarine to the carrier in Illinois, and that the Pennsylvania statute has no extraterritorial operation. The court says the seller's knowledge that the purchaser might, or even that he intended to, sell the goods contrary to the law

the goods and subsequently selling them, for they make no allusion to it in their testimony. Then, again, the witness says that the goods thus refused to be accepted were sold to Welsh "later in the fall," and that "certain discounts" were made. Now, the notes were taken for the whole price,—that is to say, apparently, without any discount having been made; and the short time intervening between the taking of the notes and the shipment of the goods would hardly justify the expression "later in the fall." The notes were made on October 15th, and the goods were invoiced at Dallas, Texas, on September 23d. Allowing a few days for them to reach destination, Crowley, Louisiana, and barely twenty days intervened between the alleged refusal to receive them and the alleged resale of them later in the fall.

The testimony would more nearly fit the shipment made from Gueydan, Louisiana. The date of that shipment was August 27th, and the date of the note given for it is November 17th. The note is for an amount less than the amount of the invoice, and the

goods included buggies, and it is said that Welsh advanced as a reason for not receiving them that they were damaged. Here was a reason for refusing to accept, and here, also, is a discount, and also a delay such as might justify the expression "later in the fall."

Be the foregoing as it may, however, we have concluded to allow the privilege on this shipment from Gueydan, Louisiana, for another reason. The sale as to it was consummated at Gueydan, Louisiana, by the segregation of the particular goods from the stock there on hand, and thus, under the doctrine of *State v. Shields*, 110 La. 547, 34 So. 673, was a Louisiana contract.

The judgment appealed from is amended so as to reduce it to \$500, with 8 per cent per annum interest from December 9, 1901, the amount for which a privilege is allowed to the Texas Moline Plow Company, and as thus amended it is affirmed; the opponents to pay the costs of this appeal.

Nicholls, Ch. J., absent, sick.

of Pennsylvania could not vitiate a contract made and executed in Illinois. The opinion does not refer to the public policy of the forum as a possible ground for refusing to enforce the contract upon the assumption that it was valid by the law of Illinois.

Parsons Oil Co. v. Boyett, 44 Ark. 230, is to the same effect as the last case. The decision, however, is conditioned upon the fact that the seller is not to actively participate or be interested in the resale of the goods by the buyer in violation of law.

It will be observed that, according to the rules stated in II., *supra*, the executed and executory contracts involved in the last two cases were consummated in the same state; but in the next case the two contracts were consummated in different states; and the question is referred to the law of the state where the executed contract was consummated.

Where a contract is made in Iowa for the sale of a gambling device to be delivered in Illinois, the validity of the sale and promise to pay are to be determined by the laws of Illinois. *Price v. Burns*, 101 Ill. App. 418.

It will be observed that, notwithstanding the actions in the first two cases were upon notes for the purchase price, and not upon the original contract of sale, the governing law was determined by applying the general principle to that contract, rather than to the notes. That was because the validity of a note, as affected by the consideration, is necessarily determined by the law that determines the validity of the original contract which furnishes the purported consideration. (For further illustration of this principle, see note to *Brown v. Wieland*, 61 L. R. A. 417, 433, div. VI.)

c. As to rescission of sale for fraud; resolatory condition.

There are some divergencies in the laws of different states as to the circumstances under which a vendor may rescind the sale and re-

cover the property upon the ground of the vendee's fraud in respect of his financial condition and ability to pay; and it therefore sometimes becomes necessary to determine what law shall govern in this respect. There seems to be a tendency upon the part of the courts to refer this question to the law of the place where the executed contract is made (generally the law of the place where the property was delivered). Thus:

The question as to what constitutes a fraud on the part of a purchaser of goods which will entitle the seller to rescind is to be determined by the law of New York, where the order for the goods was given to the traveling salesman of the seller in Pennsylvania, the goods to be delivered on board the cars in New York, the buyer paying the freight. *Lowrey v. Ulmer*, 38 W. N. C. 232. This decision seems to be upon the assumption that the salesman had authority to accept the order. The court says the contract was executory in Pennsylvania, that the order was only part of the contract, and that the owners had a right to refuse to deliver up to the time of parting with the legal control of their property, and that the sale was, therefore, completed upon the delivery of the goods to the common carrier in New York.

So, in *Mann v. Salsberg*, 17 Pa. Super. Ct. 280, the court said that, if the goods were delivered at Baltimore to a common carrier consigned to the purchaser in Pennsylvania, the contract was a Maryland contract, and the rule in that state with respect to the vendor's right to rescind was to be applied. It appeared that the order for the goods was taken in Pennsylvania by a traveling salesman of a Maryland house, but it does not appear whether he had authority to accept the order, or merely to solicit it subject to acceptance or rejection by the principal in Maryland; and the court apparently assumed that the question turned upon the place where delivery was made, without reference to the place where the order was accepted.

While, in the cases next cited, the court seems to refer the question to the law of the state where the executed contract was consummated (i. e., to the law of the state of delivery), yet the executory contract seems also to have been made in that state by the acceptance of the order there.

The question as to what amounts to a fraud by the buyer upon the seller of goods, such as entitles the latter to rescind the sale, is to be determined by the law of Pennsylvania, where the order for the goods, which was in accordance with terms of sale agreed upon between the agents of the parties in Illinois, was sent from that state to the seller in Pennsylvania, the delivery being made to a railroad company in Philadelphia, which, the court says, in the absence of any agreement between the parties to the contrary, was, in law, a delivery to the purchaser. *Kline v. Baker*, 99 Mass. 253.

The law of the state where goods sold are situated, and the sellers live, governs a sale completed by delivery to a carrier in that state as to the question whether a purchase of goods by one knowing himself to be insolvent is void. *Perلمان v. Sartorius*, 162 Pa. 320, 42 Am. St. Rep. 834, 29 Atl. 832.

Where an order for goods from a resident of Pennsylvania is accepted in New York, and the goods are delivered in the latter state to the purchaser, the question as to the right to rescind the sale on the ground of fraud is to be determined by the law of New York. *Whiting Mfg. Co. v. Fourth Street Nat. Bank*, 15 Pa. Super. Ct. 419.

Where a resident of Pennsylvania buys goods in New York with a preconceived design not to pay for them, but to turn them over to other creditors, the right of the seller to rescind on the ground of fraud is to be determined by the law of New York. *Arnold v. Shade*, 3 Phila. 82.

The rule in Tennessee, that the mere fact that the purchaser knew he was insolvent at the time he purchased goods does not of itself entitle the vendor to rescind and replevin the goods, will be applied where a contract was made in that state, between a retail dealer thereof and a wholesale dealer of Georgia, under which goods were from time to time ordered by mail from Tennessee and shipped from Georgia and delivered in Tennessee, and paid for by acceptances on delivery, as agreed in the contract. *Rome Furniture & Lumber Co. v. Walling* (Tenn. Ch. App.) 58 S. W. 1094.

The next case apparently refers the question to the law of the state where the executory contract was made, although it may have been that the court regarded the delivery, and therefore the consummation of the executed contract, as having taken place in that state.

Where a traveling agent for a Maryland house receives in Pennsylvania an offer for goods at a lower price than he is authorized to sell, and telegraphs to his principal, who replies authorizing him to accept, and he accepts pursuant to such answer, the contract is to be regarded as a Pennsylvania contract, and therefore not subject to the law of Maryland to the effect that a sale to one who knows himself to be insolvent passes no title. *Penninghaus v. Jacobs*, 12 Lanc. L. Rev. 203.

In the foregoing cases the question arose between the vendor and a creditor of the vendee who had seized the goods under process, except in *Rome Furniture & Lumber Co. v. Walling* (Tenn. Ch. App.) 58 S. W. 1094, where the ac-

tion was against an assignee for creditors of the vendee. In none of these cases, however, is the location of the property at the time of the seizure regarded as the criterion of the governing law with respect to this question. But in *Tatum v. Wright*, 7 La. Ann. 358, it was held that the law of another state where personal property is sold, which allows the seller to recover the property from the purchaser or a subsequent holder, when he has been swindled into taking counterfeit bank notes in payment, would not be applied where the property was subsequently brought into Louisiana, and a resident of that state advanced money upon it.

The resolutory condition is peculiar to the civil law, and does not enter into a contract of sale made in the state of New York, the goods being delivered in that state. *Lalancé Grosjean Mfg. Co. v. Wolff*, 28 La. Ann. 942.

d. *As to right to maintain action for purchase price before expiration of credit.*

Where goods are ordered through the mail by a person in Oklahoma from a person in New York, and the goods are delivered to a carrier in New York and transported to Oklahoma, the purchaser paying the freight at the latter place, the contract must be regarded as having been made in New York, and is, therefore, governed by the rule prevailing in that state, whereby the seller may sue to recover the purchase price before the expiration of the period of credit if the goods were obtained by false representations. *Jaffray v. Wolf*, 4 Okla. 303, 47 Pac. 496.

The last case assumes that the question relates to the substantive rights of the parties, and not to the remedy merely; but *Galloyway v. Holmes*, 1 Dougl. (Mich.) 330, held that the law of the place where a sale of goods on credit was made, which enables the vendor, in case of fraud on the part of the purchaser, to maintain assumpsit for the price before the expiration of the credit, affects the remedy only, and does not apply so as to enable the vendor to maintain such an action in another state.

IV. *The contract as affecting the title to, or interest in, property.*

a. *In general.*

It is frequently stated as a fundamental principle that personal property has no situs of its own, but follows the person of the owner. *Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Allen v. Bain*, 2 Head, 107; *Williams v. Pope Mfg. Co.* 52 La. Ann. 1417, 50 L. R. A. 818, 78 Am. St. Rep. 390, 27 So. 851. If that principle were to be conceded without qualification, the general rule frequently stated by the courts, that the validity of a transfer of personal property depends upon the law of the seller's domicile, would be clearly deducible therefrom. Conceding the general principle, however, its practical scope and effect are greatly reduced by the co-ordinate principle which is clearly stated, in its relation to the general principle, in the following language quoted from *Smead v. Chandler* (Ark.) 76 S. W. 1066: "Every state has jurisdiction over all property, personal and real, within its territorial limits, and, within the bounds of legislation, may regulate and control it in such manner as to it may seem fit or expedient. It may provide how far the laws of a foreign state, in which a contract or transfer or mortgage

of property has been made, shall govern in the enforcement of such contract, transfer, or mortgage by its courts, or that its own laws shall be the only rule observed in such cases. But when it has not done so, the general rule is 'that the nature, the obligation, and the interpretation of personal contracts and contracts concerning movable property are governed, in such a state, by the laws of the place where they are made, unless the parties at the time of making them have some other law in view.' *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 458, 32 L. ed. 798, 9 Sup. Ct. Rep. 469."

Although a court of one state may give effect to the law of domicile of another state, yet this is a mere principle of comity between the courts, which must give way when the statutes of a country where the property is situated, or the established policy of its laws, prescribe to its court a different rule. *Walworth v. Harris*, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340.

Many other cases have expressly recognized the effect of the conceded power of the state over the personal property within its jurisdiction to narrow and restrict the practical operation of the general principle that refers all the legal incidents of personal property to the law of the owner's domicile. See, especially, *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; *Hervey v. Rhode Island Locomotive Works* 93 U. S. 664, 23 L. ed. 1003; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 376. In *Loftus v. Farmers' & M. Nat. Bank*, 133 Pa. 97, 7 L. R. A. 313, 19 Atl. 347, after stating that a state has the power to change the rule that the validity of a transfer of personal property is to be determined by the law of the owner's domicile, so far as it relates to property within its borders, and to make the transfer thereof subject to its own laws, the court added: "Indeed it may be said that the tendency of modern authorities, under the influence of the European continental jurisprudence, is towards the recognition of the law of the situs to such an extent that what was an exception is tending to become the rule."

It is clear, from the authorities above cited, that the court of a state in which the property is situated may test the validity of a transfer or mortgage thereof by the domestic law, though made by a nonresident in another state, if, in its opinion, that law evinces a public policy which justifies its extension to contracts made under such circumstances, and must do so if that law expressly, and in terms, covers them, whatever the principles of private international law might otherwise require. Practically, then, the only case in which the court—at least a court of the state in which the property was located at the time of the contract—is left free to make a choice between the *lex situs* upon the one side, and *lex domicilii* or *lex loci contractus*, upon the other, is when the *lex situs* is not express or explicit upon the point. In such a case the general principles governing the choice of laws with respect to personal property may be invoked; but, even in such a case, those principles may be disregarded if, in the opinion of the court, the contract, notwithstanding its foreign element, comes within the public policy evinced by the *lex situs*. When the cases are examined with reference to the decisions actually rendered, it will be found (whether the result is attributable to general principles or to local policy is, perhaps, not material) that the ma-

jority of them apply the law of the place where the property is situated at the time of the contract to questions relating to the steps that must be taken to protect the title or interest acquired or reserved by the contract against the rights of third persons, *e. g.*, subsequent purchasers or creditors of the parties, even when the terms of the law do not expressly require such application. When, however, the rights of the parties, or of third persons, in or to the property depend upon the original validity or effect of the contract of sale itself, the governing law is usually determined by the general principles governing personal contracts, and the *lex situs*, as such, is not to be applied, though, as already pointed out, the place where the property is situated may affect the application of such general principles to this class of contracts.

Many of the cases seem formally to refer the former class of questions to the *lex domicilii* or *lex loci contractus* (these are generally coincident), but it will ordinarily be found that the *lex domicilii* or *lex loci contractus*, as the case may be, was coincident with the *lex situs*, having reference to the time of the execution of the contract; and the fact that the *lex situs* is the applicatory law in this respect emerges clearly when the property was located at the time of the contract in a state other than that in which the contract was executed and the owner was domiciled. When a decision upon a question of this class appears to be against the *lex situs*, it will generally be found that it is merely against the law of the place to which the property was removed subsequently to the execution of the contract, and in favor of the law of the place where the property was located at the time the contract was executed.

The justification for the foregoing statements will be found in the cases cited in the following divisions of this note, and in the cases cited in the note to *Sulder v. Yates*, ante, 353, with reference to chattel mortgages.

b. *Validity of sale depending upon transfer of possession generally.*

. The question as to the necessity of delivery of possession of the property to the vendee in order to protect him against subsequent bona fide purchasers from, or creditors of, the vendor is sometimes apparently referred to the *lex loci contractus*; but in such cases it will, usually at least, be found that the property at the time of the contract was in the state where the contract was made; and the decisions are therefore not inconsistent with the position that this question is to be determined by the law of the place where the property is located at the time the contract is made. These cases are, however, authority for applying the law of the place where the property was situated at the time the contract was made, at least if coincident with the *lex loci contractus*, as opposed to the law of the place where the property was situated at the time of its subsequent sale by, or seizure under process against, the vendor.

The rule in New York, by which the retention of the possession of personal property by the vendor after the sale is only evidence of fraud, and does not authorize the court to pronounce the sale fraudulent *per se*, governs in determining the validity of the sale of a ship made in that state by vendors domiciled in Connecticut, notwithstanding that the vessel was subsequently attached by a creditor of the vendor

while in his possession in Connecticut. *Koster v. Merritt*, 32 Conn. 240. The court in this case formally referred the question to the *lex loci contractus* as opposed to the *lex fori*; but it will be observed that the *lex loci contractus* and the *lex situs* (having reference to the situation at the time the contract was made) were coincident.

So, where horses and mules are sold while in Virginia, but are subsequently sent to Pennsylvania to be pastured, and are there seized under a foreign attachment by creditors of the vendor, the validity of the sale and transfer is to be tested by the law of Virginia, under which the retention of possession by the vendor is merely prima facie evidence of fraud which may be rebutted by proof, rather than by the law of Pennsylvania, under which such retention of possession is conclusive evidence of fraud. *Born v. Shaw*, 29 Pa. 288, 72 Am. Dec. 638.

A bill of sale executed in Maryland between residents of that state, and duly recorded there, will protect the property against attachment by a Maryland creditor of the vendor while it is in the latter's possession in Pennsylvania. *Guthman v. Cole*, 21 W. N. C. 96.

The validity of a sale of personal property, as against a subsequent attaching creditor of the seller, depending upon the question of the transfer of the possession, is to be determined by the law of Vermont, where the bill of sale was executed, delivered, and recorded in that state, and the property was there at that time, as well as at the time it was attached, notwithstanding that the contract of sale was written in Massachusetts. The seller in this case seems to have resided in Vermont. *Ames v. McCamber*, 124 Mass. 85.

The validity of a sale of personal property, made in New Hampshire where the property then was, is to be determined by the law of that state, notwithstanding that the vendor was domiciled in Vermont, in the absence of any evidence of an intention to evade the laws of the latter state. *French v. Hall*, 9 N. H. 137, 32 Am. Dec. 841. The purchaser, after having possession of the property for some time, let it for hire to the former owner to go into Vermont, where it was attached as his property and sold upon execution. The court held that, while the regularity of the proceedings in attaching and selling the property was to be determined by the law of Vermont, the validity of the title to the property under the contract of sale, and therefore its liability to attachment, was to be determined by the law of New Hampshire, where the sale was made; but it will be observed that the property was in New Hampshire at the time of the sale.

The Texas rule, that no title can be acquired to cattle running on the range except by registered bill of sale of marks and brands does not apply to cattle which were not within the state at the time of the sale, but were subsequently brought there and seized under process against the original owner,—especially when, at the time of such seizure, they were in possession of the purchaser. *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 301, 16 S. W. 1028.

It will be observed that the case next cited, while holding that the *lex loci contractus* upon this point will prevail over the law of the place to which the property was removed after the sale, intimated that the law of the place where the property was at the time of the sale (excluding the law of the place where the prop-

erty might happen to be *in transitu*) will prevail over the *lex loci contractus* if the two are opposed.

Where a vessel while at sea is sold in New York, where the parties are domiciled, and by the law of which delivery is not necessary to transfer the title, the vessel cannot, upon her arrival at New Orleans, be attached for a debt of the vendor. *Thuret v. Jenkins*, 7 Mart. (La.) 818, 12 Am. Dec. 508. The court impliedly concedes that the decision would have been different if the vessel had been in Louisiana at the time of the sale.

A sale of goods, without delivery, while *in transitu* from Tennessee to Louisiana, being valid by the law of Tennessee, where the sale was made and where the parties resided, the goods will not be subject to attachment by a creditor of the seller when they reach Louisiana; although, if the goods had been in the latter state at the time of sale, an attachment would have been sustained, because, by the law of that state, a sale without delivery is invalid as against creditors. *Fell v. Darden*, 17 La. Ann. 236.

But it was held in *McKaig v. Jones*, 2 Clark (Pa.) 123, that, although by the law of Maryland a bill of sale of personal property, duly recorded, is valid, notwithstanding the vendor retains possession, yet, if the property is brought into Pennsylvania by the vendor, it is liable to the executions of his creditors in that state.

The above case, in making the law of the state into which the property was subsequently removed prevail over that in which it was located at the time of the sale, is against the weight of authority, and is opposed to the principle applied in the subsequent case of *Born v. Shaw*, 29 Pa. 288, 72 Am. Dec. 638, decided in the same state.

In the two cases next cited; it will be observed that the property was, at the time of the sale, in a state other than that in which the sale was made.

Personal property which is in Louisiana at the time of a sale thereof is subject to attachment by a creditor of the seller after the sale but before the delivery, although, by the law of another state, where the sale was made, and where the parties were domiciled, delivery is not essential to protect the purchaser against the seller's creditors. *Olivier v. Townes*, 2 Mart. N. S. 98.

A bill of sale of a slave, which was executed in Virginia and was valid by the law of that state, will protect the purchaser as against a subsequent purchaser from a third person, who, at the time of the Virginia sale, held the slave in North Carolina as a bailee of the original vendor, notwithstanding that the bill of sale was neither proved nor registered, nor had a subscribing witness, as required by the law of North Carolina. *Drewry v. Phillips*, 44 N. C. (Busbee L.) 82. The court conceded that the rule would have been different if the defendant were claiming as a creditor, or under a creditor, of the original vendor.

When the cases above cited are considered together, and those that apparently refer the question to the *lex loci contractus* are considered in the light of the fact that the property involved was at the time of the sale located in the state where the sale was made, they seem to justify the statement that the necessity of a delivery of possession, in order to protect the purchaser of personal property against subse-

quent bona fide purchasers from, or creditors of, the vendor, is to be determined, neither by the *lex domicilii*, nor *lex loci contractus* as such, but by the law of the place where the property is located at the time of the original sale. In this respect, therefore, there is an exception to the general principle, so frequently stated by the courts, that personal property has no situs of its own, but follows the person of the owner.

Walp v. Lamkin, 76 Conn. 515, 57 Atl. 277, however, while conceding that, as a general principle, a sale of personal property, valid by the laws of the place where made and where the property is then situated, should be deemed valid everywhere, held that a sale, made in New York, of goods then in that state, but which had previously constituted the entire stock of a retail dealer in Connecticut, who, with the intent to defraud his creditors, had sold the same in a single transaction, and not in the regular course of business, to the person who subsequently sold them in New York, could not be upheld as against the creditors of the retailer, the sale by the latter not having been recorded as required by the law of Connecticut, and it appearing that the New York purchaser knew of the retailer's fraudulent purpose, although the intermediate purchaser did not, and that the goods were re-shipped to Connecticut immediately after the second purchase, they not having been in New York more than one day. The decision is upon the ground that, in view of the circumstances, it would be contrary to the public policy of Connecticut to recognise the validity of the second purchase.

e. Vendor's Lien.

It is clear, under the authorities, that a vendor is not entitled to the vendor's lien for the purchase price allowed by the statute of a particular state, when neither the executory nor executed contract was completed in that state, though the purchaser was a resident of that state, and it was contemplated at the time that the property would be taken to that state. Thus, it will be observed that, in the three cases next cited, as well as *WELSH'S SUCCESSION*, which deny a vendor's lien under the Louisiana statute, both executory and executed contracts were consummated out of that state, though it was contemplated at the time that the property was to be taken to that state.

A sale of goods must be regarded as made in England, and therefore the vendor is not entitled to the vendor's lien given by the Louisiana statute, where the order was sent by mail from Louisiana to the vendor in England, and there executed by the latter. *Whiston v. Stodder*, 8 Mart. (La.) 95, 13 Am. Dec. 281. The Louisiana statute creating the vendor's privilege appertains to the contract itself, and not to the remedy for enforcing its execution and, therefore, does not apply where the sale was made outside of the state. *Ibid.*

The vendor's lien under the Louisiana statute does not attach upon the removal of personal property to that state after its sale in another. *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Colt v. O'Callaghan*, 2 La. Ann. 984.

Where an agent in New Orleans for dealers in New York has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection, the contract and sale are deemed to be made in New York when the order is accepted and the goods

are delivered to the carrier in that state, in the absence of any stipulation for delivery in New Orleans, and the seller is not entitled to a vendor's lien under the Louisiana statute. *Clafin v. Mayer*, 41 La. Ann. 1048, 7 So. 139.

A sale of a machine by an Ohio corporation to a purchaser in Louisiana, to be forwarded "by quickest route, making best rate" for the purchasers, is an Ohio, and not a Louisiana, contract; and the vendor is not entitled to a lien under the Louisiana statute, although a representative of the seller goes to Louisiana to be present at the starting of the machine, and the seller accepts a time draft in lieu of the cash payment provided for. *G. A. Gray Co. v. Taylor Bros. Iron-Works Co.* 14 C. C. A. 56, 23 U. S. App. 671, 66 Fed. 686.

Upon the other hand, if the executed contract is consummated in the state which allows the lien, by the delivery of the property there, it is clear that the vendor is entitled to the lien, although the executory contract was consummated in another state. Thus:

Where an executory contract for the sale of goods was made in New York, but the delivery took place in Louisiana, the contract must be considered as completed in Louisiana, and the vendor's lien given by the law of that state attaches. *Overend v. Robinson*, 10 La. Ann. 728.

McIlvaine v. Legare, 36 La. Ann. 359, makes the question, whether the vendor of movables is entitled to the vendor's privilege accorded by the Louisiana statute, dependent upon the question, whether the sale was consummated in, Louisiana or elsewhere; and the lien was upheld in this case, it appearing that the goods were to be delivered in Louisiana and paid for on inspection.

A contract made in New York for the delivery and erection of cotton presses on premises in Louisiana, the acceptance being dependent upon the success of a stipulated test to be applied to the presses after erection, is to be construed with reference to the law of Louisiana, and the presses are therefore subject to the vendor's privilege accorded by that law. *De La Vergne Refrigerating Mach. Co. v. New Orleans & W. R. Co.* 51 La. Ann. 1738, 26 So. 455. Here it will be observed that the right to the lien is made to depend upon the fact that the final acceptance, by which the contract was consummated, took place in Louisiana.

Sales made in Louisiana, by agents of nonresident vendors duly authorised, of goods to be delivered and actually delivered in the state, constitute Louisiana contracts, subject to the law of that state and entailing the vendor's privilege. *Newman v. Cannon*, 43 La. Ann. 712, 9 So. 489. In this case both executory and executed contracts were consummated in Louisiana; but it is clear, upon the authority of the case last cited, that the fact that the executed contract was consummated in that state would, alone, have been sufficient to entitle the vendor to the lien under its statute.

As elsewhere shown, the delivery and acceptance of the property is ordinarily the final act by which the executed contract is completed; when the particular property is not identified by the executory contract itself; and therefore the place where the property is delivered and accepted, in such a case, is the place of the executed contract.

It will be observed, however, that it is the *lex loci contractus*, as such, and not the *lex situs*, as such, that is to be applied to the sub.

ject of the vendor's lien. The distinction is not practically important when the executory contract has reference to an unidentified portion of a larger mass of property, since, *ex hypothesi*, the executed contract will necessarily be consummated in the state where the property is situated at the time. The distinction, however, becomes a practical one when the sale is of specific identified property, since in that case delivery is not essential to the consummation of the executed contract, and that contract may, therefore, be consummated in a state other than that in which the property is located. The distinction alluded to is illustrated by the case next cited.

A vendor's privilege does not attach to contracts made in a state where the parties are domiciled, by the law of which no such privilege exists, even if a portion of the goods were in New Orleans at the time of the contract,—movables having no situs as a general rule. *Brent v. Shouse*, 16 La. Ann. 158, 79 Am. Dec. 573.

The question remains, whether the vendor is entitled to the lien when the executory contract is consummated in the state which allows a lien, but the executed contract is consummated by the delivery of the property in another state. The Louisiana supreme court, in *McLane v. His Creditors*, 47 La. Ann. 134, 16 So. 764, answers that question in the affirmative, or, at least, it holds that, if the executory contract is consummated in Louisiana, the vendor is entitled to the lien, notwithstanding that the executory contract did not identify the particular property, and notwithstanding that the delivery to a carrier in another state is to be regarded as a delivery to the purchaser. In one part of the opinion the court distinguishes between delivery to, and acceptance by, the purchaser, apparently regarding the acceptance as taking place in Louisiana; and in that view the executed, as well as the executory contract would be actually (not by a fiction of law merely) consummated in that state. In a subsequent part of the opinion, however, the court seems to put the decision upon the ground that the acceptance, *quoad* the place of delivery, relates back to the consummation of the executory contract. The court said in this connection: "It is true that, *quoad* certain results and certain parties, the executory nature of the contract might bring about important differences between the situation in the two cases; but, if matters ultimately took the shape of actual acceptance and actual delivery without the intervention of disturbing factors, the legal situation, in our opinion, is that which we have indicated." While the court thus apparently rendered the decision upon the hypothesis that the title to the property passed when it was delivered to the carrier in the other state, it said: "We are by no means prepared to say, however, as a matter of fact, that the ownership of these goods, whether viewed from the standpoint of a Louisiana, or that of a Missouri, contract, would shift in Missouri at the time, and by the fact of the segregation of a particular machine from among a number of others at the company's factory, and its being brought directly under the operation of the contract by appropriation. *McLane* had never seen the particular machine which would ultimately be brought in under the contract. It was in contemplation of both parties that it should reach him in Louisiana, and that while there in his possession a portion of the price would be still unpaid. It would be fair to pre-

sume, in absence of express stipulation to the contrary, that *McLane* should reserve right of final acceptance to a reasonable time after its receipt by him at Franklin, and that both parties should contract with reference to the operation of the laws of Louisiana upon the enforcement of the rights of the seller."

The doctrine of the foregoing case was approved and applied in *Erman v. Lehman*, 47 La. Ann. 1651, 18 So. 630. (See II., *supra*, for the discussion of this case in its bearing upon the point where the executory contract was consummated.)

While in most of the cases thus far cited the controversy respecting the lien was between the vendor upon one side, and persons claiming through or under the purchaser upon the other, the question turned upon the original existence of a lien, and not upon the steps necessary to preserve or enforce, against third persons, a lien existing under the statute and contract. Assuming the existence of such a lien under the statute of a particular state, the question arises whether it will survive the removal of the property to another state, and will be enforced against purchasers from, or creditors of, the vendee in the latter state.

Whether or not a seller of personal property has a lien for the unpaid purchase price as against subsequent attaching creditors of the vendee is to be determined by the law of the state where the property was at the time of the attachment, and not by the law of the state where the property was sold. *Barney & S. Mfg. Co. v. Hart*, 8 Ky. L. Rep. 223, 1 S. W. 414. In this case the sale was made in Ohio, and the property was attached in Kentucky after its removal to that state. The court said that there may have been a valid lien by the law of Ohio, but it had no effect in Kentucky because there was no record of the lien as required by the law of the latter state.

But a vendor's lien created by an Alabama statute, which provides that, when a contract is made for the sale of cotton in Mobile, and by the general usage of trade in that city it is considered a sale for cash, but the broker or agent is allowed a reasonable time to examine, reweigh, and resample the cotton before paying for it, the seller shall have a lien upon the cotton to continue for fifteen days from the time when the cotton, or an order for its delivery on a warehouseman shall be delivered.—will be enforced by a court of Louisiana as against a bank which advanced money upon the faith of the purchaser's title to the cotton, where all the parties to the controversy are residents of Mobile, and the seizure was made within five days, during which a lien is allowed by a similar statute of Louisiana. *Tyree v. Sands*, 24 La. Ann. 363. The decision is upon the ground that the recognition of the privilege did not violate any priority established by the law of the forum, but, on the contrary, was in harmony with such law; that it did not injure the rights of the citizens of the forum, for no such rights were involved; and, finally, it did not infringe the rule that the remedy must, in all cases, be in accordance with the law of the forum, for that law allowed the process adopted by the vendor in the case at bar.

The Arkansas statute providing that, in an action to recover the purchase money for a chattel, the debtor shall not be allowed to claim the specific chattel he has purchased but never paid for as exempt from seizure and sale, but the

vendor may obtain an order of sequestration, applies to an action in Arkansas for the purchase price of property which was sold upon credit in another state, but subsequently removed to Arkansas. *Swanger v. Goodwin*, 49 Ark. 287, 5 S. W. 319. The decision is upon the ground that the effect of the law was not to give the vendor a lien, but merely a remedy.

d. Conditional sale.

As to rights and obligations of immediate parties under conditional contract, see *Gross v. Jordan*, 83 Me. 380, 22 Atl. 250, and *Public Parks Amusement Co. v. Embree-McLean Carriage Co.* 64 Ark. 29, 40 S. W. 582, III. a, *supra*. Where notes for the purchase price of machinery, and a deed providing, in effect, that the property shall remain the property of the vendors until the notes are paid, were dated in Massachusetts, but were delivered in Maine, the property being in the latter state, the validity of the reservation of the title will be determined by the law of Maine, and the law of that state, requiring such agreement to be recorded in order to be effectual as against creditors of the purchaser, will be applied. *Holt v. Knowlton*, 86 Me. 456, 29 Atl. 1113.

A statute of Georgia, providing that cotton sold on cash sale shall not be considered as the property of the buyer, or the ownership given up until the same shall be fully paid for, although it may have been delivered into the possession of the buyer, does not protect the vendor in such a sale made in Georgia against a subsequent bona fide purchaser from the vendee in New York. *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626. The decision is upon the ground that, assuming that the Georgia statute entered into the original contract of sale, its only effect would be to place the parties in the same position as if it had been stipulated at the time of the delivery that such delivery should be conditional upon payment, and the law of New York, which protects a bona fide purchaser from one to whom goods have been conditionally delivered, must be applied. The court distinguished between a sale with conditional delivery and a conditional sale.

The court, in *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566, 7 Atl. 418, takes the position that the validity of a conditional contract of sale with reservation of title in the vendor, as between the parties, is to be determined by the law of the place where the contract was made and the property was then located, notwithstanding that the property was subsequently removed to another state; and it was assumed that such law would also determine the rights of a third person, so far as they depended upon its validity or invalidity as between the parties; but, assuming its validity, according to that law, as between the parties, its validity as against a third person who deals with the property after its removal to another state, upon faith of the vendee's possession and apparent title and without notice of the reservation, is to be determined by the law of the latter state. It was accordingly held in that case that the law of Pennsylvania, by which the reservation of title upon a conditional sale of chattels is valid as between the parties, but invalid as to third persons, governs, so far as the immediate parties are concerned, a contract made in that state for the sale of property then in that state, to be delivered therein to the purchaser; but the law of New Jersey, by which

such a reservation of title is valid, even as against third persons, governs when the property is removed to New Jersey, and resold by the purchaser to a third person without notice of the reservation.

The law of New Jersey, by which a conditional sale of chattels is valid without registration, even as against a subsequent bona fide purchaser from the vendee, rather than the law of New York, which requires such a contract to be recorded, governs where a contract was made in New York between residents of New Jersey for the conditional sale of property, part of which was then in New York, but which was to be delivered in New Jersey, and to be paid for in that state, it being subsequently purchased from the vendee in the latter state. *Flske v. Peebles*, 13 N. Y. S. R. 743.

And, conversely, it was held in *Torrance v. Third Nat. Bank*, 70 Hun, 44, 23 N. Y. Supp. 1073, that the law of Pennsylvania, by which such a reservation of title is invalid as against creditors of, or bona fide purchasers from, the vendee, governed where the conditional contract was made in New York for the sale of a safe to be shipped to Pennsylvania, and the safe was subsequently purchased in the latter state under an execution against the vendee.

The case next cited, however, seems to refer the question to the law of the state where the contract was made, though that was also the state in which the transaction upon which the mortgagee based his claims as against the vendor took place.

The question in *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. 93, was between a vendor of chattels under a verbal agreement reserving the title until payment of the purchase price, and a mortgagee of real property in New Hampshire, who claimed that the chattels had become fixtures. The court said that, as the lien contract was made in New Hampshire, the laws and decisions of that state must control the case. It appeared in this case that the bargain for the personal property was made in Vermont, and the justification for the statement that the lien contract was made in New Hampshire is not apparent, unless New Hampshire was regarded as the place of that contract upon the theory that the contract was consummated by the delivery of the property in New Hampshire.

There is considerable conflict among the cases whether it is necessary, in order to protect the vendor under a reservation of title which was valid by the law of the state where the contract was made and where the property was then situated, to file or record the contract, or take the other steps required by the local law of another state into which the property is removed by the vendee. The weight of authority, however, seems to hold, in accord with the rule with reference to chattel mortgages (see *note to Snider v. Yates, ante*, 353), that, unless the local law of the state into which the property is removed with reference to filing or recording conditional contracts of sale, expressly applies to contracts made out of the state with reference to property subsequently brought into the state, compliance therewith is unnecessary in order to protect the vendors after the removal of the property, unless it was contemplated at the time of the sale that the property would be removed to the state.

A contract of conditional sale of chattels in Kansas, made between residents of that state and valid by the law thereof, reserving title in

the vendor until payment of the purchase price, may be enforced in Colorado after the property is brought there, although the requirements of the latter state with reference to such contracts were not complied with. *Harper v. People*, 2 Colo. App. 177, 29 Pac. 1040. There was no averment in this case that the vendor knew that the property was to be brought into Colorado; but the court lays down the principle without reference to the knowledge of the parties in that respect. The action was by the vendor for conversion against an officer who took the property from his possession after he had taken it from the possession of the vendee as permitted by the contract. The decision, however, would clearly have been the same if the officer had seized it while still in possession of the vendee.

Warnken v. Langdon Mercantile Co. 8 N. D. 243, 77 N. W. 1000, apparently assumed that the validity and effect of the reservation of title, in a conditional sale of personal property made in Manitoba, were to be determined by the law of Manitoba, even as against a person who took a mortgage upon the property after the vendee had, without consent of the vendor, taken it to North Dakota, though so far as appears, there was no registration of the mortgage either in Manitoba or in North Dakota.

The vendor in a conditional sale of a piano, which was valid by the law of the state in which it was made, even as against a subsequent bona fide purchaser, though not recorded, may recover the same from one who purchased it in good faith from the vendee after the latter, without the knowledge or consent of the vendor, had removed it to Kansas, although it was not registered in the latter state as provided by the Kansas statute with reference to conditional sales generally. *Baldwin v. Hill*, 4 Kan. App. 168, 46 Pac. 329.

The reservation of the title until payment of the purchase price in a contract of sale made in Vermont by a citizen of that state to a citizen of Maine, being valid by the law of the former state without the recording of the contract, is valid in Maine, and protects the property against attachment in that state by a creditor of the purchaser; and the Maine statute, requiring such contracts to be recorded in order to protect the seller as against creditors of the purchasers, does not apply. *Drew v. Smith*, 59 Me. 393.

The New Jersey statute, requiring instruments attesting conditional sales to be recorded in the county where the party contracting to buy, if a resident of the state, shall reside at the time of the execution thereof, and, if not a resident of the state, then in the county where the property bought shall be at the time of the execution of the instrument,—does not apply where the vendee did not reside in the state at the time of the sale, and the property was not then within the state, though it was subsequently removed thereto by the vendee without the vendor's knowledge. *Woolley v. Geneva Wagon Co.* 59 N. J. L. 278, 35 Atl. 789. It was assumed in this case that the vendor would be protected without recording the instrument in New Jersey.

Cooper v. Philadelphia Worsted Co. (N. J. Eq.) 57 Atl. 733, however, held that the foregoing statute applied to a purchase by a New Jersey corporation of personal property which, at the time, was in another state, but was subsequently removed to New Jersey, though such removal was not contemplated at the time of the purchase.

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A conditional sale of chattels valid in the state in which it is made, as against creditors of the purchaser, is valid as against creditors attaching the property in New Hampshire, although it is not recorded in the latter state as required by the statute with reference to conditional sales executed within the state, and although it was contemplated at the time of the sale that the property would be taken to New Hampshire. *Cleveland Mach. Works v. Lang*, 87 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20.

The lien of a conditional vendor valid within Massachusetts, where the contract was made and the goods were delivered, is not invalidated, nor the property subjected to attachment by creditors of the vendee, by subsequent removal of the property to New Hampshire, and the failure to comply with the formalities of oath and record required by the New Hampshire statute. *Dorntee Casket Co. v. Cunnison*, 69 N. H. 297, 45 Atl. 318.

The requirement of the Wisconsin statute, that a conditional sale of personal property shall be filed in the town where the vendee resides, or, if a nonresident, in the county where the property may be at the time of the making of the contract, does not apply to a sale made in New York between residents of that state, of property at the time in transit from England to Wisconsin. *Mershon v. Moors*, 78 Wis. 502, 45 N. W. 95.

Where an order for a safe, stipulating that the title shall remain in the vendor until payment of the purchase price, is given in Vermont by a resident of that state, to an agent of a safe dealer doing business in Massachusetts subject to the approval of the principal, who accepts the order and ships the safe by freight to the purchaser in Vermont, the sale is a Massachusetts contract, and the reservation of the title, being valid by the law of Massachusetts, will protect the vendor as against an assignee in insolvency of the purchaser, although, by the laws of Vermont, it would be otherwise. *Bartlett v. Kelley*, 66 Vt. 515, 44 Am. St. Rep. 862, 29 Atl. 804.

The Nova Scotia act requiring recording of contracts for conditional sales does not apply to machinery bought in Ontario, the title to remain in the seller, although intended for use in a factory in Nova Scotia. *McGregor v. Kerr*, 29 N. S. 45.

The New Jersey statute, requiring conditional contracts of sale to be recorded, does not apply to a contract made between nonresidents concerning personal property situated out of the state, the contract not contemplating the removal of the property into New Jersey. *Hirsch v. C. W. Leatherbee Lumber Co.* (N. J. L.) 53 Atl. 645. This was an action by the seller against the purchaser for conversion, and neither the action nor defense was based upon anything that occurred while the property was in New Jersey.

In *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729, the court said that it may be that a conditional sale of personal property, entered into in Alabama, would not be good as between an original seller and an innocent purchaser for value without notice in Georgia, to which the property is subsequently taken, but that that would be the case only when the rights are to be determined in Georgia courts. Continuing, the court said that it knew of no rule of comity between states that would give to the registration laws of Georgia an extraterritorial force, operative on contracts executed within, and

with a view to being enforced in, Alabama, when rights growing out of such contracts are sought to be enforced in the courts of Alabama.

Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849, also assumes that it is not necessary to record the contract in the state to which the property is removed, if the contract of sale was completed in another state where the property was then located, although in this case the law of Maine requiring conditional contracts to be recorded was applied, notwithstanding that, at the time of the sale, the property was in Maryland. The decision, however, was upon the ground that the sale, which was of specific property, was completed in Maine by the act of the purchaser in depositing in the mail in that state a letter directed to the vendor in Maryland, definitely and unconditionally accepting the latter's proposition to sell. It will be observed that that act completed the executed, as well as the executory, contract, since the property was already identified, and delivery was, therefore, not essential to the consummation of the executed contract.

It will be observed that the rule supported by the foregoing cases does not apply when the contract, which is made in one state, contemplates the delivery of the property in another. Thus:

A state statute requiring conditional sales of personal property to be recorded applies to a contract of sale, made in another state, of property to be delivered and held within the former state. *Knowles Loom Works v. Vacher*, 57 N. J. L. 490, 33 L. R. A. 805, 31 Atl. 306.

Where a conditional contract of sale is made in Rhode Island, where the vendor was domiciled, but provides for the delivery of the chattels, and contemplates their use, in another state, it is governed by the law of the latter state with respect to the necessity of recording the same in order to protect the vendor against the creditors of the vendee. *Re Legg*, 96 Fed. 326.

In Alabama the statute with reference to the registration of conditional contracts expressly requires that, when property is brought into the state while subject to the condition, the contract must be recorded within three months thereafter. It was held in *Brandon Printing Co. v. Bostick*, 126 Ala. 247, 28 So. 705, that a contract made within this provision, rather than the provision applicable to contracts made within the state with reference to the property therein, where the contract of sale was made in Tennessee, and the property was, pursuant to the purchaser's request, delivered to a carrier in that state consigned to the purchaser in Alabama.

It will be observed that the rule was applied in *Cleveland Mach. Works v. Lang*, 87 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20, notwithstanding that it was contemplated, at the time the contract was made, that the property was to be removed to New Hampshire. This extension of the rule, however, is open to question.

In *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003, it was held, upon the authority of *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109, that the reservation of title in a conditional contract of sale, made in another state between nonresidents, would not protect the vendor against seizure of the property under process against the vendee after its removal to Illinois, unless recorded in that

state as required by its law. This decision upon its face would seem to involve a repudiation *in toto* of the rule supported by the cases above cited; but, when it is examined in connection with the facts of the case, it appears merely to make an exception to the rule when the removal of the property to the state was contemplated by the parties at the time of the contract. The decision is put upon the ground that the policy of the law of Illinois requires that the real owner of personal property, creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, shall comply with the requirements of the chattel-mortgage act of Illinois. So far as appears, however, while the public policy of Illinois requires instruments creating such liens to be filed in the state if the property was within the state when the instrument was executed, though executed in another state, it does not require such an instrument to be filed in the state, when the property was not in the state at that time, but was subsequently brought therein,—at least unless it was contemplated at the time that it should be brought into the state. This distinction was expressly alluded to in *Green v. Van Buskirk*. (See discussion of the latter case, and of Illinois cases on the subject, in *note to Snider v. Yates*, *ante*, 353, 363.) The report of the case in *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003, shows an express finding of fact that the vendor delivered the property (apparently in Rhode Island or New York) to be used in Illinois. For the reasons stated, this fact seems to be a qualification of the decision, though it is not expressly recognized as such in the opinion.

In *Beggs v. Bartels*, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874, where a conditional sale of a boiler and machinery, which provided that they were to be used in a factory in Connecticut, was made in New York, the goods being delivered to the purchaser upon the cars in the latter state, it was held that the validity of the reservation of the title, as against creditors of the purchaser who attached the property after its removal to Connecticut, was to be determined by the law of the latter state; and it was accordingly held that the reservation was not valid as against the attachments, the contract not having been acknowledged before competent authority as required by the Connecticut statute, although it was valid as against third persons according to the law of New York. The decision is upon the ground that the law of the place of performance prevails over the law of the place where a contract is made, and that the portion of the contract with reference to the reservation of the title was performable in Connecticut. The court said that it need not be determined whether the rights of the attaching creditors might not also be sustained upon considerations of public policy.

The converse of the rule stated at the beginning of the subdivision, *i. e.*, that the failure to comply with the law of the state where the contract was made and the property then located will defeat the reservation, even as against a third person who deals with the property after its removal to another state, is not so well supported as the rule itself, though it seems to have been held in the case next cited.

The lien of a conditional vendor is not enforceable in New Hampshire as against a subsequent mortgagee of the vendee, where the

contract was not recorded in the state where it was made and where the property was then situated, as required by the law of that state in order to make it valid as against third persons dealing with the vendee. *Davis v. Osgood*, 69 N. H. 427, 44 Atl. 432. It does not expressly appear that the property had been removed to New Hampshire before the execution of the mortgage, but that was apparently the fact; and it would also seem that the sale had been recorded in New Hampshire, for the court said that the provisions of the New Hampshire statute respecting the record of conditional sales apply only to sales made within the state.

In *Weinstein v. Freyer*, 93 Ala. 257, 12 L. R. A. 700, 9 So. 285, however, it was held that the law of Georgia, by which a conditional contract of sale is not valid against a subsequent purchaser from the vendee without notice unless recorded, does not apply where the original contract of sale was made in Georgia between parties there domiciled, the property being also in that state at the time, if it was subsequently brought to Alabama by the vendee, and there sold to a third person. The court said that the law of Alabama, by which the reservation of property is good, even as against a purchaser without notice, applied.

So, the requirement of the statute of another state, that an instrument which reserves the title to personal property to the vendor until payment of the purchase price must be recorded to make the reservation valid as against third persons, has no operation or effect in Arkansas; and the title of the original vendor in such a conditional sale prevails over that of a third person who purchases the property from the original purchaser after its removal into Arkansas, although the instrument reserving title was not recorded. *Public Parks Amusement Co. v. Embree-McLean Carriage Co.* 64 Ark. 29, 40 S. W. 582.

Some of the cases, however, hold, without qualification, that filing or recording in the state to which the property is removed is necessary in order to protect the vendor under his reservation as against subsequent purchasers from, or creditors of, the vendee. Thus:

Where personal property is brought into Georgia, the requirements which the Georgia law imposes for the benefit of third persons as to the attestation and recording of contracts, by which the title to the property is reserved to the vendor, are not dispensed with by the fact that it was purchased, and is to be paid for, in

another state. *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420.

A contract of conditional purchase and sale of property, by which the title of the vendor is retained until the payment of the purchase price, made and to be performed in a state in which a public record of the agreement is not required, may not be enforced as against a purchaser in good faith and for value of the property in another state to which it has been removed, and in which the contract has not been recorded, as required by the statutes of that state, although the removal was without the knowledge of the vendor, when there was no stipulation in the contract against removal of the property from the state in which the sale was made. *Sanger v. Jesse French Piano & Organ Co.* 21 Tex. Civ. App. 523, 52 S. W. 621.

The rights of one who purchases personal property then in Kentucky from a person to whom it had been previously sold in Ohio under a contract reserving title until payment of the purchase price is to be determined by the law of Kentucky, rather than the law of Ohio. *Hart v. Barney & S. Mfg. Co.* 7 Fed. 543. A statute of Kentucky, requiring conditional contracts of sale to be registered in order to be valid as against creditors of the vendee, was accordingly applied.

Whether an instrument executed in New York, under which an engine was furnished to a steam lighter, with a reservation of the title until the payment of the purchase price, is a mere conditional sale of the property, or is "a conveyance intended to operate as a mortgage" within the New Jersey statute requiring such conveyances to be recorded, is to be determined by the law of New Jersey, rather than the law of New York, where the lighter afterwards goes to New Jersey, and an attempt is made by creditors to attach the engine there. *The Marina*, 19 Fed. 760.

Dixon v. Blondin, 58 Vt. 689, 5 Atl. 514, held that parol evidence was not admissible in a suit between a vendor and an attaching creditor of the vendee to prove that the sale was conditional, where it was evidenced by a writing importing an absolute sale, in reliance upon which the attachment was made, notwithstanding that the contract was made in New Hampshire, by the law of which a conditional sale, not evidenced by a writing, is valid. It was held, however, that the vendor's title under a verbal conditional sale made in New Hampshire will be protected if he has done nothing by which he is estopped. G. H. P.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Albert BORK and Wife
v.

UNITED NEW JERSEY RAILROAD &
CANAL COMPANY, *Plff. in Err.*,
and

Two Other Cases.

(.....N. J.)

*1. The owner of the fee of land, sub-

*Headnotes by HENDRICKSON, J.

ject to an easement of a public highway, may maintain ejectment against an intruder who wrongfully appropriates the same to a purpose wholly foreign to the easement, but his recovery of possession will be subject to the easement in question.

2. The laying of a steam railroad longitudinally in a street, unless by authority of a legislative grant, express or implied, will be regarded as such an exclusive and wrongful appropriation of that part of the street to a purpose foreign to the ease-

NOTE.—As to ejectment to recover land subject to easement of highway illegally appropriated, see also, in this series, *note to Hancock v. 64 L. R. A.*

McAvoy, 18 L. R. A. 787; *Thomas v. Hunt*, 32 L. R. A. 857; *San Francisco v. Grote*, 41 L. R. A. 335; and *French v. Robb*, 57 L. R. A. 956.

ment as to sustain such action of ejectment by the abutting owner against the company.

(February 29, 1904.)

ERROR to the Supreme Court to review a judgment in favor of plaintiffs in an action brought to oust defendant from possession of a public street in front of plaintiffs' property. *Affirmed.*

The facts are stated in the opinion.

Mr. J. H. Gaskill, for plaintiff in error:

Ejectment is not the proper remedy to recover possession where the property alleged to be invaded consists of a public street.

Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452; *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216.

Defendants in error cannot maintain their action of ejectment in the present instance, for the reason that there has been no disseisin or ouster.

Newell, Ejectment, ed. 1892, p. 31; *Redfield v. Utica & S. R. Co.* 25 Barb. 54.

The appropriation must be unreasonable, and it must be for a purpose wholly foreign to the easement or servitude.

Etz v. Daily, 20 Barb. 32; *Lozier v. New York C. R. Co.* 42 Barb. 465; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *Stackpole v. Healy*, 16 Mass. 35, 18 Am. Dec. 121; *Hancock v. Wentworth*, 5 Met. 446; *Morgan v. Moore*, 3 Gray, 319; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Wager v. Troy Union R. Co.* 25 N. Y. 526.

To sustain the action of ejectment, the occupation of land by the defendant must be wholly inconsistent with the public easement.

Adams v. Saratoga & W. R. Co. 11 Barb. 414; *De Witt v. Ithaca*, 15 Hun, 568; *Weisbrod v. Chicago & N. W. R. Co.* 21 Wis. 602; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407; *Bailey v. McCain*, 92 Ill. 277; *Hoboken Land & Improv. Co. v. Hoboken*, 36 N. J. L. 540.

Messrs. Francis D. Weaver and John W. Westcott, for defendants in error:

Ejectment will lie by the owner of the soil, for land which is part of the King's highway. The recovery must be subject to the way.

Goodtitle ex dem. Chester v. Alker, 1 Burr. 143, 1 Ld. Kenyon, 427; 4 Viner, Chemin Private, B; *Woodruff v. Neal*, 28 Conn. 165; *Taylor v. Armstrong*, 24 Ark. 105; *Weyl v. Sonoma Valley R. Co.* 69 Cal. 202, 10 Pac. 510; *Savannah v. Steamboat Co. R. M. Charlt. (Ga.)* 342; *Louisville, St. L. & T. R. Co. v. Hess*, 92 Ky. 407, 17 S. W. 870; *Blake v. Han*, 53 Me. 430; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73; *Snoddy v. Bolen*, 122 Mo. 483, 21 L. R. A. 507, 24 S. W. 142, 25 S. W. 932; 64 L. R. A.

Carpenter v. Oswego & S. R. Co. 24 N. Y. 655; *Phillips v. Dunkirk, W. & P. R. Co.* 78 Pa. 180; *Weisbrod v. Chicago & N. W. R. Co.* 21 Wis. 602; *Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 209; *Wright v. Carter*, 27 N. J. L. 76; *Burnet v. Crane*, 56 N. J. L. 288, 44 Am. St. Rep. 395, 28 Atl. 591.

A work which, though public, is presumably derogatory to, or at least not in consonance with, the use of a street as a public highway; e. g., a freight station, a market, or a toll house,—may never be imposed without compensation.

Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; *State v. Laverack*, 34 N. J. L. 201; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

The laying of pipes for the distribution of water and gas in a country road is an invasion of the property of the fee owner in the soil, subject only to the public easement of passage, and consequently a taking.

Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. 35, 56 Am. Rep. 246, 2 Atl. 105.

A steam surface railroad cannot be placed upon a public highway without compensation to the owner of the fee. This is based on the ground that a steam railroad is an exclusive use of the highway, and destroys the utility for ordinary vehicles.

Williams v. New York C. R. Co. 16 N. Y. 97, 69 Am. Dec. 651; *Starr v. Camden & A. R. Co.* 24 N. J. L. 592; *Citizens' Coach Co. v. Camden Horse R. Co.* 33 N. J. Eq. 274, 36 Am. Rep. 542; *Wager v. Troy Union R. Co.* 25 N. Y. 531.

The occupation of the highway is a taking of the property of the adjacent owner.

Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; *Dusenbury v. Mutual Teleg. Co.* 11 Abb. N. C. 440; *Tiffany v. United States Illuminating Co.* 10 Jones & S. 280; *Pacific Postal Teleg. Co. v. Irvine*, 49 Fed. 113; 2 Dill. Mun. Corp. 4th ed. 698.

Hendrickson, J., delivered the opinion of the court:

This writ brings up for review a judgment of the supreme court entered upon a *postea* from the Camden circuit. The action is ejectment, and was brought by the plaintiffs, abutting owners on that part of Front street, in the city of Camden, between Clinton street and Kaighns avenue, in order to secure the removal of the track and road-bed of the defendant, laid down by it in front of plaintiffs' premises for steam railway purposes. The use of the track was limited to the operation of freight cars thereon. A verdict for the plaintiffs of 6 cents damages was directed by the learned

trial judge. A request of the defendant for an instruction to the jury that no recovery could be had for the premises described in the declaration was refused. To these rulings exceptions were taken by the defendant, and sealed, and error has been duly assigned thereon.

The premises embraced in the suit was the strip of land between the center line of the street and the plaintiffs' property line, containing the track and roadbed of the defendant, having a length of about 37 feet and a width of 2½ feet from the center line, subject to the public easement to and over said land.

The first ground urged in support of these assignments of error is that ejectment will not lie to recover possession of a portion of a public street; actual possession being inconsistent with the public easement, and constituting a nuisance, which would render the plaintiffs liable to indictment. The defendant cites as authority for this doctrine *Oincinnati v. White*, 6 Pet. 431, 8 L. ed. 452; *Stiles v. Curtis*, 4 Day, 328. But the authority of the former case would be more persuasive if the point here referred to and there discussed had been necessary to the decision. For it will be remembered that the case was determined against the plaintiff in his suit to recover a plot of ground contained in what was known as a "city common," on the ground that it had been dedicated to public use by a previous grantor in the plaintiff's chain of title. But the law upon the subject now under discussion has so long been settled in this state against the contention of the defendant that it would seem to be now too late to question it. In 1858 a suit of ejectment was brought by the owner of the fee in a turnpike road, which carried with it the public easement of the highway, against a defendant who was the tenant of a tollhouse built upon part of the highway. Other questions were involved, but Chief Justice Green, in delivering the opinion of the supreme court, said: "It is admitted that ejectment will lie by the owner of the soil for a part of the highway illegally appropriated by a third party to his own use. So the law is settled." The case went to this court afterwards, and there was a reversal, but no opinion was filed. No question was raised, however, as to the propriety of the form of action, and the ejectment suit prevailed. See *State v. Laverack*, 34 N. J. L. 201; *Burnet v. Crane*, 56 N. J. L. 235, 44 Am. St. Rep. 395, 28 Atl. 591. In the latter case this court held that ejectment was an appropriate remedy for the owner of the fee against one who, having a right of way over the *locus in quo*, extended his fence and took exclusive possession thereof. In *French v. Robb*, 67 N. J. L. 260, 57 64 L. R. A.

L. R. A. 956, 91 Am. St. Rep. 433, 51 Atl. 509, the abutting owner brought ejectment, to remove an electric-light pole in the public street, used for private lighting. This court held in that case that the owner of the soil in a street may maintain ejectment against any person wrongfully taking or claiming exclusive possession of the same. This doctrine is supported by the great weight of authority elsewhere. It was fully sustained in the early English case of *Goodtitle ex dem. Chester v. Alker*, 1 Burr. 143, 1 Ld. Kenyon, 427. One of the questions was whether an ejectment will lie by the owner of the soil for land which is subject to passage over it as a King's highway, and the opinion recited that 1 Rolle, Abr. 392, letter b, pl. 1, 2, is express "that the King has nothing but the passage for himself and his people, but the freehold and all the profits belong to the owner of the soil." Lord Mansfield, speaking for the court, said, among other things: "There is no reason why he [the owner] should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement." The legal writers and the judicial decisions are found to be generally in accord with the doctrine here stated. In Newell on Ejectment (1892), p. 31, the rule is stated thus: "It is a well-settled rule of law that the owner of the land subject to an easement, servitude, or public use may recover the possession of land in an action of ejectment against a person wrongfully appropriating the same to a purpose wholly foreign to the easement or servitude. The rule applies to the public highways . . . and the like, but in the action the land is recovered subject to the easement or servitude." The rule is similarly stated in 10 Am. & Eng. Enc. Law, 2d ed. p. 473, and the cases in support of the doctrine are fully collated there and in 17 Century Digest, 1978.

It is further contended by the plaintiff in error that, granting the doctrine to be as stated, the occupancy of the street in this case was not exclusive or inconsistent with the public use, according to the meaning of the rule; that in fact the space between the rails was planked so as to admit the use of the highway by the public, except as to the small strip in the center of the street when the cars were actually running. But the answer to this is that such a use is an additional burden to the highway, and, unless supported by legislative authority, it does wrongfully appropriate a portion of the highway to a purpose foreign to the easement. In *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 259, 38 Atl. 849, Affirmed in 58 N. J. Eq. 547, 43 Atl. 700, it was declared that a steam railroad laid longitudinally in a street is regarded as practically

an exclusive appropriation of that part of the street which it occupies to a use inconsistent with the legitimate use of the street by the public. And in *Louisville, St. L. & T. R. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. 870, it was held that, in a suit by the abutting owner, ejectionment would lie against a railroad company appropriating the same to its permanent use without legislative grant, express or implied.

It is not contended that there was any error in the refusal to admit in evidence the city ordinance empowering the defendant to construct and operate the branch railroad in

question. Such an ordinance would not be admissible in the absence of any legislative grant to support the ordinance.

Under the evidence the plaintiff was entitled to a direction of the verdict in his favor, and hence there was no error in the rulings of the trial judge.

The same result is reached in No. 20, *George Rathacker v. Same Defendants*, and in No. 21, *Philip Wilson v. Same*; the three cases, involving the same questions, having been argued together.

The judgment in each of these cases is affirmed, with costs.

NEW YORK COURT OF APPEALS.

Henrietta MEYER, *Respt.*,

v.

SUPREME LODGE KNIGHTS OF PYTHIAS, *Appt.*

(.....N. Y.)

1. A physician called by a stranger to furnish aid to one who has attempted suicide, and who is compelled to render his services against the will and opposition of the patient, is within the provision of the statute prohibiting a physician from testifying to facts learned while attending a patient in a professional capacity.
2. The contract contained in a mutual benefit certificate, which requires the beneficiary to sign an acceptance of its provisions, is made where the contract is consummated by such acceptance, and subject to the laws there in force.
3. A provision in a mutual benefit certificate by which the beneficiary waives the benefit of any statutory provisions prohibiting physicians from disclosing information acquired in attendance upon patients does not meet the requirement of the statute that such waiver, in case of a deceased person, must be by his personal representatives in order to render the evidence admissible.

(*Parker, Ch. J., and Gray, J., dissent.*)

(March 15, 1904.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Kings County in favor of plaintiff in an action brought to

NOTE.—For a case in this series somewhat similar to the one above, holding, however, that a physician may testify as to facts learned in examining a prisoner against his will, see *State v. Height*, 59 L. R. A. 437.

For conflict of laws as to contracts of insurance, see also *Johnson v. Mutual Life Insurance Co.* 63 L. R. A. 833, and *note*, 64 L. R. A.

recover the amount alleged to be due on a mutual benefit certificate. *Affirmed.*

The facts are stated in the opinions.

Messrs. Laurence G. Goodhart and Carlos H. Hardy, for appellant:

The last act which changed the offer of Meyer into a contract between him and the defendant—that is, the acceptance of the offer—was the issuance of the certificate.

The acceptance which made up a contract took place within the jurisdiction of the state of Illinois. It is, therefore, an Illinois contract, and the *lex loci celebrationis* applies.

22 Am. & Eng. Enc. Law, 2d ed. p. 1324; *Bascom v. Zediker*, 43 Neb. 380, 67 N. W. 148; *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359; *Armstrong v. Beat*, 112 N. C. 59, 25 L. R. A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *Carrollton Furniture Mfg. Co. v. American Credit Co.* 59 C. C. A. 545, 124 Fed. 25; *Sheldon v. Haxtun*, 91 N. Y. 124; *M'Intyre v. Parks*, 3 Met. 207; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Gay v. Rainey*, 89 Ill. 221, 31 Am. Rep. 76; *Buchanan v. Drivers' Nat. Bank*, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430; *Merchant v. Chapman*, 4 Allen, 362; *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Hosford v. Nichols*, 1 Paige, 220; *Jewell v. Wright*, 30 N. Y. 264, 86 Am. Dec. 372; *Merchants' Bank v. Griswold*, 72 N. Y. 480; *Dickinson v. Edwards*, 77 N. Y. 576, 33 Am. Rep. 671; *Farmers' & M. Sav. Co. v. Bazole*, 67 Ark. 252, 54 S. W. 339; *Zeltner v. Irvin*, 25 App. Div. 228, 49 N. Y. Supp. 337; *Baum v. Birchall*, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620.

And it will be presumed that the contract is to be performed at the place where it is made (*i. e.*, Chicago, Illinois), and is to be

governed by the law of Illinois, unless there is something in the terms of the contract, or in the explanatory circumstances of its execution, inconsistent with that intention.

First Nat. Bank v. Shaw, 61 N. Y. 294; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 448, 32 L. ed. 795, 9 Sup. Ct. Rep. 469; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 6 Best & S. 100, 35 L. J. Q. B. N. S. 74, 13 L. T. N. S. 602; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *De Sobry v. De Laistre*, 2 Harr. & J. 191, 3 Am. Dec. 535; *Tillinghast v. Boston & P. R. Lumber Co.* 39 S. C. 484, 22 L. R. A. 49, 18 S. E. 120; *Fisher v. Otis*, 3 Pinney (Wis.) 78; *Hilliard v. Outlaw*, 92 N. C. 266; *Kittle v. DeLamater*, 3 Neb. 325; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170; *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Philadelphia Loan Co. v. Town-er*, 13 Conn. 257.

The interpretation of the contract, and of the rights and obligations of the parties thereto, is regulated by the law prevailing at the place of performance.

St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849; *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372; *Dickinson v. Edwards*, 58 How. Pr. 24; *Soudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Cox v. United States*, 6 Pet. 172, 8 L. ed. 359; *Morris v. East Side R. Co.* 43 C. C. A. 605, 104 Fed. 409; *Sandham v. Grounds*, 36 C. C. A. 103, 94 Fed. 83; *Martin v. Roberts*, 36 Fed. 217; *Don v. Lippmann*, 5 Clark & F. 1; *Fergusson v. Fyffe*, 8 Clark & F. 121; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Akers v. Demond*, 103 Mass. 323; *Brown v. Camden & A. R. Co.* 83 Pa. 316; *Wackerly Nat. Bank v. Hall*, 150 Pa. 466, 30 Am. St. Rep. 823, 24 Atl. 665; *Baum v. Birchall*, 150 Pa. 104, 30 Am. St. Rep. 797, 24 Atl. 620; *Fitzsimons v. Guanahani Co.* 16 S. C. 192; *Robinson v. Queen*, 87 Tenn. 445, 3 L. R. A. 214, 10 Am. St. Rep. 690, 11 S. W. 38; *Cartwright v. New York, R. & M. R. Co.* 59 Vt. 675, 9 Atl. 370; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Belmont v. Cor-nen*, 48 Conn. 342; *Vermont State Bank v. Porter*, 5 Day, 322, 5 Am. Dec. 157; *Herschfeld v. Dexel*, 12 Ga. 582; *Grunwald v. Freese* (Cal.) 34 Pac. 73; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Guignon v. Union Trust Co.* 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556; *Lowy v. Andreas*, 20 Ill. App. 521; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856; *People's Bldg. L. & Sav. Asso. v. Fowble*, 17 Utah, 122, 53 Pac. 999; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 776; *Boyd v. Ellis*, 11 Iowa, 97; *Arnold v. Potter*, 22 64 L. R. A.

Iowa, 194; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Capron v. Adams*, 28 Md. 529; *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Jordan v. Fitz*, 63 N. H. 227; *Whitney v. Whiting*, 35 N. H. 462; *Thayer v. Elliott*, 16 N. H. 102; *Dyer v. Hunt*, 5 N. H. 401; *Knos v. Gerhauser*, 3 Mont. 275; *Shacklett v. Polk*, 51 Miss. 378; *Hart v. Livermore Foundry & Mach. Co.* 72 Miss. 809, 17 So. 769; *Queen ex rel. Atty. Gen. v. Ogilvie*, 6 Can. Exch. 21.

Communications from a patient to his physician were not privileged at common law.

23 Am. & Eng. Enc. Law, 83; *Edington v. Aina L. Ins. Co.* 77 N. Y. 564; *People v. Stout*, 3 Park. Crim. Rep. 670; *Kendall v. Grey*, 2 Hilt. 300; *Rea v. Gibbons*, 1 Car. & P. 97; *Browne v. Carter*, 9 Lower Can. Jur. 163; *Duchess of Kingston's Case*, 20 How. St. Tr. 572; *Broad v. Pitt*, 3 Car. & P. 518; *Wheeler v. LeMarchant*, L. R. 17 Ch. Div. 675, 50 L. J. Ch. N. S. 793, 44 L. T. N. S. 632, 45 J. P. 728; *Goddard v. Gardner*, 28 Conn. 172; *Springer v. Byram*, 137 Ind. 15, 23 L. R. A. 244, 45 Am. St. Rep. 159, 36 N. E. 361; *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184; *Barnes v. Harris*, 7 Cush. 577, 54 Am. Dec. 734; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433; *Territory v. Corbett*, 3 Mont. 50; *Stegald v. State*, 22 Tex. App. 464, 3 S. W. 771; *Boyle v. Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351; *Re Bruendl*, 102 Wis. 45, 78 N. W. 169.

The by-law waiving the statutory provision as to physician's testimony has been held valid in the home of the corporation.

Supreme Lodge, K. of P. v. Clarke, 88 Ill. App. 600; *Seitzinger v. Modern Woodmen*, 204 Ill. 58, 68 N. E. 478.

When the application was offered and received in evidence on the trial of this action, at that moment the stipulation waiving the physician's privilege became part of the record, and the waiver was, therefore, made up on the trial of the action.

Foley v. Royal Arcanum, 78 Hun, 222, 28 N. Y. Supp. 952; *Dougherty v. Metropolitan L. Ins. Co.* 87 Hun, 15, 33 N. Y. Supp. 873; *Holden v. Metropolitan L. Ins. Co.* 11 App. Div. 426, 42 N. Y. Supp. 310.

Every decision in this state was exactly to the contrary up to the time the *Holden Case* was decided by the court of appeals.

Hewitt v. Prime, 21 Wend. 79; *Foley v. Royal Arcanum*, 78 Hun, 222, 28 N. Y. Supp. 952; *Dougherty v. Metropolitan L. Ins. Co.* 87 Hun, 15, 33 N. Y. Supp. 873; *Holden v. Metropolitan L. Ins. Co.* 11 App. Div. 426, 42 N. Y. Supp. 310; *Edington v. Mutual L. Ins. Co.* 67 N. Y. 185; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 671, 3 N. W.

173; *Hunt v. Blackburn*, 128 U. S. 470, 32 L. ed. 491, 9 Sup. Ct. Rep. 125; *Adreveno v. Mutual Reserve Fund Life Assn.* 34 Fed. 870; *Sentenis v. Ladew*, 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650; *New York v. Manhattan R. Co.* 143 N. Y. 1, 37 N. E. 494; *Greve v. Aina Live Stock Ins. Co.* 81 Hun, 28, 30 N. Y. Supp. 668; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578, 30 N. E. 52; *Fuller v. Knights of Pythias*, 129 N. C. 318, 85 Am. St. Rep. 744, 40 S. E. 65; *Woodmen v. Loeher*, 17 Colo. App. 247, 68 Pac. 136; *Sovereign Camp, W. of W. v. Grandon*, 64 Neb. 39, 89 N. W. 448.

One may waive constitutional provisions made for his benefit.

Lee v. Tillotson, 24 Wend. 337, 35 Am. Dec. 624; *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246; *People v. Murray*, 5 Hill, 468; *Baker v. Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *People v. McKay*, 18 Johns. 212; *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Rathbun*, 21 Wend. 509; *Stephens v. People*, 19 N. Y. 549; *Gardiner v. People*, 6 Park. Crim. Rep. 155; *Cancemi v. People*, 18 N. Y. 128; *Dougherty v. Metropolitan L. Ins. Co.* 87 Hun, 15, 33 N. Y. Supp. 873.

The trial court erred in excluding the testimony of the witness Bruso.

Griffiths v. Metropolitan Street R. Co. 171 N. Y. 106, 63 N. E. 808; *People v. Kuerner*, 154 N. Y. 355, 48 N. E. 730; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951; *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783.

Mr. Otto H. Droege, with **Mr. J. Lawrence Friedmann**, for respondent:

Assuming that the contract was made in Illinois, upon an action brought in this state, the rules of evidence of the forum in which the action is brought govern.

Miller v. Brenham, 68 N. Y. 81; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245; *Clarke v. Lake Shore & M. S. R. Co.* 94 N. Y. 218.

When the defendant came into New York to do business it subjected itself to the laws of this state, which were made for the protection of the citizens thereof. Our courts have declared that the section in question was passed as a matter of public policy.

Davis v. Supreme Lodge, K. of H. 165 N. Y. 159, 58 N. E. 891; *Holden v. Metropolitan L. Ins. Co.* 165 N. Y. 13, 58 N. E. 771; *Butler v. Manhattan R. Co.* 143 N. Y. 630, 37 N. E. 826, 3 Misc. 453, 23 N. Y. Supp. 163; *Hoyt v. Hoyt*, 112 N. Y. 493, 20 N. E. 402; *Westover v. Aina L. Ins. Co.* 99 N. Y. 58, 52 Am. Rep. 1, 1 N. E. 104.

The testimony of the witness Bruso, who was a physician attending the deceased in his capacity as physician, was properly excluded.

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Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Grattan v. Metropolitan L. Ins. Co.* 24 Hun, 43.

Vann, J., delivered the opinion of the court:

The deceased was in *extremis*, incapable of acting or deciding for himself, and, from the necessity of the case, anyone was authorized to call a physician to treat him. Without the knowledge or consent of the dying man, Dr. Bruso was called for that purpose, and for that purpose alone he attended. He found Mr. Meyer, the deceased, in bed in an upper room of a hotel, "suffering intense pain and vomiting." Meyer told him to get out of the room,—that he did not want him there,—but he did not leave. He remained to treat him as a physician, and, in order to treat him intelligently, tried to find out what the matter was. He learned from Meyer, partly in answer to questions, and partly through voluntary disclosures, that he had taken a preparation of arsenic, known as "rough on rats," "because he wanted to die." From this information, and from observation of the physical symptoms, he decided that Meyer was suffering from arsenical poisoning. Thus informed as to the nature of the disease, he at once administered a remedy, and soon followed it by another. The helpless man, without friends to aid or advise, hopeless of life and court-ting death, objected, and tried to curse him away from his bedside. The doctor, loyal to the instincts of his profession, refused to listen to the ravings of the would-be suicide, and continued to prescribe in order to relieve suffering and prolong life. Upon the trial he was not allowed to disclose the information acquired under these circumstances, and we are now to determine whether there was enough evidence to warrant the trial judge in deciding, as a preliminary question of fact, that such information was acquired "in attending a patient in a professional capacity," and that it "was necessary to enable him to act in that capacity." Code Civ. Proc. § 834; *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 106, 111, 63 N. E., 808.

The learned doctor was called as physician, he attended as a physician, he made a diagnosis as a physician, and he administered remedies as a physician. In all that he did, he acted in a professional capacity. While it is true that in all he did he acted against the will and in spite of the remonstrance of a man whose condition imperatively called for professional treatment, still the meeting was professional in nature, and all that he said or did was strictly in the line of his profession. Was the subject any the less a patient, within the meaning

and object of the statute, because he was forced to submit to ministrations designed to save his life? Was the doctor guilty of assault when he gave the hypodermic injection? Was he bound to leave him there to die, without an effort to help him? Was the statute designed to protect those only who are treated by consent, but not those treated through necessity? Does it not mean by a "patient" at least one who is consciously treated by a physician, even without his consent, when the facts tend to show that through bodily suffering his mind had partially lost its hold? Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and, if he remains and relieves him by physical touch, hold him guilty of assault? Either Dr. Brusco was the physician of Mr. Meyer, or he committed an assault upon him, and was guilty of a crime. If the wife of the deceased had called the doctor, she would have acted as an agent by implied authority. The bell boy who in fact called him also acted upon implied authority, and, when the doctor came, the act of the agent in calling him, if subject to revocation in the actual case, would have been in the supposed case. While the doctor in either case could have retired, if he remained in either he remained as a physician, the sick man became his patient, and he was acting in a professional capacity when, as a duly licensed physician, he actually treated Mr. Meyer as a patient. When one who is sick unto death is in fact treated by a physician as a patient, even against his will, he becomes the patient of that physician, by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived, the existence of the professional relation could not be questioned. The relation of physician and patient, so far as the statute under consideration is concerned, springs from the fact of professional treatment, independent of the causes which led to such treatment. An examination made in order to prescribe establishes the same relation. I am of opinion that Dr. Brusco, who treated the deceased at the hotel, occupied the same confidential relation to him as did the physicians at the hospital. The fact that the patient told the doctor several times to let him alone, as he wished to die, expressing himself in a brutal and profane manner, does not, in my judgment, negative the existence of the relation of physician and patient. As was said by Judge Earl in *Renihan v. Dennin*, 103 N. Y. 573, 578, 57 Am. Rep. 770, 9 N. E. 320, 321: "Dr. Bontecou was a person duly authorized to practise physic. Whatever information he had about the con-

dition of the testator he acquired while attending him as a patient. It is true that the testator did not call him or procure his attendance, but he did not thrust himself into his presence or intrude there. He was called by the attending physician, and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient, or even by strangers about him; and the statute would be robbed of much of its virtue if a physician thus called were to be excluded from its provisions because . . . he was not employed by the patient, nor a contract relation created between him and the patient. To bring the case within the statute, it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity." So, in *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661, 4 N. E. 326, it was held that the fact that the physician was selected and sent by the district attorney to attend the patient after the commission of a crime against her person did not affect the question.

When a physician is sent by a prosecuting officer to make a report upon the sanity of a prisoner, if he does not treat or prescribe for the subject, the statements of the latter are not protected. *People v. Sliney*, 137 N. Y. 570, 33 N. E. 150. But even though a physician is sent for the sole purpose of examining as to sanity, if he prescribes for the prisoner during the visit, the relation of physician and patient is thereby created, and the disclosures made are within the statute. *People v. Stout*, 3 Park. Crim. Rep. 670; *Weitz v. Mound City R. Co.* 53 Mo. App. 39; *Freel v. Market Street Cable R. Co.* 97 Cal. 40, 31 Pac. 730; *Colorado Fuel & Iron Co. v. Cummings*, 8 Colo. App. 541, 46 Pac. 875. See also *Grossman v. Supreme Lodge, K. & L. of H.* 25 N. Y. S. R. 843, 6 N. Y. Supp. 821; *Grattan v. Metropolitan L. Ins. Co.* 24 Hun, 43; *Edington v. Mutual L. Ins. Co.* 67 N. Y. 185. The fact of treatment is the decisive test in this case. Meyer was treated by the witness as a physician, and answered his questions, knowing that he was a physician, and that he was about to prescribe for him against his will. As was well said by the learned judges of the appellate division: "The language [of the statute] is broad enough to cover cases of medical attendance, whether such attendance results from the voluntary call of the patient upon a physician, or from the exigencies of the patient's situation. If the relation is that of a physician attending a patient in a professional capacity, no matter how the relation was brought about, the

sections apply." [82 App. Div. 361, 81 N. Y. Supp. 813].

In *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 106, 63 N. E. 808, relied upon by the appellant, there was no evidence that the physician acted in a professional capacity, or even that the supposed patient knew he was a physician. The doctor in that case testified that at the time he acquired the information he did not "treat him, in any sense, as a physician;" that his conversation with him did not relate to his physical condition, but was confined "to the method of the accident, and that whatever he said was entirely distinct from any treatment or visit of a physician, or anything of that sort;" that, while he had rendered "first aid" to the plaintiff in a drug store immediately after the accident, when no statement was made, "he did not think that the plaintiff knew that he was the physician who treated him at the drug store; and that he did not advise him of the fact until after the plaintiff had given him a statement." Judge Werner, writing for this court, said: "Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion that the conversation which the doctor was about to give had any relation to professional treatment."

I think that the statute impresses absolute secrecy upon all knowledge acquired by a physician in a sickroom that is necessary to enable him to properly treat the sick person, whether the treatment be with or without his consent. While I agree with Judge Gray in his conclusion as to the first question considered by him, I differ as to the last, and, for the reasons stated, vote in favor of *affirmance*, with costs.

O'Brien, Bartlett, and Martin, JJ., concur.

Gray, J., dissenting:

The action was brought to recover against the defendant, a fraternal, mutual benefit corporation, organized under the acts of the Congress of the United States, upon a certificate of membership issued to Emanuel Meyer, by which it promised to pay, upon his death, to his wife, this plaintiff, the sum of \$2,000. The defendant alleged in defense of the action that the death of Meyer was the result of suicide, which, within the terms of the agreement of the parties, avoided the certificate. Upon the trial of the issues, the defendant, claiming the affirmative, and not questioning plaintiff's preliminary proofs to establish a case under the allegations of her complaint, was allowed to begin with its defense, and its evi-

dence as directed towards proving that the beneficiary committed suicide by taking poison. The trial judge submitted to the jury the one question "whether the deceased committed suicide," and, upon their answering "No" to the question, he directed judgment to be entered for the plaintiff. That judgment has been affirmed by the appellate division, and upon this appeal, in substance, the general argument of the appellant is that the waiver of the deceased, contained in his application for the insurance certificate, of all provisions of law then or thereafter in force prohibiting any physician from testifying to any information acquired by attendance upon him, was a part of a contract, which had been validly made in the state of Illinois, and that §§ 834 and 836 of the Code of Civil Procedure of this state, under which such testimony is rendered inadmissible unless the statutory prohibition is waived upon the trial by the personal representatives of the deceased, are inoperative, as being in violation of the provisions of the Federal Constitution which prohibit legislation in impairment of contracts. The argument, further, is that, as to one of the physicians called upon to testify for the defense, his testimony, certainly, did not come within the statutory prohibition, inasmuch as the necessary relationship of physician and patient did not exist.

With respect to the first of these questions raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say now that this contract was consummated in the state of New York, and is to be governed, in its enforcement, by the laws of that state. The beneficiary was a resident of this state, and there made his application for the insurance. The certificate issuing upon the application appears, from its language only, to have been signed by the officers of the defendant at Chicago, in the state of Illinois, on September 20, 1894; but upon it was printed the following clause: "I hereby accept this certificate of membership subject to all the conditions therein contained." And that had the signature of the applicant, followed by the words, "Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, Secretary Section 2179, Endowment Rank, K. of P." By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but "to the further conditions and agreements hereinafter named;" and the clause containing his acceptance, above quoted, was one of those "further agreements." From these

terms of the agreements of the parties, the only natural conclusion is that the place of the contract was where it was intended and understood to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate, namely, to accept it "subject to all the conditions therein contained." The contract was not completed, in the sense that it was binding upon either party to it, until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York,—a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that by its terms it was first to take effect as a binding obligation when the required agreement on the part of the member was executed by him.

The difficulty in this case, which, in my judgment, entitles the defendant to a new trial in the action, is the exclusion of the evidence of Dr. Brusco, called as a witness for the defendant, and asked to state a conversation had with Meyer, the deceased. This witness was a physician, having his office in the city of Buffalo, in this state, near the Iroquois hotel. He testified that, in the early morning, one of the bell boys of the hotel came for him, and, upon entering one of the rooms, he found a man in the bed, suffering from pain and vomiting. Objection being made to his evidence, which was in the form of a deposition, the court put the question: "Did this doctor treat him?" The defendant's counsel replied: "He inserted something hypodermically into the man against his wish." The objection to the testimony was sustained, the defendant excepted, and the whole deposition of the witness was excluded, under the previous ruling of the court that §§ 834 and 836 of the Code of Civil Procedure applied. From the deposition thus offered and excluded, it appeared that the witness had a conversation with Meyer, which was narrated, so far as material, as follows: "I asked him what he had been doing, and he told me it was none of my damned business; that he didn't want me in there, and he wanted me to get out of there. . . . I looked around the room. . . . I found . . . a box of rough on rats . . . empty. . . . He told me he had taken it . . . because he wanted to die; . . . he didn't want to get well; . . . he didn't want me to do anything. . . . I prepared a hypodermic injection, . . . and stimulated him, so he would not die in the Hotel Iroquois. . . . When I was

going to give him the hypodermic, he said: 'You [cursing him in foul language] keep away from here. Didn't I tell you before to keep away?' I paid no attention to him, and gave him the hypodermic." The witness was then asked if he knew what was the cause of the condition of the man, and he answered that it was arsenical poisoning, and that the symptoms evidenced it. The deceased was immediately conveyed from the hotel to the hospital, where he died soon afterwards. The evidence of Dr. Brusco was deemed inadmissible, under the provisions of § 834 of the Code of Civil Procedure, which prohibits a physician from disclosing "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The agreement of the insured, contained in his application, which waived, for himself, his representatives and beneficiaries, "any and all provisions of law, now or hereafter in force, prohibiting . . . any physician . . . attending me . . . from disclosing, or testifying to any information acquired thereby," and which expressly consented to such testimony being given in any suit, was held below to be insufficient to meet the requirement of § 836 of the Code of Civil Procedure, that the provisions of § 834 must be expressly waived upon the trial by the personal representatives of the deceased patient. Such a waiver was refused at this trial. Our recent decision in *Holden v. Metropolitan L. Ins. Co.* 165 N. Y. 13, 58 N. E. 771, justified the ruling below upon the question of the force of the waiver in the insurance contract. Theretofore it had been the rule to regard such a waiver as a binding part of the contract of insurance, and, as such, available to the insurer in any action upon the policy. *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456.

But was there disclosed that relationship of physician and patient between the deceased and Dr. Brusco which made operative the prohibitory provisions of § 834? As the inadmissibility of such testimony is only because of the statute, it is quite important that the case should come very clearly within its terms, however liberal the construction which we should give to an enactment intended to promote the ends of justice. The object of this legislation was to render privileged what communications are made between a physician and his patient, but, obviously it is essential that it shall appear that the person attended is his patient, in the sense in which such a term is ordinarily understood. In *Griffiths v. Metropolitan Street R. Co.* 171 N. Y. 106, 63 N. E. 808, we quite lately had occasion to

consider such a question under a state of facts not essentially dissimilar to that now before us. In that case the plaintiff brought his action to recover damages for injuries sustained through the negligence of the defendant's servant, a gripman upon one of its cars. The defendant called a physician as a witness who was at the scene of the accident when an ambulance arrived, and who rendered "first aid" to the plaintiff. The witness was also an attending physician at the hospital to which the plaintiff was assisted by him in the ambulance, but he rendered no further services to him while in the hospital. The witness was asked to relate a conversation which he had with the plaintiff in the hospital subsequently, but the court sustained an objection to its admissibility, under § 834 of the Code, and the witness was not allowed to testify to what was said by plaintiff with reference to his sufferings or to the accident. When the case reached this court, it was held that the exclusion of the physician's evidence was an error, for which the judgment should be reversed, and a new trial had. The decision by this court rested upon the ground that the burden upon the plaintiff of showing that the evidence was within the statutory prohibition had not been met, and that the facts did not warrant the presumption that the relation of physician and patient existed. The opinion quite fully reviewed the cases illustrating the application of the statutory provision in question, and the rule was distinctly adhered to, that,

to warrant the application, it must appear that the relation of physician and patient at the time existed, and that the information sought to be excluded was necessary to enable the physician to act as such. Previous to the *Griffiths Case*, that rule had been expressed in *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730. Can we say that the rule applies to such a situation as that disclosed in this case, any more than it did in *Griffiths's Case*? I think not. It seems to me to be difficult to assert, with any gravity of countenance, at least, with Meyer rejecting the witness's presence and services, and cursing him for his interference, and with the witness's determined efforts to prevent Meyer from dying in the hotel, whose servants had summoned him, that the relation of physician and patient arose, and that the confidential relation existed which the statute has in view, and which, with a tender solicitude for a patient's interests, it is designed to safeguard.

The inadmissibility of the testimony of the hospital physicians rests upon a different basis. Both may reasonably be said to have been in attendance upon him as a hospital patient, but, in my opinion, the deposition of Dr. Bruso was erroneously excluded, and therefore I advise the reversal of the judgment.

Parker, Ch. J., concurs with Gray, J. Werner, J., absent.

OHIO SUPREME COURT.

ST. MARYS MACHINE COMPANY,
Plff. in Err.,

v.

NATIONAL SUPPLY COMPANY *et al.*

(68 Ohio St. 535.)

- *1. After condition broken, the mortgagee under a chattel mortgage is the owner of the property covered by the mortgage, and the mortgagor has only a right of redemption.
2. Where a receiver is appointed and takes possession of chattels covered by a chattel mortgage after condition broken, as provided in § 3206a, Rev. Stat. 1892, such chattels, to the extent that the same may be required to satisfy the mortgage, are the property of the mortgagee, and not the mortgagor.
3. The "trust fund" mentioned in said

*Headnotes by the Court.

NOTE.—As to when mechanics' liens are superior to earlier mortgages, see, in this series, note to *Wimberley v. Mayberry*, 14 L. R. A. 303.

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section is the fund which would be left for general creditors under § 6355, Rev. Stat. 1892, in the absence of labor claims, and out of that general fund labor claims must be paid, whether the proceeding be under said § 3206a or under § 6355.

(June 16, 1903.)

ERROR to the Circuit Court for Allen County to review a judgment modifying a decree of the Court of Common Pleas distributing the proceeds of the chattels of L. E. Bloomfield, which were claimed under various mortgages and laborer's liens. *Reversed.*

Statement by **Burket, Ch. J.:**

The facts in this case involve the rights of several mortgagees under chattel mortgages from L. E. Bloomfield, a contractor, engaged in drilling oil wells, in which business he owned and used drilling tools, machinery, horses, wagons, and harness, but was not the owner of any real estate. He gave chattel mortgages to different parties

on this property, some of them covering the same property, and all of which were properly executed and filed and kept alive so as to be valid liens upon the property covered by the several mortgages. On February 8, 1901, the National Supply Company, one of said mortgagees, began its action in the court of common pleas of Allen county against said L. E. Bloomfield, making the several chattel mortgagees defendants, and in that action the court appointed receivers, who qualified, and, under the order of the court, took possession of all the property of Mr. Bloomfield, including the property covered by said chattel mortgages, and converted all the property into money, and brought the same into court for distribution. Said chattel mortgages were all past due when said action was commenced. By consent of all parties, the taxes and expenses, including the compensation of the receivers, were paid out of the fund realized upon the sale of the personal property. Many claims for labor performed for Mr. Bloomfield in his said business within three months before said receivers were appointed were filed and allowed, and thereupon a contest arose upon distribution between said mortgagees and said labor claims. The cause came to the circuit court on appeal, and was there heard and determined. There was no contest as to the amount due to each mortgagee or to each laborer, the sole question being as to priorities, the fund not being sufficient to pay all. The circuit court held that the amount due on the labor claims should be first paid in full, and should be deducted *pro rata* from the fund arising from the sale of the property covered by the several mortgages, without reference to the question of priority of such mortgages as among themselves, and that the remainder thus left to each mortgagee under his mortgage should be paid to him. In the case of the St. Marys Machine Company this holding resulted as follows: Amount found due this company was \$1,315.57; net amount realized on sale of property covered by its chattel mortgage, \$955.19; amount deducted from that sum and paid over to labor claims \$435.75, leaving a balance of \$519.44 to be paid over to the company. The other mortgagees were treated in the same manner, the only difference being as to amounts. The mortgagees saved proper exceptions, and brought the case here, seeking to reverse the judgment of the circuit court, and asking for judgment in their favor upon the findings of fact made by that court.

Messrs. D. F. Mooney and Richie, Leeland, & Roby, for plaintiff in error:

The interest of a mortgagee under a chattel mortgage is that of a general owner of §4 L. R. A.

the property mortgaged; and, where there is no reservation of the right to the possession in the mortgagor, the mortgagee is entitled to the possession.

Robinson v. Fitch, 26 Ohio St. 659.

If § 3206a, Rev. Stat. 1892, authorized the court to make the order taking from the machine company \$435.75 of the money arising from the sale of property it bought and became the owner of on January 19, 1900 (*Robinson v. Fitch*, 26 Ohio St. 659; *Sayler v. Simpson*, 45 Ohio St. 141, 12 N. E. 181), and apply that money in paying claims due for labor, no part of which was performed for nearly ten months after the machine company purchased that property, then this section is in conflict with § 10, art. 1, of the Constitution of the United States; and with § 1, art. 1, and § 23, art. 2, of the Constitution of Ohio.

It will not be presumed that the legislature intended to repeal the sections of the statute which give to a mortgagee of chattels a lien on the property described in the mortgage, which is superior to all other liens upon, or claims against, such chattels, where the mortgagee has fully complied with the statute.

The paragraph directing payment of three months' wages out of the trust fund in the hands of a receiver gave such labor claims "precedence before general creditors," but not over those who have prior liens upon the funds in the hands of the receiver.

Devine v. Taylor, 12 Ohio C. C. 725;

Hughes v. Dale, 16 Ohio C. C. 645; *Hughes v. City Hall Bank*, 61 Ohio St. 386, 55 N. E. 1001.

In the case of an assignment by an insolvent debtor for the benefit of creditors, the rights of the assignee in the property assigned are no greater than those of the debtor prior to the assignment.

Hodgson v. Barrett, 33 Ohio St. 63, 31

Am. Rep. 527; *Moran v. Kinney*, 38 Ohio St. 610; *Landemann v. Ingham*, 36 Ohio St. 1.

Mr. I. B. Longworth, for defendants in error:

The words "all other claims" include all liens by mortgage, chattel or otherwise, and indicate the broad intention of the legislature. Every possible right is excluded from a preference over these claims for labor performed in three months, except costs and taxes. The obligation of a contract depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other.

Weil v. State, 46 Ohio St. 452, 21 N. E. 643; *Smith v. Parsons*, 1 Ohio, 236, 13 Am.

Dec. 608; *Ireland v. Palestine*, B. N. P. & N. W. Turnp. Co. 19 Ohio St. 369; *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863.

Plaintiff in error took its chattel mortgage on the property in question subject to the liability to have the fund arising from the sale of the property under mortgage disbursed first for costs and taxes, then to satisfy the claims for labor performed for Bloomfield within three months prior to such time as his property should come into the hands of a receiver.

Statutes such as the one in question are enacted in the interests of those who are not in position to guard their own interests, and are prompted by a wise public policy, and have uniformly been held to be constitutional.

Trust v. Miami Oil Co. 19 Ohio C. C. 727; *Hughes v. Dale*, 16 Ohio C. C. 645; *Aurora Nat. Bank v. Black*, 129 Ind. 595, 29 N. E. 396; *Pendergast v. Yandes*, 124 Ind. 159, 8 L. R. A. 849, 24 N. E. 724; *Warren v. Sohn*, 112 Ind. 213, 13 N. E. 863; *Bass v. Doorman*, 112 Ind. 390, 14 N. E. 377; *Allred v. Haile*, 84 Ga. 570, 10 S. E. 1095.

Messrs. Ira C. Taber, Cable & Parmenter, and Ridenour & Halfhill also for defendants in error.

Burket, Ch. J., delivered the opinion of the court:

The solution of the controversy between the parties depends upon a proper construction of § 3206a, Rev. Stat. 1892. That section is as follows:

"Laborers and employees of any persons, association of persons, or corporation, whether such employment be at agriculture, mining, manufacture, or other manual labor, shall have a lien upon the real property of their employers for their wages, which is hereby declared to be superior to the following liens taken or attaching during the existence of such unpaid labor claims, to wit: Liens of attachment, liens of mortgages given or taken at a time of actual insolvency of the debtor, or with a view of preferring creditors or to secure a pre-existing debt, and superior to all claims for homestead or other exemptions, except under § 5430; and in all cases where property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver, or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust. The lien herein provided shall be deemed to be waived by the laborer or employee, as to any portion of such labor, unless within thirty days from 64 L. R. A.

the expiration of three months from the performance of such portion he shall file with the recorder of the county where the labor was performed an itemized statement verified by affidavit of the amount, kind, and value of the labor performed within said period, with all credits and offsets, and the amount then due him therefor, which verified statement, when so filed, shall be recorded in a book kept for the purpose, and shall become and operate as a lien upon the real property of the employer without any specific description thereof, for the period of one year from and after the filing thereof, and, if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated; and the proceedings to enforce such lien shall be the same as in other cases of lien, against the owner of the property and all other persons interested: Provided, that if several persons have or obtain liens under the provisions of this section, against the property of the same employer, they shall have no priority among themselves, but shall be paid *pro rata*, nor shall they have priority over those obtaining liens under §§ 3184, 3185, 3186, 3187, of this chapter; but the persons obtaining liens under said §§ 3184, 3185, 3186, and 3187 shall have priority as provided therein."

As there was no real estate in this case, the only part of the section here applicable is the following: "And in all cases where property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver, or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the cost of administering the trust." As the amount found due the St. Marys Machine Company was greater than the value of the mortgaged property, as shown by the amount for which it sold, the property covered by the mortgage was the property of the machine company, and not the property of Mr. Bloomfield. All he had was a right of redemption by payment of the debt. *Saylor v. Simpson*, 45 Ohio St. 141, 150, 12 N. E. 181. This is a property right, but not property itself, within the purview of this section. It was, therefore, not the property of the employer, Mr. Bloomfield, but the property of the machine company, that came into the hands of the receivers in this case, and, according to the holding of this court in *Hughes v. City Hall Bank*, 61 Ohio St. 386, 55 N. E. 1001, it could not be subjected to the payment of labor claims under this section.

Again, said section provides that such

labor claims "shall be first paid out of the trust fund, in preference to all other claims," etc. "Trust funds," under this section, must be the same, whether the estate is in the hands of an assignee, receiver, or trustee; and in all such cases the fund for distribution among creditors generally is known as a "trust fund," because the person in charge of the estate holds the fund in trust for all who can show themselves to be beneficiaries under the general law of the land, and not entitled as owners, in whole or part, by virtue of a special property or particular lien. As to such, the receiver holds the property or its proceeds, not in the sense of a trust fund, but under a special obligation to restore it to its owner.

The correctness of the foregoing holding is strengthened by a reference to § 6355, Rev. Stat. 1892, which is *in pari materia* with said § 3206a, and both sections must be read and construed together. Section 6355 is as follows: "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor, and every person who shall have performed any labor as an operative in the service of the assignor shall be entitled to receive out of the trust funds, before the payment of the other creditors, the full amount of the wages due to such person for such labor performed within twelve months preceding the assignment, not exceeding \$300. But the foregoing provisions shall not prejudice, or in any way effect, securities given or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or securities given within such time to create a preference among creditors or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor to the extent above provided, in case of assignment."

This section provides for the distribution of the assets of the estate of an insolvent in cases of assignments for the benefit of creditors, and provides for the payment of labor claims of operatives in the service of the assignor, for labor performed within twelve months, not exceeding \$300, but such labor claims cannot prevail over securities given or liens obtained in good faith for value. From this it is clear that the fund out of which such labor claims can be paid, in cases of assignees or trustees in insolvency, is the general fund remaining after the payment of all securities and liens obtained in good faith for value. This general fund cor-

responds to, and is the same as, the "trust fund" mentioned in said § 3206a, Rev. Stat. 1892, and each of said funds is what remains after the payment of the valid securities and liens against the property in the hands of the assignee or trustee; and to the extent of such securities and liens, construing both sections together, the property in the hands of the assignee or trustee is not regarded as the property of the employer, but as the property of the owner of the security or lien, and as being so connected with the property of the employer or assignor as to require the whole to be administered by the assignee or trustee, rendering to the owner of the securities and liens the proceeds of their property, and distributing by order of the probate court the remainder among the general creditors, subject to the rights of labor claims. Under the one section a labor claim includes all labor within twelve months, not exceeding \$300, and in the other the period is only three months, with no limitation as to amount. In this regard there seems to be some conflict, but in any particular case the laborer should be allowed to invoke the provision most favorable to himself.

Said § 6355 applies only to assignees and trustees, while the other section applies to assignees, trustees, and receivers; but, when the section is properly construed as to assignees and trustees, the same construction must be applied to receivers, because in said § 3206a all three stand upon exactly the same footing.

This section of the statute has been differently construed by the circuit court in several cases, and, while the true construction may not be clear at a glance, after mature deliberation, and a full examination of the principles involved, the above construction seems to be clearly warranted, and, when so construed, the section is constitutional. With this construction of the section, the other questions so ably argued by counsel become unimportant, and are not here considered.

The judgment of the Circuit Court will be reversed, and cause remanded to that court with instructions to render a judgment of distribution, applying the net proceeds of the sale of the property covered by each chattel mortgage to the payment of the amount due upon such mortgage, preserving priorities where there are two or more chattel mortgages on the same property, and that the balance, if any, be applied upon the labor claims *pro rata*.

Judgment reversed, and judgment for plaintiff in error.

Spear, Davis, Shauck, Price, and Crew, JJ., concur.

DELAWARE SUPREME COURT.

Fannie S. LANE, Admr., etc., of Jesse Lane, *Respt.*,

v.

Martin LANE, Trustee, etc., of Jesse Lane, Deceased, *et al.*, *Appts.*

(.....Del.....)

1. Questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicil of the donor of the power, and not by the law of the domicil of the donee.
2. A general disposition of his estate, real and personal, of whatever kind and wherever situated, without any reference to a power of appointment created by the will of another, or intent to indicate an intention to execute the power, is not, in the absence of statute, a sufficient execution of a power to direct and appoint in what manner a fund established by the other will shall be distributed.

(June 16, 1903.)

NOTE.—What is a sufficient execution by will of a power of appointment.

- I. How intent to exercise power evidenced.
 - a. General rules and principles, 849.
 - b. Reference in donee's will to the power, 858.
 - c. Reference in donee's will to property the subject of the power, 865.
 - d. Effect of general provision in donee's will.
 1. Presence or absence of interest aside from power, 871.
 2. Circumstances surrounding donee, 880.
 3. Under statutes, 882.
 - e. Will executed before creation of power, 888.
 - f. What law governs in ascertaining intent, 892.

II. Validity of attempt to exercise power.

- a. Validity of donee's will.
 1. General rule, 892.
 2. What law governs.
 - (a) Formal validity of donee's will, 896.
 - (b) Essential validity of donee's will, 899.
- b. When limited to a class.
 1. Exclusion of member of class, 899.
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 3. Illusory appointment; remoteness, 902.
- c. When donee's will creates a trust, 903.
- d. When power exhausted; revocation, 905.
- e. Appointment by survivor of two or more donees, 907.
- f. Appointment by infant, 907.
- g. Exercised at different times and by different acts; partial appointment, 907.
- h. Exercise by deed of power limited to will, 909.
- i. Gift of less estate than provided in power, 910.

A PPEAL by defendants from a decree of the Chancery Court for New Castle County in favor of plaintiff in a suit to compel an accounting by defendants, and for the payment of a legacy. *Affirmed.*

The facts are stated in the opinion.

Messrs. George Tucker Bispham and Benjamin Nields, for appellants:

A general devise of real or personal estate will operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will.

1 Vict. 1837, chap. 26, § 37.

English cases prior to the statute show the reasons for its enactment, and the reasons for the adoption, by American courts, of the rule as above stated.

Darlington v. Pulteney, 1 Cowp. 260; *Clere's Case*, 6 Coke, 17b; *Andrews v. Em-mot*, 2 Bro. Ch. 297; *Standen v. Standen*, 2 Ves. Jr. 589; *Doe ex dem. Nowell v. Roake*, 2 Bing. 497, 10 J. B. Moore, 113; *Jones v.*

II.—continued.

- j. Delegation of exercise of power, 910.
- k. Exercise for consideration, 910.
- l. Exercise for charitable use, 911.
- III. Relief in equity against defective exercise of power, 911.
- IV. When power in effect absolute gift, 913.
- V. Miscellaneous cases, 913.
- VI. Conclusion, 916.

I. How intent to exercise power evidenced.

a. General rules and principles.

As is well known, very many of the questions which come before the courts for their determination depend upon the facts and circumstances of each particular case. While certain well-known general rules and principles, in a sense, are considered in the decision of all the cases, yet individual instances are constantly arising, in which some particular exists which will cause an exception to or qualification or novel application of, such general rule. This truth is exemplified in the numerous and varied cases which have been brought forth by the different courts and judges, in an endeavor to decide when, and under what circumstances, the will of one having a power of appointment will be deemed an execution or exercise of the power. The general rule would seem to be, in substance, that, in order successfully to exercise a power of appointment, the donee thereof must, in the attempt to do so, have made some allusion to, or taken notice of, the power itself, or in some manner referred to the property or matter which is the subject of it; from which an intention to execute the power is plainly apparent. That is to say,—that was the original rule at common law. Later the English courts of equity introduced another proof of the intention of the donee of the power to execute the same, *viz.*, where it was apparent that the will of the donee would otherwise be inoperative.

Three classes of cases have been held to be

Tucker, 2 Meriv. 533; *Nannock v. Horton*, 7 Ves. Jr. 398; *Davies v. Thorns*, 3 DeG. & S. 347, 18 L. J. Ch. N. S. 212, 13 Jur. 383.

In several of the American states, independently of legislative enactment, the courts have ruled according to the statute 1 Vict.

Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,470; *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270; *Cumston v. Bartlett*, 149 Mass. 243, 21 N. E. 373; *Sewall v. Wilmer*, 132 Mass. 131; *Hassam v. Hazen*, 156 Mass. 93, 30 N. E. 469; *White v. Hicks*, 33 N. Y. 383; *Hutton v. Benkard*, 92 N. Y. 295; *New York Life Ins. & T. Co. v. Livingston*, 133 N. Y. 125, 30 N. E. 724; *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940;

Johnston v. Knight, 117 N. C. 122, 23 S. E. 92; *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Doe ex dem. Davis v. Vincent*, 1 Houst. (Del.) 416.

Where a will is made and executed according to the law of the testator's (donee's) domicile, the law forms a part of the will; is read into it, and evidences the intention of the testator.

Chandler v. Pocock, L. R. 15 Ch. Div. 496; 49 L. J. Ch. N. S. 442, 43 L. T. N. S. 112, 28 Week. Rep. 806.

A will disposing of personal property is to be interpreted according to the law of the testator's domicile.

Trotter v. Trotter, 4 Bligh, N. R. 502, 3 Wilson & S. 407; *Wallis v. Brightwell*, 2

sufficient demonstrations of an intended execution of a power by will: (1) Where there has been some reference in the will to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will executed by the donee of the power would have no operation, except as an execution of the power. *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631, Affirming 39 Fed. 235; *Bilderback v. Boyce*, 14 S. C. 528.

And it has also been held that, where the donee of a power created by a will devised to the identical persons, and no others, who were designated in the will, that fact produces the conviction that she was then intending to exercise the authority given her by the donor of the power, and it will be deemed to have been intentional and not accidental, among near relations, for the donee could not have disposed of property to anyone else. *Johnston v. Knight*, 117 N. C. 122, 23 S. E. 92.

An express declaration of the intent to execute a power of appointment by will need not appear on the face of the will, provided such intention otherwise sufficiently appears. While this general rule is apparently a simple one, the inquiry as to what state of things sufficiently manifests an intention in a testator to execute a power by his will, to which power he does not specifically refer, has given rise to the greater part of the cases on the question whether a pre-existing power has been actually executed by a subsequent will. *Pepper's Will*, 1 Para. Sel. Eq. Cas. 486.

Whether a power of appointment has been exercised is a question of intention, and a question of intention only. *Re Rickman*, 80 L. T. N. S. 518.

Where a person has a general power of appointment over personal estate, and by his will appoints the estate to executors, it is always a question of intention whether the power is exercised or not; and when the subject of the power is personal estate, and the appointment is made to the executors of the donee of the power, the presumption is that it was intended to make the fund part of the personal estate of the donee. *Re Van Hagan*, L. R. 16 Ch. Div. 18, 50 L. J. Ch. N. S. 1, 44 L. T. N. S. 161, 29 Week. Rep. 84.

The donee of a power under a will, by doing a thing which, independently of the power, would be nugatory, conclusively evinces an intention to execute the power; and the act, 64 L. R. A.

if within the scope of the power, must be regarded as a valid execution of it. *Warner v. Connecticut Mut. L. Ins. Co.* 109 U. S. 337, 27 L. ed. 862, 3 Sup. Ct. Rep. 221.

In *Doe ex dem. Nowell v. Roake*, 2 Bing. 497, 10 J. B. Moore, 118, where a person, who was seised of one undivided moiety of the estate by purchase and had the power of disposing of the other undivided moiety, made her will, whereby she gave and devised to her nephew all her freehold estates in the city of London and county of Surrey, or elsewhere, for his life, on condition that out of the rents thereof he keep such estates in proper and tenantable repair, this was held by the common pleas to be a good and sufficient exercise of the power. The court said that it had often been said that a power is not executed, unless the power or the estate be referred to by the will, or the will can have no effect except as an execution of the power, but that these were not the only cases; that they were only put as instances of the strong and unequivocal proof that is required; but that, even if there was a rule that courts of law are only permitted to hold a power well executed in these instances, they thought that this case came within it; but that the fact that the devise was upon condition that out of the rents thereof—that is, out of the rents of the entire property—the devisee should from time to time keep such estate in repair; and as he could not keep an undivided moiety in repair, but must repair the whole, or have the whole without repair,—these words, therefore, clearly refer to the property; and that if they do, the entire property was referred to in the devise.

Upon a writ of error to the common pleas, the King's bench reversed this judgment (*Denn ex dem. Noel v. Roake*, 8 Dowl. & R. 514, 5 Barn. & C. 720), saying that, while they might think the testatrix intended that the entirety should go in strict settlement on the family of the sister of the testatrix (the nephew), according to the directions of her will, yet it was possible to suppose that the testatrix had no intention to execute the power; and, if the intention to execute the power be doubtful, the will cannot be deemed an execution of it. No answer was made by the court to the reasoning of Best, Ch. J., in the common pleas, that the condition to keep in repair was indicative of the intention of the testatrix to execute the power as to the undivided moiety, as it would

P. Wms. 88; Dicey, Conf. L. rule 181, p. 684.

In at least one English case a rule conformable to intention was laid down.

Standen v. Standen, 2 Ves. Jr. 589. See also *Bradley v. Westcott*, 13 Ves. Jr. 452, 9 Revised Rep. 207.

An intent to execute the power sufficiently appears on the face of the will.

Kimball v. New Hampshire Bible Soc. 65 N. H. 139, 23 Atl. 83-85; *Re Van Hagan*, L. R. 16 Ch. Div. 18, 50 L. J. Ch. N. S. 1, 44 L. T. N. S. 161, 29 Week. Rep. 84; *Freese v. Clement*, L. R. 18 Ch. Div. 510, 50 L. J. Ch. N. S. 801, 44 L. T. N. S. 399, 30 Week. Rep. 1; *Re Pinède*, L. R. 12 Ch. Div. 674, 48 L. J. Ch. N. S. 741, 41 L. T. N. S. 579, 28

Week. Rep. 178; *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940.

Mr. William S. Hilles, for respondent:

The intention to execute a power must appear, either by a reference to the power itself, or by some relation to the subject-matter of it, in a way which can leave no doubt of the intention to execute it.

Doe ex dem. Davis v. Vincent, 1 Houst. (Del.) 416; *Olere's Case*, 6 Coke, 17b; *Parker v. Kett*, 12 Mod. 466; *Andreus v. Emmot*, 1 Bro. Ch. 297; *Langham v. Nenny*, 3 Ves. Jr. 487; *Croft v. Sles*, 4 Ves. Jr. 60; *Nannock v. Horton*, 7 Ves. Jr. 391; *Bennett v. Aburrow*, 8 Ves. Jr. 609, 7 Revised Rep. 131; *Roach v. Haynes*, 8 Ves. Jr. 584; *Bradley v. Westcott*, 13 Ves. Jr. 445, 9 Revised Rep. 207; *Lowell v. Knight*, 3 Sim. 275, 1 L.

be impossible to keep an undivided moiety in repair; and the devise must, therefore, have been intended by her to relate to the whole property, the undivided moiety that she owned and the other, over which she only had the power of appointment.

The case was afterwards removed by writ of error to the House of Lords, where the decision of the King's bench, reversing that of the common pleas, was affirmed. Alexander, C. B., who delivered the opinion of all the judges, saying, in reference to the position taken by Best, Ch. J., in the common pleas, that the circumstance of the condition that the devisee for life should, out of the rents and profits of the devised premises, keep them in tenantable repair, that the direction respecting the repairs had no effect in proving, according to the authorities, that the testatrix meant to execute her authority over the undivided moiety of the estate; that there was no incongruity in directing a tenant for life of an undivided moiety to keep his share in the premises in repair; that a person with such an interest is not without remedies for enforcing repairs, and, at the worst, the devise would make him liable as against the remainderman for dilapidation. *Denn ex dem. Nowell v. Roake*, 6 Bing. 475, 1 Dow & C. 437, 4 Bligh N. R. 8.

The decisions both of the King's bench and of the House of Lords seem to have been a strict enforcement of the rule laid down in a number of cases, that a general devise of a person having a power of appointment, who possesses property other than that over which such power appertains, will not operate as an exercise of the power to dispose of the property under the appointment, unless the intention to do so is undoubtedly expressed by some reference, either to the property covered by the power, or to the fact that it is done by virtue of the power. The reasoning of Best, Ch. J., in the common pleas has been frequently cited and quoted, and generally commended, by American courts and judges, notably by Story, J., in the oft-cited case of *Blagge v. Miles*, *infra*.

Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479, is an authority that has been cited more than any other in the United States, for the doctrine that, in considering the question as to whether or not the power of appointment has been exercised, the general rule is that the intention of the testator is the polestar to direct the court in the interpretation of wills, 64 L. R. A.

and that technical words and set phrases are controlled by, and do not control, that intention, when clearly expressed or positively ascertained. That three classes of cases are sufficient demonstrations of an intended execution of the power by will: (1) Where there has been some reference in the will to the power; (2) or a reference to the property, which is the subject, on which it is to be executed; (3) or, where the provision in the will, executed by the donee of the power, would otherwise be ineffectual or a mere nullity; in other words, it would have no operation except as an execution of the power. The court said that Mr. Chief Justice Best, in *Doe ex dem. Nowell v. Roake*, 2 Bing. 497, 10 J. B. Moore, 118, had put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof required to establish the intention to execute the power; but they are not the only cases. On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held that the power is well executed, unless courts of justice are at liberty to overturn principles, instead of interpreting acts and intentions. Judge Story said, further, that he entirely agreed with Lord Chief Justice Best in his remark in *Roake v. Denn*, 4 Bligh N. R. 22, 6 Bing. 475, 1 Dow & C. 437, that "rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges." The court said that it was unnecessary to refer at large to the cases which establish these propositions. That the rule of ascertaining the intention has been recognized at all times; and that if the judges in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them. That in case of wills, where the intention is to govern, no authorities ought to control the interpretation which the court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind as applied to the other. In this case a woman, having the power of appointment under the provisions of a will to dispose of certain real estate, made her own will, whereby she devised the residue of her estate of every

J. Ch. N. S. 47; *Lempriere v. Valpy*, 5 Sim. 108; *Webb v. Honnor*, 1 Jac. & W. 352, 21 Revised Rep. 180; *Jones v. Curry*, 1 Swanst. 66, 1 Wils. Ch. 24; *Doe ex dem. Nowell v. Roake*, 2 Bing. 497, 10 J. B. Moore, 113.

The American courts have adopted the same rules.

Blagge v. Miles, 1 Story, 426, Fed. Cas. No. 1,479; *Mory v. Michael*, 18 Md. 227; *Foos v. Scarf*, 55 Md. 301; *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79; *Birdsall v. Richards*, 18 Pa. 256; *Bell v. Twilight*, 22 N. H. 500; *Johnson v. Stanton*, 30 Conn. 297; *Coffing v. Taylor*, 16 Ill. 457; *Blake v. Hawkins*, 98 U. S. 315, 326, 25 L. ed. 139, 141; *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631; *Meeker v. Breintnall*, 38 N. J. Eq. 345; 4 Kent, Com. 351, 352; Haw-

kins, Wills, 22; 2 Story, Eq. Jur. § 1062a; 1 Jarman, Wills, 678; Theobald, Wills, 171, 172, 175; Page, Wills, § 698.

The appointee under a power takes his estate or interest, not under the deed of appointment, but under the deed or will creating the power.

4 Kent, Com. 354, 355; *Marlborough v. Godolphin*, 2 Ves. Sr. 61; *Middleton v. Crofts*, 2 Atk. 668, Appx.

The law of the domicile of the original testator is the appropriate test of an execution of a power.

Cotting v. De Sartiges, 17 R. I. 669, 16 L. R. A. 367, 24 Atl. 530; *Seacall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. 345; *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51;

name and nature. This was held to be the same as though she had devised the residue of her estate, real as well as personal; and it was held that it would be sufficient to pass real estate if she had owned any in her own right, and, the fact being that she had no real estate over which she had any control, except that left by the will of the father, the testator, as to which by that will she had a power of appointment, her will was a valid exercise of that power.

Before the passage of the act 7 Wm. IV. & 1 Vict. chap. 26, the supreme judicial court of Massachusetts established the rule that a testamentary paper executed by a woman after her marriage happening after a contract entered into between the man and woman and a trustee in contemplation of the marriage, in which the man covenanted that the woman might, during coverture, make a testamentary disposition of any sum of money or personal effects not exceeding a certain amount, being less than he afterwards received by the marriage; and that he would pay over to her executor, after her death, the amount so bequeathed, which bequeathed all her estate, real and personal,—meaning all the estate and property reserved to her at her own disposal by the marriage contract,—was a valid appointment under the marriage contract, as it was manifest that the intent was to dispose of all the personal estate of which the power of disposal was reserved to the wife, and that the use of the superfluous term "real estate" did not vitiate the appointment so far as it was well exercised pursuant to the power. *Newburyport Bank v. Stone*, 13 Pick. 420.

A single woman conveyed all her real and personal estate to trustees upon trust to manage the property and pay the income of it to her during her life, and convey it to such persons as she should, by her last will, designate. By her will she gave and devised one half of all the estate, real, personal, and mixed, of which she should die seised or possessed, to trustees for the benefit of the family of a brother; one tenth in trust for her sister and her children; and the residue of her said estate to four brothers and sisters, naming them in the will. The court held that this was a valid exercise of the appointment reserved by her to herself under the conveyance as mentioned, adding that a general devise of all of the testator's estate will operate as an execu-

tion of a power over property she formerly owned. *Amory v. Meredith*, 7 Allen, 397.

Where one had conveyed land on a consideration which moved from him, to be held upon a trust which secured to him the entire beneficial interest therein during his life, and power of appointment in respect thereof by will, a will executed by him, which makes specific provision for certain heirs at law, and then, by a general clause, disposes of all the rest of his estate, operates as an appointment in respect to such land. *Bangs v. Smith*, 98 Mass. 270.

There is a material practical difference between a will and an appointment by will. A married woman may make an appointment by the common law, but cannot make a will except as authorized by recent statutes. The theoretical distinction is that a will concerns the estate of a testator, and an appointment under a power that of the donor or the power. It is the exercise of the power of designation as to the estate of the donor, and is the same when given or reserved to the wife, as to her own estate, in an antenuptial contract between the parties intending marriage. *Osgood v. Bliss*, 141 Mass. 474, 55 Am. Rep. 538, 6 N. E. 527.

By the decisions in Massachusetts it would seem that the rule has been that, unless there is something in a will which it is claimed exercises the power of appointment, to show that a testator did not intend to exercise the power, a general residuary devise will operate as a valid execution of the power. *Hassam v. Hazen*, 158 Mass. 93, 30 N. E. 469.

A married woman who had, before her marriage, by a trust deed, conveyed certain property to the trustees upon trusts to pay the net income to her during her life, and at her decease pay, distribute, and convey the trust property to and among such persons as she should by her last will and testament appoint, and, in default of such testamentary appointment, then to pay and convey the same to and among such persons as would be entitled thereto by the statute of distributions of intestate estates, by her will gave, devised, and bequeathed all the rest, residue, and remainder of her property, real, personal, and mixed, that she then had or might thereafter acquire, to her husband, to him and his heirs and assigns forever, with a request that her husband assign by will "what of this property I now

Hernando v. Sautell, L. R. 27 Ch. Div. 284, 53 L. J. Ch. N. S. 865, 51 L. T. N. S. 117, 33 Week. Rep. 252; *Re Mégret* [1901] 1 Ch. 547, 70 L. J. Ch. N. S. 451, 84 L. T. N. S. 192; 22 Am. & Eng. Enc. Law, p. 1372; Rorer, Interstate Law, 289n; Story, Conf. L. pp. 544n, 649, 650a; Wharton, Conf. L. § 598a; 1 Redf. Wills, 410; Page, Wills, § 39; 1 Underhill, Wills, § 25.

The question here is not whether the will of Augustin S. Lane is entitled to probate in Delaware, but the construction to be given to that will when proved.

Huber's Goods [1896] Prob. 209, 65 L. J. Prob. N. S. 119, 75 L. T. N. S. 453; *Tomlin v. Lattern* [1900] 1 Ch. 442, 69 L. J. Ch. N. S. 225, 82 L. T. N. S. 79, 48 Week. Rep. 373; *D'Huart v. Harkness*, 34 Beav.

leave him he has not expended, to such of my relatives as he, in his judgment, may think may need it." At her decease her husband was insane, and so remained until he died, leaving his father as his sole heir. It was held that the will of the wife was a good appointment under the power she had reserved to herself in the deed of trust, and the heir of the husband took thereunder as against the brother and only next of kin of the wife. *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190.

That the Massachusetts rule is adopted in New Hampshire is seen in *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940, where the supreme court of New Hampshire declined to follow the English rule in determining whether a will exercised a power of appointment, and held that, although in the appointer's will there was no mention of the power, nor of the property to which it related, and he had other property upon which the will operated, as was the case in *Kimball v. New Hampshire Bible Soc.* 65 N. H. 139, 23 Atl. 83-85, *infra*, I. d. 2, the will would, nevertheless, operate as a valid exercise of the power; saying that the same rule prevailed in Massachusetts, and had then been effected in New York and in England by statute.

When the donee of a power of appointment refers to it, or when he disposes of the subject of it by such a description as identifies it, or when the instrument of execution cannot have any operation except on the ground that the donee intended to execute the power, the intent to execute it is free from uncertainty. *Clermontel's Estate*, 12 Phila. 139.

A freehold messuage described by name was, by an indenture, conveyed to a trustee to such uses and upon such trusts as a married woman should by deed or will appoint, and, in default thereof during her life, and after her death and such default of appointment, to her husband absolutely. The husband, by his will, devised a certain yearly fee-farm rent payable out of such messuage, and certain furniture and other articles therein, unto his wife absolutely, and then gave the residue of his estate and effects, real and personal, to the trustee to sell and pay out of the proceeds his debts and legacies, and deal with the ultimate proceeds as thereby provided. After his death the wife, by her will, gave all the real and personal estate of which she might be possessed or to which she might be entitled, or of which, by 64 L. R. A.

324, 34 L. J. Ch. N. S. 311; *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581; *Hummel v. Hummel* [1898] 1 Ch. 642, 67 L. J. Ch. N. S. 363, 78 L. T. N. S. 518; *Alexander's Goods*, 29 L. J. Prob. N. S. 93, 6 Jur. N. S. 345, 2 L. T. N. S. 56, 8 Week. Rep. 451.

Spruance, J., delivered the opinion of the court:

The complainant below, Fannie S. Lane, administratrix of Jesse Lane, filed her bill in the court of chancery for New Castle county against Martin Lane, trustee, and the other respondents, for an accounting by the said trustee, and for a decree that he pay to the complainant a certain legacy,

virtue of any power or authority, she was competent to dispose in the manner therein stated; and then, after making certain devises and bequests in which she treated the subjects of such devises and bequests as her own, she gave the property which formed the subject of the power to her husband and made him her residuary legatee. She made no distinction in her will between property which belonged to her and property over which she had only a power of disposition. It was held that by this will she indicated her intention that the power should be exercised and that the property to which it related should be deemed hers for all purposes; and that it went to her heirs, and not to those of her husband by default of appointment. *Coxen v. Rowland* [1894] 1 Ch. 406, 63 L. J. Ch. N. S. 179, 8 Reports, 525, 70 L. T. N. S. 89, 42 Week. Rep. 568.

A testatrix entitled for life, under her marriage settlement, to the dividends and interest of a fund and a small sum of cash, with a general power of appointment, where there had been previous appointments by deed of her husband and herself generally, and herself alone after his death,—made her will whereby she confirmed the former appointments, and then, after giving a sum theretofore appointed by deed to a son who had thereafter died, to be paid to another son in trust for the son of the deceased, and bequeathed to two other sons certain lands, gave, bequeathed, and devised the residue and remainder of her estate unto two sons, and appointed another son and a daughter as executors. It was held that the will, being one which, while it appointed executors, did so in a way not indicating any intention to deal with the property as testatrix's own, and one which did not in terms charge debts and funeral expenses on the property dealt with, operated as an execution of the power of appointment in all its parts. *Peirce v. McNeale* [1894] Ir. Rep. 1 Ch. Div. 118.

Where one is vested with an estate for life, but with power to appoint in fee, a devise by such donee of the power, of the property as her own, is a good exercise of the power. *Morgan ex dem. Surman v. Surman*, 1 Taunt. 289. The court said that it would be different if she had an interest in the reversion as well as the power. It was also held that in this case there was no such thing as an illusory appoint-

with its increase and income, alleged to be the property of the complainant as administratrix as aforesaid. The case was heard by the chancellor upon bill and answer and an agreed statement of facts. The following are the material facts disclosed by the record:

Jesse Lane, the elder, by his will bearing date April 15, 1880, bequeathed, *inter alia*, as follows: "Item 8. I give and bequeath unto Edward Bringham, Jr., the sum of fifty thousand dollars, in special trust to invest the same in some safe and productive securities, with power from time to time to call in and reinvest the same, as may be necessary, and all the interest, dividends, and income which may accrue therefrom to receive and pay over into the proper hands of

my son, Augustin S. Lane, for his sole use during his natural life; and upon his decease then in trust to dispose of said principal sum of fifty thousand dollars in such manner as my said son Augustin by his last will and testament, or by any writing executed as such, shall direct and appoint, and in default of such appointment then in trust to pay and distribute the said principal sum of fifty thousand dollars to and among the children of my said son Augustin living at the time of his death and the issue of any deceased child of said Augustin in equal shares but so that such issue of any child of said Augustin, deceased in his lifetime, shall take among them equally, if more than one, only the share their parent, if living, would take; and, in default of any children or is-

ment in law, whatever might be the rule in equity.

A widow having the power, under her late husband's will, of appointing a portion of the sum directed by his will to be set aside for the purpose of producing an annuity to be paid to her during her life by an appointment in the nature of a last will and testament, exercises such power by a will whereby she devises all her estate, real and personal, to one of her children. *Bolton v. DePeyster*, 25 Barb. 539.

Where a general power of appointment resides in a married woman, her will, although as such and for the purpose of conveying property it is utterly void, may still be good as an appointment, which is the mere exercise of the power to designate the persons who are to take the beneficial use of the estate. *Cueman v. Broadnax*, 37 N. J. L. 508.

This is upon the original theory that while a married woman could not make a valid will, she could, by an instrument in the nature of a will, exercise the power of appointment; the idea being that she did not act herself, but merely as the attorney or agent of the donor to carry out his wishes, although the particular manner was left to her as such attorney or agent.

Bradish v. Gibbs, 3 Johns. Ch. 523, is a case frequently cited in favor of the doctrine that a *feme covert* may execute by will, in favor of her husband, a power given or reserved to her while sole, over her real estate, and this whether the real estate over which such power is exercised has come to her from some other person or has been reserved by her in an antenuptial agreement; and that in either case she may, in the exercise of the power, by her last will devise the whole or any part of such estate to her husband. The decision by Chancellor Kent goes into a history of the dispute in England over the question as to the ability of the wife to make the devise in favor of her husband,—particularly when the estate has come originally from herself by antenuptial agreement; but he finally concludes that the case of *Rippon v. Dawling*, 2 Amb. 585, *infra*, I. c., had put the question completely at rest. He admitted that the husband's claim to his wife's bounty is to be closely inspected, and wholly free from symptoms of coercion and undue influence, but that, in a fair case, which has no such imputation, and where there is no offspring to claim a divided attention, the

wife's bounty is reasonable and just, springing, as it does, from the best of human ties, and founded on the warmest affections of the heart. But after this slight indulgence in what might seem to be somewhat of the sentimental, the chancellor proceeds to give the best reason for the holding, in that there is less danger of improper influence in his exercise over the wife in case of an appointment by will than by deed; because a will, made in execution of a power, still retains all the properties of a will, and is revocable at the pleasure of the wife.

In considering whether a power of appointment has been exercised by the will of a testatrix, who was also disposing of what belonged to herself absolutely, and she could do with it what she could not do under the power, a bequest which she could not give under the power must be attributed to her unlimited authority as owner; and whatever was required in the proper exercise of her power of appointment must be regarded as done by virtue of it, and the will is to be construed, therefore, in such manner as to make it efficient for both purposes, rather than that it should be allowed to fail, in whole or in part, as to either. *Van Syckel's Estate*, 24 Pa. Co. Ct. 241.

In the cases in which the question arises as to whether a power of appointment has been duly exercised, the true test is, What was the intention of the donee of the power? And so, where a will provided for the testator's wife in a manner which became inoperative and unimportant upon her death, and gave the whole residue of his property in trust for his children and their issue, and he afterward, his wife having died, by a deed of trust conveyed an undivided fourth of the parcel of real estate which constituted the bulk of his property to trustees, two of whom were also trustees under his will, in trust for his six children by name and their issue; and, in case of their death without issue, in trust for his own heirs, and reserved to himself the most complete and absolute power, by deed or will, to alter the uses or the trusts; and thereafter he married again, and subsequently lost one of his sons, who was a trustee under the will and deed of trust, by death; and after that he made a codicil, and died the day after it was made, which codicil first gave to his wife "in fee simple, one-sixth part of the whole estate and property, real, personal, or mixed, whereof I die

sue of the said Augustin surviving him, then in trust to pay over and dispose of the said sum of fifty thousand dollars, and any and all other sum of money held by said trustee for the use and benefit of said Augustin under the provision of this will, in equal shares to my son, Martin Lane, and to the trustee herein appointed for my daughter, Anna B. Elliott, and to the trustee herein appointed for my daughter, Sally Harvey, to be held by said trustee in special trust to invest, apply, and dispose of in the same manner and subject in all respects to the trusts declared respecting the several legacies herein bequeathed in trust for my said daughters, Anna B. Elliott and Sally Harvey," etc.

The said testator, Jesse Lane, was, at the time of making said will and at the time

of his death, domiciled in and a citizen of the state of Delaware; and his will was proved before the register of wills for New Castle county. He died in the year 1881, leaving to survive him the said Augustin S. Lane, Martin Lane, Anna B. Elliott, and Sally Harvey. The said trustee, Edward Bringham, Jr., renounced and disclaimed the said trusts, and Martin Lane was duly appointed by the chancellor trustee in his stead. The said Martin Lane at the time of his appointment was and now is domiciled in and a citizen of the state of Delaware. The said legacy of \$50,000 was paid to the said Martin Lane, trustee, who continued to execute the trusts during the lifetime of the said Augustin S. Lane. The said trust

possessed;" followed by a statement: "It being my intention to give to her what would be her legal share if she were one of my children."—It was held that the codicil operated as an execution of the power of disposal of all the property conveyed by the deed of trust, and that the second wife was entitled to one-sixth part of the whole residue of the estate remaining for distribution after the settlement of the estate, including the property described in the deed of trust, in fee simple. *Willard v. Ware*, 10 Allen, 263.

In considering the question whether a power has been executed by the donee thereof, it is not enough that it is possible, but not certain, that he intended an execution of the power, for it must not be forgotten that, when handling such a question, the court is dealing with the property of another, and not with that of the donee of the power; that in the donee it is but a trust, and those interested in the estate of the donor have a right to know that the will of their testator has been actually executed as he intended, by the donee of his power. And hence, they are entitled to certainties, not mere conjectures or possibilities. *Bingham's Appeal*, 64 Pa. 345, *infra*, I. f.

The true test of whether a person having a power of appointment has exercised the same is, Is there a distinct intention to execute the power? And an instrument in which the persons to take and the amount to be taken are sufficiently pointed out, but which the donee of the power purposely abstains from executing, and in which such donee says, in effect, that she knows she has the power to appoint the funds, but does not exercise it, will not be deemed a valid execution of the power, as the jurisdiction of the court is to supply defects caused by mistake or inadvertence, but not to supply omissions intentionally made. *Garth v. Townsend*, L. R. 7 Eq. 220.

In *Re Bidwell*, 1 New Reports, 176, 32 L. J. Ch. N. S. 71, 9 Jur. N. S. 37, 8 L. T. N. S. 107, 11 Week. Rep. 161, the vice chancellor said that, as the nature of the trust declared by the will was inconsistent with a right exercise of the power, and another construction was possible, he could not attribute to the testator an intention to exercise the power; and the court will not attribute to a testator an intention to dispose of property not his own, un- 64 L. R. A.

less such intention is evinced by very clear language.

Where a power of appointment by deed or will had been, before the death of the donee of the power, effectually exercised, and the property disposed of by deed, his will, in which he plainly says he does not intend to deal with any property "otherwise effectually disposed of," shows an express intention not thereby to exercise the power of appointment. *Moss v. Harter*, 2 Smale & G. 458, 18 Jur. 973, 2 Week. Rep. 540.

In *Van Wert v. Benedict*, 1 Bradf. 114, it was said that by the common law, and previous to the act, 1 Vict. chap. 26, a general devise, however unlimited in its terms, did not operate as an appointment, and that to make a will take effect as an execution of a power, there must have been either an express reference to the power itself, or its subject, the property held under it.

Where a wife took a life estate in the land and personal estate mentioned in her husband's will, with a power of appointment among the children at her death, her will, which does not refer to the power or purport to act under it, and does not mention specifically any of the property willed to her by her husband, but professes simply to dispose of her own estate, does not have effect as an exercise of the power. *Holt v. Hogan*, 58 N. C. (5 Jones, Eq.) 82.

No general devise or bequest of all a testator's property, real and personal, nor any general residuary clause, will be, in itself, a sufficient exercise of a power of appointment by the testator. *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436.

Where a testator in his lifetime, by a voluntary deed, assigned all his personal estate in trust, to pay the interest thereon to himself for life, and after his death to such as he should appoint by will for their lives, and, subject to such condition, to pay the principal to his next of kin who should be living at his decease, and thereafter made a will by which he gave certain legacies and the residue to persons by name, who were his next of kin at the time of the making of the voluntary deed and at his death, the power of appointment is not executed by such a will. *Griffin v. Nanson*, 4 Ves. Jr. 343.

In *Sloane v. Cadogan*, 2 Sugden, Powers. Appx. No. 9, it was held that it was now settled that a general disposition does not include

tee had never rendered or passed any account of said trust fund or its income.

The said Augustin S. Lane made his last will and testament, bearing date October 8, 1887, whereby he devised and bequeathed, *inter alia*, as follows: "(2) All my estate, real and personal, of whatever kind and wheresoever situate, I give, devise, and bequeath to my brother, Martin Lane, his heirs, executors, administrators, and assigns, in trust to safely invest and keep the same invested, and out of the income derived therefrom to pay to my wife, Fannie, during the term of her natural life, the sum of twelve hundred dollars per annum, in twelve equal monthly payments of one hundred dollars each, and in further trust to pay out of the remaining income from my said

estate a sum sufficient for the support and education of my son Jesse, until he shall arrive at the age of twenty-one years, at which time I give and devise and bequeath to him all my estate (except such part as may be required to pay the above annuity to my wife), to my said son Jesse, his heirs and assigns, absolutely; and, in the event of my said son dying before the age of twenty-one without leaving children living at the time of his decease, then my will is that the part of my estate so as aforesaid willed to him shall belong to and be the property of the same persons who, under the intestate laws of Pennsylvania, would be entitled to the same if I had died unmarried and without issue and intestate. My will being that no estate (other than sufficient of the income

property over which the party had only a power, unless an intention to do so appears.

A testator entitled, under the will of another, to a considerable sum, settled a certain amount of the sum on his daughter on her marriage, and, on his own second marriage, a certain amount on his wife for life, with a reservation, in default of issue, to such persons as he should appoint by will, and, in default of appointment, to his next of kin; and he thereafter made his will, reciting that, under the will of the person mentioned, he was entitled to considerable sums, and that he had settled an amount on his daughter, part thereof, and an amount upon his wife upon his marriage; and he ratified and confirmed the settlement upon his daughter and wife; and as to all the residue and remainder of his money to which he was entitled under the original will mentioned, he gave them upon trusts which would eventuate in the entitling of his wife. It was held that the residuary gift in his will was not an exercise of the power of appointment reserved to him in the settlement; and that the sum settled upon his wife for life belonged to his next of kin. *Re Bringlee*, 26 L. T. N. S. 58.

Where, under a settlement, a testator had, in an event which happened, power to appoint a sum certain which was to be raised after his decease by the terms to which the fee of the same estate was subject; and in his will there was no manner of reference to the settlement, or to the power of the testator to appoint,—the will cannot operate directly as an exercise of the power to appoint the sum mentioned. *Farmer v. Bradford*, 3 Russ. Ch. 354, 5 L. J. Ch. 157, 27 Revised Rep. 89.

One having a power of appointment to one or more of his children, by his will, devised and bequeathed all his real and personal estate to trustees to pay and apply the yearly rents of his real estate, one third to his wife for life during widowhood, and the other two thirds for the benefit of his three sons. This was held not to be a good execution of the power, inasmuch as it contained no reference to the power, or to the property which was the subject of it, from which it could naturally be inferred that the donee, in confirming his will, had the power in contemplation. *Doe ex dem. Caldecott v. Johnson*, 7 Mann. & G. 1047.

One having the power of appointment, by a will, to a certain sum and also an interest in the residue of the donor's personal estate, by 64 L. R. A.

her will bequeathed three legacies, one of one half of the amount, and two of one fourth of the amount each, and then gave a certain sum to each of her executors; and her will contained the following clause: "Forasmuch as the amount of my property is not yet ascertained, the same awaiting the settlement of my late mother's affairs, my will is that, if my money and personal estate should not be sufficient to pay the said legacies in full, the legatees shall make an abatement;" and then followed a residuary clause. This was held not to be an execution of her power of appointment. *Buxton v. Buxton*, 1 Keen, 753.

Where one having an estate of his own in one county and another in another county, and having, also, the legal, but no beneficial, estate in still another, with power of appointing it to either of his sons by his will devised all his estates of what nature or kind soever in the first-named county, and at places in the second county, or elsewhere in the Kingdom of England, after payment of his debts, etc., this was held not to be a good exercise of the power as to the estate in the third county. *Roe ex dem. Reade v. Reade*, 8 T. R. 118.

Where one having a general power of appointment over real estate, and also personal estate consisting of household furniture, linen, and plate, by her will gave "all my estate and effects of whatsoever denomination" to certain persons, subject to legacies and an annuity, and also "my household linen and plate;" but made no reference to the power, or to the property subjected to it, other than the language last quoted,—the will was not a good execution of the power, either as to the real or personal property. *Jones v. Curry*, 1 Wils. Ch. 24, 1 Swanst. 66.

A donee of the power to dispose by will, who has no interest in the subject-matter, making no mention in his will of the gift or of the power, nor any reference to the instrument by which it was created, has failed to execute the power. *Long v. Landis*, 9 Lanc. Bar, 153.

A testator by his will devised certain real estate to trustees upon trust for life, and then for his son for life, and after his death for such one or more of his children or other issue born in his lifetime as he, the son, should, by deed or will, appoint, and, in default, upon trust for the son's children equally. After the death of the widow the son, by his will, after appointing trustees and executors and giving

for his support) shall vest in my said son until he shall arrive at the age of twenty-one years, or, in the event of his sooner dying leaving children him surviving, that the estate shall vest in such child or children who may be living at his decease. (3) At the death of my said wife I direct that the part of my estate which may be retained by my said trustee to secure the annuity to her shall go and belong to the same person or persons and for the same estate as is expressed in the second clause of my will with respect to that part of my estate therein bequeathed and devised."

The said Augustin S. Lane was at the time of making his said will and at the time of his death domiciled in and a citizen of the state of Pennsylvania; and his

will was proved before the register of wills for Delaware county in said state. He died in the year 1890 leaving to survive him his widow, the said Fannie S. Lane, and one child, Jesse Lane, Jr., his only issue. The said Jesse Lane, Jr., died in the year 1899, intestate, unmarried, without issue, and not having attained the age of twenty-one years. The said Fannie S. Lane was duly appointed and qualified as his administratrix. The said Augustin S. Lane left a personal estate, after payment of debts, of \$52,513.70. The chancellor decreed that said will of Augustin S. Lane was not an execution of the power of appointment given to him by the will of his father, Jesse Lane, and that the said legacy of \$50,000, held by the said Martin Lane as trustee as aforesaid, should

his furniture and other household effects to his wife absolutely, devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust to sell and convert and out of the proceeds to pay, the income of a sum certain to his widow, and the remainder as to the capital in trust for his children by her or their issue, as his wife should appoint, and, in default, in trust for his children by her. He afterwards died, and neither at the date of his will, nor at his death, had he any real estate of his own. In holding that there was no execution of the power, Kay, J., said: "On the best consideration I can give, in this case, to the words of the will, and to the circumstances of the testator at the time, I do not believe he intended to exercise this special power. If not exercised, the property would go, in default, amongst all his children. It is reasonable to suppose he desired not to disturb that provision. I believe either that he forgot all about the power, or that he desired not to exercise it. If he forgot the power, but intended to pass the property subject to it, possibly that might be sufficient; but I cannot find anything to satisfy me that this was his intention. The burden of proof is on those who assert affirmatively that the power was exercised. The court must be satisfied of this by sufficient evidence. I am not so satisfied. The inclination of my opinion is that the testator did not intend to exercise this special power." *Re Mills*, L. R. 34 Ch. Div. 186, 58 L. J. Ch. N. S. 118, 53 L. T. N. S. 665, 35 Week. Rep. 133.

It is difficult to see why this decision is not opposed to the line of cases which hold that, where the provision in the will executed by the donee of the power would have no operation, except as an execution of the power, the will will be held to be an intended execution of the power; as, having no real estate of his own, the devise by the testator of all of his real estate would be inoperative, except as an exercise of the power.

Where, under a marriage settlement, real estate was left to the intended husband and wife during their lives, and thereafter for the children of the wife as she should by will appoint, and, in default of such appointment, in equal shares, and, in default of children, for such person as the wife should by will appoint, and, in default, for the wife, her heirs, and assigns; and thereafter there were four children 64 L. R. A.

of the marriage, of whom only one, a son, was surviving at the commencement of this proceeding,—it was held that the gift and devise by the wife, contained in her will in pursuance of all the powers and authorities in anywise enabling her thereto, whereby she did give and devise, direct and appoint, all her property, real and personal, to trustees to pay the income of a moiety thereof to her son for life; then to his wife for life; and then upon trust for their children; and as to the other moiety, upon trust for persons not objects of the power,—was not, in all these circumstances, sufficient evidence to show an intention on the part of the testatrix to execute her separate power of appointment in favor of her son. The court held that there was an absence in this case of such evidence as had been held admissible in other cases, namely, that this special power was only a testamentary power to which the testatrix was entitled: that not only was there no such evidence, but it was obvious that it could not be given, because the testatrix by the settlement itself had a general testamentary power; that as regarded the beneficial interests conferred, only one was within the scope of the power, namely, the life interest to the son; and that the court was not satisfied, under those circumstances, that the intention of the testatrix was to exercise that power. *Re Rickman*, 80 L. T. N. S. 518.

Before the passing of the act 7 Wm. IV. & 1 Vict., a married woman was competent to dispose of her property over which she had a power of appointment exercisable during coverture. By the act her capacity in that respect remains unaltered; but the provisions of the act as to the mode by which a power was to be exercised by her, and all the other provisions of the act, will apply to any testamentary instrument which a married woman would have been competent to execute prior to the passing of the act, just as it would apply to any testamentary instrument executed by any person *sui juris*. The legislature says: "We will not enlarge your disposing power, but that power shall be exercised, and shall be construed and operated upon, in the manner here provided." *Bernard v. Minshull*, Johns. V. C. (Eng.) 278, 28 L. J. Ch. N. S. 649, 5 Jur. N. S. 931.

Although it is not necessary to the due execution of a power that it should be recited or expressly referred to, there must yet be something to show that the party intended to exe-

be paid to the said Fannie S. Lane, administratrix of Jesse Lane, Jr., with the accrued income thereof, since the death of the said Augustin, less the amount of such income paid to the said Jesse Lane, Jr., in his lifetime, and that the said trustee should state and file an account of the income of said trust fund since the death of the said Augustin. From said decree this appeal was taken.

The question for our determination is whether, by the will of Augustin S. Lane, there was a valid execution of the power of appointment given to him by the said eighth item of the will of his father, Jesse Lane, the elder. If there was not, then under the will of Jesse Lane, the elder, upon the death of Augustin S. Lane, his son and only sur-

viving issue, Jesse Lane, Jr., became entitled absolutely to the trust fund, and his administratrix, the complainant below, is entitled to recover the same, with the accrued interest and income thereof. The rules of the common law applicable to this case have been quite well established by numerous decisions in England and in this country.

In *Parker v. Kett*, 12 Mod. 469, decided in 1701, it was said by the court: "When one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority, it shall rather be understood to have been by force of his authority, than void, though in doing the act he takes no notice of his authority; but where one has an interest and an authority together, and he does an act

cute it. *Den ex dem. Micbeau v. Crawford*, 8 N. J. L. 90.

b. Reference in donee's will to the power.

It has always been held that a plain, unequivocal reference, by the donee in his will, to the power, such as will indicate a certain intention on the part of such donee to exercise the power, will be a sufficient execution thereof; and the cases immediately following illustrate when and under what circumstances it has been decided that the will of the donee was a valid exercise of the power.

Whether a power of appointment is duly exercised is always a question of intention of the donee, and, while the will of one possessing the power of appointment to his children directed therein that the property to which a part of the will related be converted and used for the payment of his funeral and other expenses, debts, and legacies, and attempted to settle the interest of his daughters for their benefit, and after their deaths on their respective husbands and children,—were all things which were clearly not within the power, yet this circumstance did not operate to rebut the presumption of his intention being to exercise the power of appointment, where, by express words in the will, he stated his intention to be to deal with all the property which he should in any way have power to dispose of, or appoint by will. *Price v. Price*, 46 L. T. N. S. 228.

Where a married woman, the donee of a general power of appointment by deed or will over insurance moneys payable upon her own death, united with her husband in settling certain family estates by an indenture which treated the moneys as the husband's own property, and settled them as such (she at the time not having any knowledge of the existence of her power over the moneys thus assigned), and she afterwards executed her will, whereby she devised and bequeathed the property over which she had any disposing power in trust for her five daughters and the issue of a deceased daughter,—by such will she exercised her general power, so as to make the policy money her own assets. *Griffith-Boscawen v. Scott*, L. R. 26 Ch. Div. 358, 53 L. J. Ch. N. S. 571, 50 L. T. N. S. 386, 32 Week. Rep. 580.

A married woman, being entitled to appoint by will a sum in 3-per-cent consolidated bank annuities, made her will whereby she gave a certain sum, but not the whole, of the bank

annuities for the use and benefit of her daughter for life, and as the daughter should by her will appoint, and the daughter thereafter made her will, whereby she, by virtue of the power given to her by the will of her mother and of the original testator, and of every other power thereunto enabling, appointed and confirmed all sums in the public funds over which she had a disposing power, or to which she was entitled under either or any of the wills, or by any other means. It was held that the will of the mother, giving her daughter the power of appointment, was a valid exercise of the power given the mother under the will of the original testator, and that the same was exercised by the daughter by the appointment of the stock by her will. *Philpott v. Turner*, 9 Sim. 227, 2 Jur. 414.

In *Bredell v. Collier*, 40 Mo. 287, a woman who died a short time after the decease of her husband had a power of appointment under the will of her late husband, and thereafter she gave the entire property of which she might die possessed, wherever situate, real, personal, and mixed, including any and all rights acquired by her under the will of her late husband, to her mother to enjoy the sole and entire use of the same during her life. It was contended that this will did not execute the power given to her by her husband of the right to dispose of one half of his property by testamentary disposal; but the court held it amounted to, and must be holden, a valid and operative execution of the power.

Where a testator gave and bequeathed to his wife all his property, real and personal, to have and to hold during her life, and to will to her children as she thought proper at her death, a will executed by the wife, stated to be in pursuance and in execution of the power, which gives to all the children, but in unequal shares, the property so bequeathed, is a valid execution by the wife of the power of appointment conferred upon her by the will of her husband. *Alder v. Jones* (Md.) 56 Atl. 487.

In *Heyer v. Burger, Hoffm.* Ch. 1, it was held that an objection that a testator did not exercise a power of appointment given to him because his will did not refer to the power was untenable. (Probably under the New York statute, providing that a general devise is an exercise of the power, unless a contrary intention appears.)

Where a woman having a power of appoint-

generally, it shall be construed in relation to his interest, and not to his authority."

Andrews v. Emmot, 2 Bro. Ch. 297, is a leading case upon this subject. By a marriage settlement certain bank annuities were conveyed to trustees in trust for certain purposes and in trust, after the decease of John Andrews and his wife, if there should be no child, to transfer the trust fund to such persons as the said John Andrews should by deed or will appoint. John Andrews by his will, after giving sundry legacies, bequeathed, after the death of his wife, "all the rest and residue of his monies, and securities for money, goods, chattels, and personal estates, whatsoever and wheresoever, and of what nature, kind, or quality soever . . . to John Emmot." The

master of the rolls, after quoting the above citation from *Parker v. Kett*, said: "If one applies this doctrine to the present case, the testator has not referred to the power, but has done the act generally; and he had property of which he could dispose. . . . The testator has not described anything. All his expressions will refer to his own property." Held, that the will of John Andrews was not an execution of the power. Upon appeal the decree below was affirmed; the lord chancellor, holding that the power was not executed by the will of John Andrews, saying: "It is necessary, in order to do this, that he should, by his will, notify his intention to do it [execute the power]. It is too late now to expect that a testator, in order to execute a power, shall make an

ment by will made her will, taking notice that she had such power, and then bequeathed to her husband all the profits and revenues of her estates for his natural life, and, after his death, gave and bequeathed the estates to her children, if any; but in case she left no child or children, or the issue of such, after the decease of her husband, she gave and bequeathed the same to a third person, making him sole heir in default of issue left by her after the death of her husband; and a daughter was afterwards born to her, and she died shortly afterwards; and the daughter died an infant, without issue,—it was held that the power was properly exercised, and that the infant daughter took an estate tail, and the other person a remainder in fee. *Southby v. Stonehouse*, 2 Ves. Sr. 610.

Where the will of the donee of a power under her father's will declared that it was her intention to carry into effect the power reserved to her by the will of her father, and gave her estate in trust to pay her god-daughter a certain sum for life, and the rest of the income to the testatrix's husband during his life, and after his death the principal sum to be held in trust for such persons as the husband by will might declare; and the husband died in her lifetime; and thereafter, by a codicil to her will, after several specific bequests, she gave all the rest of her property to be equally divided between the brothers and sisters of the god-daughter without prejudice to the legacy of the latter,—it was held that there was no difficulty if such will and codicil could be regarded as an entire instrument, and that they must be so regarded; that the objection that the codicil speaks only of her own property, and makes no mention of the power, is annulled when the codicil and will are read together, and especially when it is observed that the bequests in the will itself are all of the testatrix's own property, although her declared intent was to execute the power, and she had no property of her own beyond the life estate under her father's will. *Clermontel's Estate*, 12 Phila. 139.

Where a testator, by his will, devised a portion of his estate to his executors in trust to pay over to his son during his natural life the income, interest, rents, and profits thereof, and after his death in trust for the use of his issue living at his death, in such parts, shares, and proportions, or of such one or more of

them, to the exclusion of another or others, for such estate or estates, in such manner and under such trusts, as he by a last will and testament might appoint; and, providing that any such provisions in favor of the issue be postponed during the widowhood of any wife of the son to the extent of the whole or any part of the accruing income after the death of the son, to such provision as the son might think proper, by will or testamentary act as aforesaid, to appoint and make for the use of any wife who might survive him,—a will of the son which gives to his wife and three girls "all money, property, etc., of any kind whatever, to which I am entitled from my father's estate," points unerringly to an execution of the power, and no other intention than that he intended thereby to devise the subject of the power can be fairly gained from such language, and the intent is clearly manifest, no property having come to him from his father's estate save that covered by the trust,—it was alike in class and description, and he, therefore, could have had but one intention. *Moss v. Pennsylvania Co.* 4 W. N. C. 358.

A husband, by his will, gave his residuary estate to his wife absolutely, forever; and by a codicil, dated two days afterwards, directed that, if she died without making a will, the remainder of his property should be equally divided among his brother's four children. After his death she, by her will, recited the will of her husband, and declared her purpose to dispose of all of his estate, and also all of her own estate; and, having thus declared her purpose, she proceeded, without making any distinction between his estate and her own, to dispose of the whole as if it had been hers alone; and it was held that she had done it in a manner sufficient to pass both. *Davies v. Fisher*, 5 Beav. 201, 11 L. J. Ch. N. S. 338, 6 Jur. 248. (In a note to this case it is stated that the statute of 7 Wm. IV., & 1 Vict. chap. 26, § 27, did not apply to the present case.)

By a settlement, power was given to the wife to dispose by will of a certain sum, part of certain funds, and, after the husband's death, of the residue of the funds. By a will recited to be by virtue of a power and the settlement, after further reciting that she had power to dispose of the amount named in the settlement, she gave certain legacies and annuities, and then directed, appointed, gave, and bequeathed

express reference to it; because it has been determined that, if a man disposes of that over which he has a power in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power."

In *Roach v. Haynes* (1803) 8 Ves. Jr. 584, Lord Chancellor Eldon held that a power of appointment was not executed by a general bequest of property described as "my estate and effects;" that such a bequest could pass only that in which the testator had an interest, and not that as to which she had merely an authority to appoint.

In *Bradley v. Westcott* (1807) 13 Ves. Jr. 445, Sir William Grant, master of rolls,

all the rest, residue, and remainder of her money and of her personal estate for payment of debts and funeral expenses; and this was held to be an execution of her power as to the residue of the funds. *Harvey v. Stracey*, J. Drew. 73, 22 L. J. Ch. N. S. 23, 16 Jur. 771.

Where, by will, a testator declared that a sum should be disposed of in such manner and for such uses and purposes as his daughter might direct by any will or testament; and the sum had increased by changes of investment; and the daughter thereafter made her will, reciting that, under the will of her father, she was entitled to dispose of the sum mentioned, and that she, in the exercise of the power, appointed said sum then secured on mortgage,—naming the mortgage and estate upon which it was,—and any other moneys representing the sum, unto her trustees for certain trusts,—this was held to be a valid appointment, not only of the original amount, but it would include the fund and all additions to it. *Leffevre v. Freeland*, 24 Beav. 403.

A general bequest, in a will, of all of the testator's property, in which he not only gives, devises, and bequeaths, but directs, limits, and appoints, is a valid exercise of the power of appointment over some of the property. *Pidgely v. Pidgely*, 1 Colly. Ch. Cas. 255, 8 Jur. 529.

Where certain stock was, by a will, bequeathed to one for life, and after his death upon trust to pay to any wife with whom he might intermarry, who should survive him, so much of the income of a designated part of such stock for her life as he should by deed or last will appoint, a will whereby the donee of the power bequeathed the residue of his estate belonging to him at the time of his decease, or over which he might have any power of disposition or control, to his wife, her heirs, assigns, and legal representatives, forever in full property, is a valid execution of the power, but conveys to the wife only a life estate. *Re Teape*, L. R. 16 Eq. 442, 43 L. J. Ch. N. S. 87, 28 L. T. N. S. 799, 21 Week. Rep. 780.

Where a married woman, by her marriage settlement, had the power to appoint a sum certain, which sum was to be raised upon a trust for that purpose, and to be paid and applied as she should by her will appoint; and she, by her will duly executed, after reciting the settlement and that she was desirous to exer-

decided that a power of appointment was not executed by a bequest of "all my personal estate, money, securities for money, goods, chattels, and effects, whatsoever and wheresoever, and of what nature, kind, or quality soever, and all my estate and interest therein," and that said bequest was applicable only to the testator's own personal property.

To the same effect are *Lovell v. Knight* (1829) 3 Sim. 275, 1 L. J. Ch. N. S. 47, and *Lempriere v. Valfy*, 5 Sim. 108.

In *Denn ex dem. Nowell v. Roake* (1830) 6 Bing. 475, 1 Dow & C. 437, 4 Bligh N. R. 3, Alexander, C. B., in delivering to the House of Lords the unanimous opinion of the judges that the will of one Sarah Trymer did not operate as an execution of her

power given her, thereby, in exercise of that power, gave and appointed the sum unto trustees, who were also executors of the will, and directed the original trustee to pay and apply the sum accordingly, and then bequeathed her personal estate to the same persons in trust, subject to her debts and legacies.—It was held that the sum was well appointed, and was a charge upon the estates of the settlement. *Goodere v. Lloyd*, 3 Sim. 538, 30 Revised Rep. 214.

Where, under a settlement, one has the power of appointment of certain funds to five persons or their respective issue, in such parts, shares, or proportions as the donee of the power shall by will appoint; and by her will she gives legacies of partially nominal sums to three of such persons, and all the residue of her property of whatever kind and wheresoever situate, and over which she had any power of appointment or disposition, to the other two,—such a will is a valid execution of the power. *Gainsford v. Dunn*, L. R. 17 Eq. 405, 43 L. J. Ch. N. S. 403, 30 L. T. N. S. 283, 22 Week. Rep. 499.

Where a person, by a family settlement, gave to his son certain funds for life, or until he should become bankrupt, with the power of appointment among his children, subject to a life interest in his wife during widowhood; and, having theretofore executed a will by which he bequeathed to trustees certain other funds to his said son for life, with power, if he should die leaving a widow surviving him, by his last will and testament to bequeath or appoint the dividends or income of the said trust moneys so bequeathed in trust for him to his widow, or for her benefit, for the whole or any part of her life; and the son by his will gave all his property over which he had any disposing power to his wife and two other trustees, to pay the income thereof to his wife during her life, and thereafter to his children.—It was held that, inasmuch as he gave all his property over which he had any disposing power, that included the power under both the settlement and the will, and, therefore, that both were well exercised. *Thornton v. Thornton*, L. R. 20 Eq. 599.

A testator, by his will, appointed his two sisters executrices thereof, and gave all the real and personal property of which he might die seised, or to which he might be entitled, to them in trust, and, after the death of one,

power to dispose of certain real estate by her will, said: "There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity or acted upon with more consistency. They begin with *Clere's Case* in the reign of Queen Elizabeth, to be found in the sixth report [6 Coke, 176] and are continued down to the present time; and I may venture to say that in no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual,—would have had nothing to operate upon, except it were considered as

an execution of such power or authority. In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. . . . It is said that the present is a question of intention, and so, perhaps, it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled. It would be extremely dangerous to depart from these rules in favor of loose speculation respecting intention in a particular case. It is, therefore, that the wisest judges have thought proper to adhere to the rules I have mentioned, in opposition to

to the survivor in trust, thereafter to be divided between his nephews and nieces, or the child or children of such as might then be dead. In such shares and proportions as his surviving sister should by her will direct and appoint. One of the sisters died, and the other, by her will, after appointing trustees, devised, appointed, and bequeathed all the real and personal estate of which she might be seised or possessed, or over which she might have any testamentary power of disposition, unto her trustees to sell, and convert into money such parts thereof as should not consist of money, and receive such parts as did consist of money, and stand possessed of the moneys upon trust to be paid and distributed as therein directed. It was held that, having referred to the testamentary power of disposition which she might have, and there being no other than the special power limited in her brother's will, the conclusion must be inevitable that she intended to exercise that power, which was the only testamentary power of disposition which she had. *Re Swinburne*, L. R. 27 Ch. Div. 696, 54 L. J. Ch. N. S. 329, 33 Week. Rep. 394.

A will which recites a power of appointment, and purports to exercise such power, is revoked by a subsequent will which contains no clause of revocation and no reference to the power, but which purports to "give, devise, bequeath, and appoint" all the real and personal estate of the testator, as the word "appoint" is, under the circumstances, a sufficient exercise of the power. *Kent v. Kent* [1902] P. 108, 71 L. J. Prob. N. S. 50, 86 L. T. N. S. 536.

Where a man had a power of appointment, by will, among his eight children, four of whom predeceased him, whereby their shares in the estate descended to him as their heir at law, a devise in his will that all the estate over which he might have any power of appointment by will should go according to the limitation therein mentioned passed his moiety derived as the heir at law of the four deceased children; and that portion of the estate will not descend to his heirs. *Atherton v. Langford*, 25 Beav. 5.

A settlement had been made which contained no power of charging in favor of younger children. Twenty years thereafter a resettlement was made, which contained a power to the tenant for life to charge the hereditaments with sums not exceeding a gross sum mentioned for the portion of his younger children. The person possessed of such power, by his

will, proceeded to say that whereas, under the settlement made in the year,—mentioning the first settlement,—he was empowered to charge, etc., and then proceeded to direct by his said will the disposition of the gross sum mentioned in the later settlement. This was held to be a good exercise of the power which he possessed under the resettlement; and the fact that he, in his preamble, referred to the original settlement, which did not contain the power, made no difference. *Re Wilmot*, 29 Beav. 644.

A testator having a power of appointment of a sum of money, by his will gave portions of it to various legatees, and in doing so stated that he had the disposal of the sum, but made no other reference to the power of appointment given by the settlement, and thereafter made a residuary bequest which made no reference to the power. This was held to be an exercise of the power with respect to the remainder of the sum, the court saying that it was a case in which the testator had clearly and distinctly referred to the power, and indicated his intention to dispose of the property subject to it, and it was as if he had said that he intended to dispose of the principal sum over which he had a power of disposal, and that he did dispose of it as appeared by his will. *Re Comber*, 11 Jur. N. S. 968, 13 L. T. N. S. 459, 14 Week. Rep. 172.

Where a married woman, who, by her marriage settlement, had a general power of appointment by will over a fund, executed her will, which she declared to be her will and appointment, as well of all the estates and property comprised in her marriage settlement as of all other property of which she might be seised or possessed; and gave a portion of the fund in favor of one and his children; and provided that, in default of children, such portion should fall into her general personal property and pass to her residuary legatee and appointee; and, after making certain specific bequests, she proceeded to appoint her sister her residuary legatee and appointee,—this was held to be a valid exercise of the power of appointment of the surplus of the trust fund over and above the portion appointed to the person named, and his children. *Re De Lusi*, Ir. L. R. 3 Eq. 232. The vice chancellor said that the question was whether, under the circumstances, he must not treat this as a gift of two small sums out of specific stock, and a specific

what they evidently thought the probable intention in the particular case before them."

Sir Edward Sugden, in his admirable work on Powers (vol. 1, p. 385, [3d Am. ed. *369]) uses this language: "It is firmly settled that a mere general devise or bequest, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or generally to any power vested in the testator."

The rules of the common law in respect to the execution of powers were changed by stat. 1 Vict. chap. 26, § 27, passed in 1837, which provided that a general devise of the real estate of the testator should be construed to include all real estate over which such testator may have had a power of ap-

pointment, and should operate as the execution of such power, unless a contrary intention should appear by the will, and that a bequest of personal estate in like general words should operate as the execution of such power under similar circumstances.

The leading American case is *Blagge v. Miles* (1841) 1 Story, 426, Fed. Cas. No. 1,479, in which Judge Story says: "It is now admitted to be established, as the general rule, that the intention of the testator is the pole star to direct the court in the interpretation of wills. . . . Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. . . . The intention to

gift of the residue of such stock, together with all other property of the testatrix, to the sister who was the residuary legatee. That the distinction was a very nice one; but he was of opinion that he was justified in holding the terms to be sufficient to constitute a specific disposition of an existing fund, and that, the testatrix having had no property of her own answering the description, the bequest must be taken to have been intended as an execution of the power.

A testator by his will gave his wife a power of appointment over a sum in bank stock and another sum secured by a mortgage, in favor of the children of her two brothers who should be alive at her decease, excepting the one who should inherit a certain estate. By a codicil to his will he recalled the exception, and, after his death, his wife, by her will, after reciting that she was possessed of the bank stock and various other property, gave all her said property to her executors upon trust, for her nephews and nieces therein named, who were objects of the power; and in another portion of her will she recited the power, given by the will of her husband, to appoint the sum secured by mortgage to her nephews and nieces, and gave such sum to them equally, but did not make any reference to the codicil of her husband's will. This was held to be a good exercise of the power as to both funds. *Saunders v. Carden*, Ir. L. R. 27 Eq. 48.

Where a testatrix, who had a testamentary power of appointing a share of personal estate among her nephews and nieces, and who had no other power of appointment, made her will containing the following: "I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between," four named nephews and nieces, "or such of them as shall be living at my decease;" and the four nephews and nieces survived the testatrix, the limited power of appointment was exercised. The court said that the use of the word "appoint" is significant in the will of a person having a testamentary power of appointment, as it is a word of art *prima facie* having reference to powers only, and cited, approved, and followed *Re Teape*, L. R. 16 Eq. 442, 43 L. J. Ch. N. S. 87, 28 L. T. N. S. 799, 21 Week. Rep. 780, and *Re Swin-* 64 L. R. A.

burne, L. R. 27 Ch. Div. 696, 54 L. J. Ch. N. S. 229, 83 Week. Rep. 394, and dissented from what was held to be a *dictum* of Chatterton. V. C., in *Re Richardson*, Ir. L. R. 17 Eq. 436, *infra*, I. d., 1. *Re Mayhew* [1901] 1 Ch. 677, 70 L. J. Ch. N. S. 428, 84 L. T. N. S. 761, 49 Week. Rep. 330.

Where one having a power of appointment by will executed her will, in which she referred to the property which was the subject of the power, and in terms exercised the power as to it, and in another part of her will stated that, subject to the payment of her debts and legacies thereinbefore given, she gave and bequeathed, and also, in exercise of all powers and authorities vested in her, directed and appointed, all her personal estate and effects whatsoever and wheresoever,—it was held that the property which was embraced in the power, but not sufficiently referred to in the first bequest, passed by the subsequent portion of the will. *Maunsell v. Maunsell*, 24 L. T. N. S. 698, 19 Week. Rep. 1003.

By his will a testator conferred two general powers of appointment upon his children, and thereafter declared that, notwithstanding the trust thereinbefore declared in favor of the issue of his daughters, it should be lawful for each of them, when married, by will or codicil to appoint that all or any part of the income of her original and accruing share or shares should, from and after her death, be paid to her husband for his life or any less period, and upon such conditions and with such restrictions as she should see fit to impose. One of the daughters married and made her will, whereby she gave, devised, and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment, unto her husband absolutely. It was held that she had clearly expressed her intention of exercising every power she had in favor of her husband, and that the limited power was thereby exercised, and the husband took a life estate under the appointment. *Re Sharland* [1899] 2 Ch. 536, 68 L. J. Ch. N. S. 747, 81 L. T. N. S. 384.

A will, though insufficient to pass real estate, where it affects to exercise the power of appointment, will be good to pass personal property. *Duff v. Dalzell*, 1 Bro. Ch. 147.

Where, by articles for settlement of the wife's real and leasehold estates, the husband had power to appoint her estates to the chil-

execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. . . . Three classes of cases have been held to be sufficient demonstrations of an intended execution of the power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity,—in other words, it would have no

operation, except as an execution of the power."

The rule thus stated was referred to with approval by the Supreme Court of the United States in *Blake v. Hawkins*, 98 U. S. 315, 396, 25 L. ed. 139, and *Lee v. Simpson*, 134 U. S. 572, 590, 33 L. ed. 1038, 1046, 10 Sup. Ct. Rep. 631. In many of the states the common-law rules as to the execution of powers have been altered by statutes similar to that of statute 1 Vict.; but, where not so altered, with very few exceptions, said rules appear to be in force in this country.

In Maryland a statute of this character was adopted in 1888; but prior to that time it was uniformly held that the intention to execute a power of appointment by will

dren of the marriage in such manner and form as he should by deed or will appoint, and by other articles of the same deed for the settlement of his own real estates he had an absolute power of appointment over them by deed or will in default of issue of the marriage, and there were children of the marriage, and no settlement was ever made pursuant to the articles; and the husband, who died in the lifetime of the wife, by his will, after reciting the articles for the settlement of his own estates and confirming them, and reciting the power of appointment in them at length, mentioning it as a power which he intended to exercise by his will, also, in exercise of that power and all other powers, appointed his own real estates, and all other real estates over which he had power, to trustees for a term upon trust to raise portions for his younger children, and there was no allusion in any part of his will to the articles for the settlement of his wife's estate, but he directed therein that all persons taking any benefit under his will should be bound by the doctrine of election to give effect to every disposition contained in it,—his will operated as an appointment of the wife's real estates; and the words, "in such manner and form," authorized him to give equitable interests to the children. *Trollope v. Linton*, 1 Sim. & Stu. 477, 21 L. J. Ch. N. S. 3, 24 Revised Rep. 211.

By a settlement made on marriage, the wife assigned to trustees all her personal estate upon trust after the death of herself and her husband, and, in default of children of the marriage (which happened), to pay the trust moneys to such persons as the wife by deed or will should appoint, and, in default, upon trust to pay one half of the trust moneys to such part to his sister. Thereafter the wife's mother, by her will, gave her daughter a life interest in considerable property, and after her decease the same was to be held in trust to pay one half of the trust moneys to such person as her daughter, the wife, by deed or will, should appoint, and, in default, to the children (if any) of her daughter, and, in default thereof, upon trust to pay the sum to the testatrix's grandchildren, being the same brother and sister above mentioned, in equal shares. The wife thereafter made her will, and, after referring to her powers, both under the settlement and the will of her mother, she appointed all the personal estate and effects which she

had the power to dispose of to her executor upon trust to convert the same into money, and one moiety thereof she gave to her niece, the sister before mentioned, and the other moiety to the brother, absolutely,—the persons to whom both the estate mentioned in the settlement and also in the will of the wife's mother were to go in case of no appointment. The wife survived the husband, and there were no children of the marriage. The brother, to whom the one moiety had been bequeathed absolutely, died in the lifetime of his testatrix, the wife, whereby the bequest to him lapsed. It was held that the will of the wife was a valid appointment, under both the terms of the settlement and those of her mother's will. *Chamberlain v. Hutchinson*, 22 Beav. 444.

Where, by the terms of a marriage settlement, the husband had the power to limit an estate tail to his son, and the settlement provided for a certain sum per year to the wife; and by the same settlement the allowance for the maintenance and education of daughters was left in his power; and he made his will by which he gave all his estate and effects, real and personal, to his son, to whom he had the power to limit an estate tail; and, in making a provision for his daughters, he alluded to his wife's marriage settlement; and, in providing that the sum named in the settlement be paid yearly to his wife, again referred to the settlement,—it was held that upon the whole his will manifestly extended to his settled, as well as unsettled property, and was an execution of all the powers given him by the settlement. *Hunloke v. Geil*, 1 Russ. & M. 515.

Where a person possessed of a power of appointment made his will wherein he prefaced his devise thus: "By virtue of all and every power and powers, authority and authorities, enabling me thereto, I give and devise my estates,"—such devise was his will, and the devise therein contained was a valid exercise of his power of appointment, as no testator, who considered himself to be disposing only of estates strictly his own, ever used such language; and this preface manifested a plain intention to pass all estates which he could affect by virtue of any power which was vested in him. *Bailey v. Lloyd*, 5 Russ. Ch. 330, 7 L. J. Ch. 98, 29 Revised Rep. 30.

By indentures, certain freeholds were conveyed by two persons to the use of one of them for life, and after his decease to such of his

must appear by a reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power. *Mory v. Michael* (1861) 18 Md. 227; *Foos v. Scarf* (1880) 55 Md. 301; *Cooper v. Haines* (1889) 70 Md. 282, 17 Atl. 79.

The common-law rule was applied in New Jersey in the case of *Meeker v. Breintnall* (1884) 38 N. J. Eq. 345, and in Connecticut in the case of *Hollister v. Shaw* (1878) 46 Conn. 248.

In Massachusetts, in *Amory v. Meredith*, 7 Allen, 397, decided in 1863, the common-law rule was rejected, and the rule of statute 1 Vict. adopted, as more likely to accomplish the intention of persons having powers of appointment. The court says:

children for such shares, etc., as he by deed or will should appoint, and, in default, between them equally in tail, with ultimate remainder to the appointer in fee. Thereafter the person possessing the power of appointment by his will devised to the trustees all the real estates whatsoever and wheresoever of which he or any person or persons in trust for him, was seised or to which he was entitled, or any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder, or expectancy, or of which he had power to dispose or to appoint by this his will, to sell and hold the proceeds upon certain trusts for his children, who should attain the age of twenty-one, or die under that age, leaving issue living at their death, and, in default to his nephews. It appeared that there was no other property subject to the testator's power, and it was held that, as the will in fact professed to execute all powers, and the testator expressly referred to all his powers, and there was no other property subject to any power, it was as strong, almost, as if he had specified the property himself. The court said that this was a stronger case than *Bailey v. Lloyd*, 5 Russ. Ch. 330, 7 L. J. Ch. 98, 29 Revised Rep. 30, because in that case the testator had used the expression "my" real estate; and that in many cases it had been held that these words would not pass estates over which the testator had a mere power, for the power of disposing of property is very different from the ownership of it; and that the absence of that expression made this a much stronger case in favor of the execution of the power. *Banks v. Banks*, 17 Beav. 352, 1 W. R. 511.

Where, in a deed to trustees, the grantor, who had reserved to himself the power of appointing certain leasehold premises and other personal estate held by trustees of a previous deed, made his will, whereby, after making specific bequests and provisions, he gave, devised, and bequeathed all the real and personal estates and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which, at the time of his decease, he should have any beneficial disposing power by his will, to his trustees to sell and convert into money such parts of the residuary estate as should not consist of money, and appointed the same to his wife and children; and, by virtue of a power provided in the first deed, he revoked the appointment made by him in 64 L. R. A.

"We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely in a majority of cases to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English statute [1 Vict. chap. 26, § 27] appears to us the wiser and safer rule." This case was followed in the later Massachusetts cases, and also in New Hampshire. *Emery v. Haven* (1893) 67 N. H. 503, 35 Atl. 940.

In Pennsylvania the courts adhered to the old rule of construction until the adoption of the statute of 1879, which provided that "a bequest of the personal estate of the testator, or any bequest of personal property

that deed with the effect that the income appointed therein might stand and be subject to the same power as if it had not been executed. —there were sufficient indications to satisfy the court judicially that the testator intended to exercise the power, and that it was exercised by the will. *Von Brockdorff v. Malcolm*, L. R. 30 Ch. Div. 172, 55 L. J. Ch. N. S. 121, 53 L. T. N. S. 263, 33 Week. Rep. 934.

Where a married woman, by a settlement made in contemplation of her marriage, is invested with a general power of appointment by her will, and she executes a will in all respects as required by the power, but which contains no reference to it, and thereby gives to her husband all the property which she may die possessed of, or have in reversion or in expectation, such a will is not a valid exercise of the power. *Lemphiere v. Valpy*, 5 Sim. 108.

Where one having a power over a sum of money, originally the property of his wife, but which by the marriage settlement he has a right to dispose of after the death of his wife, by his will, after giving several legacies, disposes of the residue to a certain person, such a will is not an execution of the power, the same not being alluded to in the will, and the will not containing anything by which there appears to be an intent on the part of the testator to exercise the power. *Andrews v. Emmot*, 2 Bro. Ch. 297.

Where certain stock was, by the terms of a will, given in trust, to pay the dividends thereof to the testator's son during his life, with the power after his death to transfer a part of the capital according to an appointment by the son, such a power of appointment was not exercised by a will of the son in which there was nothing that referred to the power, and nothing necessarily descriptive of the property over which it existed; and, therefore, whatever might have been the intention, the court said it was bound by the authorities to say that the testator did not mean to affect any property but what was his own. The will of the son, under which it was claimed he had exercised the power of appointment, bequeathed only seven eighths of the stock, and did not dispose of the residue, or appoint executors. The lord chancellor (Kildon) said he was not sure that the rule did not oblige the court to act against what might probably have been the intention nine times in ten, but that there was not in this will any reference whatever to the power,

described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

If this statute was applicable to the question before us, the will of Augustin S. Lane would, without doubt, be a valid execution of the power. But the donor of the power, Jesse Lane, being a citizen and resident of this state and his will a Delaware will, and the trustee a citizen and resident of this state, the question as to execution of the power is to be determined by the law of this

state, and not by the law of Pennsylvania, the domicil of Augustin S. Lane.

Questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicil of the donor of the power, and not by the law of the domicil of the donee of the power. This was conceded in the argument of the counsel of the defendants, and is abundantly established by authority in this country and in England. *Cotting v. De Sartiges*, 17 R. I. 669, 16 L. R. A. 307, 24 Atl. 530; *Sevall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. 345; *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51; *Hernando v. Sawtell*, L. R. 27 Ch. Div. 284, 294, 53 L. J. Ch. N. S. 865, 51 L. T. N. S. 117, 33 Week. Rep. 252; *Re*

and nothing having a reference to it, or that could be stated as having any reference, except the words which designated the stock by name; that if when he died he had not had any stock, but had other personal estate, that stock must have been purchased for the legatees; and that it operated only as a direction to purchase stock if he died without any; and that it was difficult to say that what would amount to that direction in a will was to be construed into a gift of that which was not his to give, but over which he had a power. *Nannock v. Horton*, 7 Ves. Jr. 398.

Where a testatrix, having a power of appointment among her children by will, made her will and appointed it to a son and daughter in moieties, and afterwards executed another will revoking all former wills made by her, without special reference to the particular will and appointment, and devised and bequeathed all her real and personal estate to her daughter absolutely, and her son died in her lifetime leaving one child, the first will was revoked by the second, and the power was not exercised by the latter. *Harvey v. Harvey*, 32 L. T. N. S. 141, 23 Week. Rep. 478.

An intent to execute a power of appointment does not appear in a will which makes no reference to the power, although the bequests somewhat exceed the amount of the testator's estate, and his relations with the donor are so intimate as to raise a presumption that he knew of the power. *Cotting v. De Sartiges*, 17 R. I. 669, 16 L. R. A. 307, 24 Atl. 530.

Where a widow having the power, under her husband's will, to dispose of real estate in a particular manner, devises the same in a different manner; and her will contains no reference whatever, in terms, to the will of her husband, or to the right or power conferred upon her by it, or to the subject-matter of the power, which clearly and unequivocally indicates, without any doubt or uncertainty, no intention on her part to execute the power delegated, or to act under the will of her husband in disposing as she has of the premises, but invariably speaks of the land as her own, and devises and disposes of it in the same manner and in the same language as if it belonged to her in her own right,—the court will not say that it is her intention to execute it in the manner which her husband's will required, which intention must always appear in the execution of such a power, either by a reference to the

power itself, or by some relation to the subject-matter of it, in a way which can leave no doubt of the intention to execute it. *Doe ex dem. Davis v. Vincent*, 1 Houst. (Del.) 416.

When one, having a life estate under a will, with power by his will to appoint to any wife of his, for and during the term of her natural life, or any lesser term, and from and after her or his decease, in case he shall not have made such appointment to her, or so far as the same shall not extend, then upon certain trusts for the benefit of his children and grandchildren as he shall by deed appoint, and, in default, for the benefit of his children or child, having no real estate of his own, by his will devised and bequeathed all his real and personal estate to his wife absolutely,—the will, containing no reference to the special power or to the property affected by it, will not operate as an exercise of the power. *Re Williams*, L. R. 42 Ch. Div. 93, 58 L. J. Ch. N. S. 451, 61 L. T. N. S. 58. One of the judges said that it was a special power, and that § 27 of the wills act, which deals with general powers of appointment, did not apply.

See also *Davies v. Thorns*, 3 DeG. & S. 347, 18 L. J. Ch. N. S. 212, 13 Jur. 383, *infra*, I. d. 1; *Phillips v. Cayley*, L. R. 43 Ch. Div. 222, 59 L. J. Ch. N. S. 177, 62 L. T. N. S. 86, 38 Week. Rep. 241, *infra*, I. d. 8.

c. Reference in donee's will to property the subject of the power.

Although the donee of a power of appointment failed to mention or refer to the same in the will by which it was claimed he had executed it, yet, if he, in his will, referred to the property, interest, or estate which was the subject of the power in such manner as clearly to show his intention to exercise it, he will be deemed to have done so.

Where a will devises or bequeaths described real estate or specific personal estate which is the identical subject of the power, in such case the power is deemed executed by the will, although not specifically referred to therein. *Pep- per's Will*, 1 Par. Sel. Eq. Cas. 436.

Where a married woman by a marriage settlement conveyed lands to the use of herself for life, and, under the circumstances detailed in the settlement, for the use of such persons and for such estates as she should, notwithstanding her coverture, by will appoint; and she executed her will, in and by which she de-

Mégret [1901] 1 Ch. 547, 70 L. J. Ch. N. S. 451, 84 L. T. N. S. 192.

The only reported case in this state as to the execution of a power of appointment is *Doe ex dem. Davis v. Vincent*, 1 Houst. (Del.) 416, decided by the superior court in 1857. By the will of John Goslin power was given to his widow by her will "to devise the estate, both real and personal, to their children, or their proper heirs, as she might deem right and equal in her best judgment, which should be final." By her will she provided as follows: "My executors, hereinafter named, shall advertise and sell at public sale all of my real estate." The court held that she was not authorized by her husband's will to direct a sale of the property, and that there was, therefore, no

valid execution of the power. After alluding to the fact that the will of the widow contained no reference to the will of her husband, or to the right of power conferred by it, or to the subject-matter of the power, and that in her will she invariably speaks of the land as her own, the court adds: "We therefore cannot say that we are satisfied, in addition to the other objections raised to the execution of the power delegated, that it was the intention of Mrs. Goslin to execute it in the manner which her husband's will required, and which intention must always appear in the execution of such a power, either by a reference to the power itself, or by some relation to the subject-matter of it, in a way which can leave

vised the lands, speaking of them as "my" lands,—it was held that this was a good devise of the lands under the power of appointment, and that the use of the word "my" must not be construed as an intention on her part to dispose of the same by virtue of any claimed ownership; but, inasmuch as the lands were originally hers, and the instrument could not operate as a will on account of her incapacity by coverture, it must be held to be an execution of the power, and the word "my" simply perfected the description, as they were in effect her lands. *Churchill v. Dibben*, 2 Ld. Kenyon, pt. 2, p. 68, 9 Sim. 447, note.

A gift of the whole of the residue of her property, by a testatrix having the power of appointment of certain property of which she is tenant for life, and having property of her own, except her freehold property, such excepted property being part of the subject of the power, passes the residue of the property subject to the power. The very fact of such exception shows that the intention of the testatrix was to exercise the power over such residue. *Reid v. Reid*, 25 Beav. 469.

If the donee of a power of appointment intends to execute it, and the mode is in other respects unexceptional, that intention, however manifest, whether directly or indirectly, positively or by just implication, will make the execution valid and operative; and so the power given by a will to dispose of, by will, a bequest of three fourths of a bond and mortgage, the enjoyment of which for life is bequeathed to the donee of the power, is properly executed by the will of the donee, which, after referring to the bequest, devises and bequeaths the entire property and estate to which she is "in any wise entitled," to her husband. *Lee v. Simpson*, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631, Affirming 39 Fed. 235.

An avowal by a testatrix in the introductory clause of her will, of her purpose thereby to execute a power of appointment possessed by her, is not of itself an execution of the power, and is important only as it may shed light upon the subsequent dispositions. To determine whether a power of appointment is well executed by a will the intention of such execution must be sought for through the whole instrument; and, although a will be expressed to be made in pursuance of a power, yet, if the testator appears to dispose of his own prop-

erty only, the power will not be executed by the will. On the other hand, if the will contains no express intention to exercise the power, yet, if it may be reasonably gathered from the gifts and directions made that the purpose and object were to execute it, the will must be regarded as an execution of the power. *Blake v. Hawkins*, 98 U. S. 315, 25 L. ed. 139.

Where a sum was given by a will to the wife of the testator for life with the power of disposing of two thirds of it at her death by will or otherwise, and she executed her will leaving the amount named in the will of her husband to the child and grandchildren of her deceased husband, and then gave all the rest and residue of her personal property to her brother and his daughter and another relative, she being possessed in her own right of a sum slightly larger than the sum over which she had the power of appointment; and then stated that the personal property bequeathed to her by her late husband remained in the hands of the executor, naming him, and that, by the terms of her husband's will, she was entitled to the full life estate in the same,—such reference by her in her will to the amount in the hands of the executor of her husband's will was a sufficient reference to the subject of the power, contained in the will of her husband, for the purpose of disposing of the same under her will. *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79.

Where a testator gave to his wife a sum certain, to be used by her during her natural life, and gave her the power to appoint the same among the legatees in his will after her decease according to her judgment and discretion, the will of the wife, in which she recognizes some of the legatees in her husband's will in such a manner as shows that it is her intention to execute the power of appointment given to her by his will, is a good exercise of such power, as it is not necessary that such intention should appear by express terms or recitals in the instrument. It is sufficient if the act shows that the donee had in view the subject of the power, and the fact that by her will she distributed among such legatees of her husband the exact amount left to her for life is an additional evidence of such intention. *Munson v. Berdan*, 35 N. J. Eq. 376.

Where the subject over which a power of appointment has been created is particularly described in a will of a testatrix possessed of

no doubt of the intention to execute the power."

While the first ground of objection was sufficient, the latter were equally applicable and conclusive, and cannot properly be treated as *obiter*. We regard this case as a distinct recognition of the binding force in this state of the common-law rules relating to the execution of powers. In the absence of any decision upon the subject in this state, we should feel obliged to adopt the common-law rule of construction, as the practice here has been quite uniform to adhere to the common law until altered by statute, and especially so in matters relating to title to property. *Olawson v. Primrose*, 4 Del. Ch. 643.

Applying the settled common-law rules of

construction to the will of Augustin S. Lane, we have no difficulty in reaching the conclusion that it was not an execution of his power of appointment. It certainly cannot be said of this will that the intention to execute the power is apparent and clear, and that it is not fairly susceptible of any other interpretation. It is at least doubtful, under all the circumstances, and that doubt is sufficient to prevent it from being decreed an execution of the power. *Blagge v. Miles*, (1841) 1 Story, 426, Fed. Cas. No. 1,479. There is nothing in the will, or in the circumstances of the testator, his family, or estate, so far as they are known to us, to indicate that it was his intention to execute the power. He designates the property bequeathed by him as "all my estate,

the power, it is a valid exercise thereof, although it does not refer to the power in terms. *Drusadow v. Wilde*, 63 Pa. 170.

Where a testator conveyed certain real estate, describing it, to his wife for life, the same to be disposed of at the pleasure of the wife at her death, her will devising the particular real estate, although it does not recite the power, is a valid exercise of the same. *Dillon v. Faloon*, 158 Pa. 468, 27 Atl. 1082.

Where the will of a wife having a power of appointment alludes to the property bequeathed as belonging to her, but the property disposed of is the subject of the power of appointment, that fact manifests her intention to execute the power, as no express evidence of such an intention is necessary. *Hood v. Haden*, 82 Va. 588.

Where by a marriage settlement the husband was clothed with the power of appointment of a moiety of lands of which his wife's father was seised at the time of the settlement, and he assumed to exercise the power by will, it was held that whether the will was or was not an execution of the power was a question of intention to be gathered from the will itself; and as, in this case, the will referred directly to the land or farm by its well-known name, it was held to be such a direct reference to the subject of the power as was sufficient to make it good as an appointment, even although it might be bad as a devise. *Dillon v. Dillon*, 1 Ball & B. 77.

A will which refers to and describes stock over which the testator has the power of appointment is a valid appointment, although the power is not referred to. *Sayer v. Sayer*, 7 Hare, 377, 18 L. J. Ch. N. S. 274, 13 Jur. 402, Affirmed in 3 Macn. & G. 606, 21 L. J. Ch. N. S. 190, 16 Jur. 21.

A devise of land, describing it by its commonly used name, over which the testator has the power of appointment, is a good exercise of the power, although the power itself is nowhere referred to in the will. *Crosier v. Crosier*, 3 Drury & Warren, 373, 2 Connor & L. 309, 5 Ir. Eq. Rep. 415.

A man upon his marriage declared that his estate should be chargeable with a sum for the benefit of younger children; and, his wife having an estate of her own, she and her husband after marriage levied a fine of it, and the uses declared were, that they should have a power by any deed or writing, or by last will, 64 L. R. A.

to appoint and divide the estate among their younger children in such proportions as they, or the survivor, should think proper. The husband survived, and by his will gave his daughter a certain amount which he declared should be in lieu and in full satisfaction of the amount covenanted to be raised out of his own estate, and charged the whole amount so given his daughter upon his wife's estate, intending thereby to execute his power. This was held by Lord Chancellor Hardwicke to be a substantial execution of the power, because, while it was true that the terms of the power were not pursued, the intent and design of it were; that it was conceded that the father might have appointed part of the estate to be sold, and the money raised by such sale; and that what he did was exactly the same thing; so the court might order the sale. *Roberts v. Dixall*, 2 Eq. Cas. Abr. 668.

One who makes a settlement of lands to the use of himself for life, with remainder to such of his four children, and in such amounts and proportions, as he shall by any writing appoint, may exercise such power of appointment by devising a rent charge out of the lands and direct the payment of sums of money to the daughters as alternative conditions, and it is not necessary that the land be distributed *in specie*. *Thwaytes v. Dye*, 2 Vern. 80.

If one has a power to charge an estate, it is not necessary, in the execution of it, that he should refer to the deed out of which the power arises, for in a court of equity it is enough that his intent appears; and if, in the execution, he sufficiently describes the estate he has the power to charge, the estate is certainly bound,—especially where the person charging is a purchaser of the power. *Probert v. Morgan*, 1 Atk. 441.

A person who was a prebendary was in the habit of demising the prebendal estate to one of his children for twenty-one years, and the child that was named as lessee always executed a declaration of trust declaring that his or her name was made use of in the lease in trust for the father for so many years of the term as he should live, and then for such person or persons as he should by deed or will appoint, and, in default thereof, to and among all his children equally; and such lessees generally surrendered the lease yearly and the owner granted a new one. He leased the prebendal estate to his daughter, who executed the usual

real and personal, of whatever kind and wheresoever situate." While he was entitled to the income of the trust fund during his life, and had the right to dispose of it by his will, it was not, in any proper sense, his estate, or any part of his estate.

The words, "of whatever kind and wheresoever situate," do not in any degree enlarge the meaning or operation of the words "all my estate." In *Andrews v. Emmot*, 2 Bro. Ch. 297, and *Bradley v. Westcott* (1807) 13 Ves. Jr. 445, similar, and even stronger, superadded words were held to have no such effect. The words "all my estate," "my estate," and "estate," as they occur in the latter part of the second item and in the third item of the will, obviously

refer to what the testator had already bequeathed, viz., his own property, and not to that as to which he had only a power of appointment.

This will does not allude to the will creating the power, or to the power, or to the trust fund, the subject of the power. If the operation of the will be limited to the testator's own estate, it will not be ineffectual, as he had at the time of his decease a personal estate the income of which was abundantly sufficient to pay the annuity of \$1,200 for his wife and to support and educate his son during his minority.

We are therefore of the opinion that the decree of the chancellor should be affirmed, and it is so ordered.

declaration of trust. In the same year he made his will, in which he, after giving some legacies, bequeathed to his eldest son all the rest of his goods, chattels, and estates, whether real or personal, in possession and reversion, and made him executor, and then, by a supplemental clause, stated that it was his will that such eldest son should have the disposal of the estate of the prebend, and receive all the profits and advantages arising and accruing from it. Thereafter new leases were made as formerly, yearly, until the subsisting lease, which was made in September, and the testator died the following April. It was held that the will executed in favor of the son was a good execution of the power reserved in the lease. *Carte v. Carte*, 3 Atk. 174, Ridgeway, 210, 1 Amb. 28.

Where a husband before marriage gave a bond conditioned to enable his intended wife to dispose of her freehold estate by deed or will, and she exercised the power by will made during her coverture, whereby she devised her estate to her younger children in fee, it was a good exercise of the power, and such younger children may maintain a bill against the heir for a conveyance of the estate. *Rippon v. Dawling*, 2 Amb. 565.

It is not necessary, in order to execute a power, to make an express reference to it. If one disposes of that over which he has a power in such a manner that it is impossible to impute to him any other intention than that of executing the power, the act done will be an execution of it. *Andrews v. Emmot*, 2 Bro. Ch. 297.

A power of appointing real estate is well executed by a will containing a devise to trustees to sell, and indicating the manner in which they shall dispose of the money produced by the sale. *Kenworthy v. Bate*, 6 Ves. Jr. 793, 6 Revised Rep. 46.

By indentures previous to a marriage equal sums provided by the intended husband and wife were directed to be laid out in stock upon trust for the husband for life, and after his decease to the wife for life, and, after the decease of the survivor, the same were to be transferred to and among such child or children of the marriage as the husband should by deed or will direct or appoint. After the marriage the sums so advanced by either, which had not been laid out in stock, were laid out in the purchase of an estate known by a designated name. Thereafter the husband declared, by his will, that the estate should be

sold after his wife's death, and the money arising from the same paid out as therein directed, and this was held to be a valid exercise of his power of appointment. *Long v. Long*, 5 Ves. Jr. 445, 5 Revised Rep. 101.

By a marriage settlement a sum of stock was settled upon the wife for life, and after her decease in trust for all and every, or such one or more of her children as she should by deed or will appoint; and by her will the wife appointed the whole fund to trustees upon trust for \$1,200, to pay the income to a son for life, and after his death for his children, and, if he should die without children, then that the sum should be added to, and form part of, the residue of the trust estate; and the trusts of the remainder of the stock were in favor of daughters for life, with testamentary powers; and the son to whom the special sum had been left as aforesaid died leaving children. It being admitted that the gift to his children was excessive, it was held that on his death the sum left in trust for him was not undisposed of, but was well appointed to the daughters by the residuary gift. *Re Meredith*, L. R. 3 Ch. Div. 757, 25 Week. Rep. 107.

Where a testator under a settlement had a special power to appoint, by will, two estates designated by name, and by his will he devised each of those estates by name as his property, he having no property in the places indicated by the names of the two estates, such a devise was an exercise of the power of appointment, and will pass those estates. *Re Wait*, L. R. 30 Ch. Div. 617, 54 L. J. Ch. N. S. 1172, 53 L. T. N. S. 336, 83 Week. Rep. 930.

The will of one having a life interest in a sum of money invested in government funds, which bequeaths all the money belonging to her in such funds with the dividends thereon, and all other money she may die possessed of, is a valid exercise of the power of appointment, as the inference is that she applied the words to the stock on which she received the dividends. *Re Gratwick*, L. R. 1 Eq. 177, 11 Jur. N. S. 919, 5 Beav. 215.

Where a man made a settlement upon his children of certain schedule property, and a demand of a certain amount which he held against the husband of one of his daughters as the subjects of that settlement, and reserved in the settlement a power of appointment of the subjects thereof by will, and thereafter made his will, whereby he bequeathed the

residue of his estate unto trustees to pay the income of the sum to his daughters in trust, and the share of each to such person as she might by deed or will appoint,—it was held that such will was a valid execution of the power in the settlement. *Re Clark*, L. R. 14 Ch. Div. 422, 49 L. J. Ch. N. S. 586, 43 L. T. N. S. 40, 28 Week. Rep. 758.

Where by a marriage settlement the husband covenanted that in case his wife should survive him his executors would pay to the trustees a sum certain to be held in trust for the wife for life, and after her decease as he should by will appoint; and he made his will directing his executors to raise the sum and pay it to the trustees of the settlement to pay the income to his wife for life, and bequeathed all the residue and remainder of his estate and effects to his wife,—this was a valid exercise of the appointment. *Scriven v. Sandom*, 2 Johns. & H. 743.

A testator by his will bequeathed a sum in $3\frac{1}{2}$ per cent bank annuities to his daughter and two other trustees upon trust for her for life, and after her death to and among such of his children as should be then living, in such shares and proportions as she should by will appoint; and after his death the stock was converted into $3\frac{1}{4}$ per cents, and remained so up to the death of the donee of the power; and she afterward made her will, in which, after leaving a small legacy to a brother and sister, she left and bequeathed to another sister "all the residue of my property to be found in the $3\frac{1}{4}$ per cent reduced bank annuities (now reduced to $3\frac{1}{4}$ per cent) and all other property whatsoever and wheresoever." This was held to be a valid exercise of the power of appointment under the will of her father. *Re Davids*, Johns. V. C. (Eng.) 495, 29 L. J. Ch. N. S. 116, 6 Jur. N. S. 94, 1 L. T. N. S. 130, 8 Week. Rep. 39.

Where the property over which a wife was given a general power of appointment by the will of her husband consisted of a sum in consols, certain leasehold ground rents, and some shares in an insurance company; and the widow made her will dated after the operation of the wills act, and thereby gave all her real estate and such part of her personal estate as should consist of money or securities for money to the persons therein named, and gave all the rest, residue, and remainder of her personal estate to certain other persons therein named,—it was held that, upon the authorities independently of the wills act, the will was a good execution of the power; and that the shares in the insurance company did not pass under the bequest of money or securities for money; and that the leasehold ground rents did not pass under the term "real estate;" and that, therefore, the legatees of the real estate, money, and securities for money would take nothing but the consols, and the rest would go to the residuary legatees. *Turner v. Turner*, 21 L. J. Ch. N. S. 843.

By indenture of settlement the father of the intended husband, on the marriage of his son, conveyed a farm described in the conveyance by a particular designation, together with other lands, to the use of himself for life, with remainder to his wife for life, with remainder to the children of the son as the latter should appoint, reserving the right to the father by his will to subject and charge all or any part of the premises thereby granted with the payment of money, not exceeding in the whole a cer-

tain sum, for the portion of all or any one or more of the younger children of the father; and that he might by deed or will, for the purpose of raising such moneys, limit and appoint all or any part of the premises which would be so charged as mentioned, to any person or persons for any term of years by way of mortgage to raise the money. The father, by his will, afterward devised the farm mentioned in the settlement to his said son in fee, subject to and charged with the payment of legacies, two fifths each, to two of his daughters, and one fifth to the third one, of the whole sum thus limited, and bequeathed such legacies to his daughters respectively. The will contained no reference to the settlement, and no limitation of any term of years, and in no other way did the father exercise the power limited to him in the indenture of settlement. The vice chancellor held that the case was governed by that of *Bennett v. Aburrow*, 8 Ves. Jr. 609, 7 Revised Rep. 131, *infra*, I. d. 1, and that the legacies to the daughters were well charged by the will upon the premises comprised in the settlement. *Davies v. Davies*, 28 L. J. Ch. N. S. 102, 4 Jur. N. S. 1291, 7 Week. Rep. 85.

By the will of a testator a sum certain was given to his wife, to dispose of the same among her relations as she by will might think proper; and the wife, by her will, gave and bequeathed the sum to her sister and another in trust to lay out the same in their names in the public funds, upon trust, to apply and retain the dividends to the sister for life, and after her death to pay and divide the sum equally among her children; and she made her sister her residuary legatee. It was held that the sum bequeathed by the will of the husband was well bequeathed by the will of the wife to her sister and the other person upon the trusts therein mentioned. *Forbes v. Ball*, 3 Meriv. 437.

One having a power to appoint by will a certain leasehold estate and certain sums of 3-per cent stock standing in the name of the accountant general of the court of chancery, she being entitled to both for life, and the stock having been transferred to the accountant general, upon a bill filed by her, began her will by giving certain pecuniary legacies, and then gave "all the rest and residue of her bank stock to her god-daughter, . . . with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." She had no bank stock, or any stock whatever, except that in court, over which she had the power of appointment. It was held that the will was a good execution of the power as to the 3-per cent stock in court, and also as to the leasehold estate; it being plain that she meant to describe the property over which her power extended under the words "all other property which she possessed," by excepting out of it £50 of her bank stock, which she gave to her executors. *Walker v. Mackie*, 4 Russ. Ch. 76.

A testator by his will gave to trustees a sum of 3-per cent securities in trust for his daughter, with a general power to her to appoint by will. By her will she gave a variety of pecuniary legacies, and directed them to be paid out of the moneys invested in her name in 4-per cent government securities, but there were no 4-per cent government securities standing in her name, and it was conceded that she had not at the time of making her will, or at

her decease, any right, title, or interest in, or any power of appointing or disposing of by will or otherwise, any bank annuities, stocks, funds, or government or other securities, except the amount of the 3 per cents standing in the names of the trustees, and that she had not at the time of making her will, or at her death, or at any other time, any property of any kind or description whatever to satisfy the bequest in her will save the amount of the 3 per cents. This was held to be a valid exercise of the power of appointment given by the will of the original testator. *Mackinley v. Sloan*, 8 Sim. 568, 1 Jur. 558.

Where a testator by will gave to a woman a general power of appointment of certain stock by her will, and she, by her will, appointed the stock to her two sons, and then left any other sum or property to which she then was, or might thereafter become, entitled under the will of the original testator, to be divided amongst such of her children as might be living at her death, and then constituted one of her sons her residuary legatee, and the other son died before her,—her will was an exercise of the power of appointment, and the son who was her residuary legatee was entitled to the share of the stock which she intended for the one who died in her lifetime. *Re Spooner*, 2 Sim. N. S. 129, 21 L. J. Ch. N. S. 151.

Where, by articles of agreement made in contemplation of an intended marriage, which was afterwards actually solemnized, it was declared that a sum certain, a portion of the wife's fortune, should be secured by the bond and warrant of her father, and the father thereafter, by his will, recited that that sum was, on the marriage of his daughter, charged for her on lands whereof he was tenant for life, with the power of appointing a larger sum for his daughters as a charge upon the estate of which he was such tenant for life; and he thereby directed that the sum which, by the marriage settlement was to be secured by his bonds, be charged upon the lands, together with other sums to be for her, his married daughter's, portion; and then directed other sums to his third, fourth, and fifth daughters, which made them each an equal amount,—such will sufficiently indicated an intention to appoint the sum first mentioned to his married daughter, notwithstanding he had not therein made any appointment to her by name. *Burke v. Lambert*, 15 Week. Rep. 913.

A married woman being entitled, under a settlement, to certain estates in two counties and in a city, and she and her husband having reserved a power to appoint a conveyance by a trustee as she should by any writing under her hand and seal direct and appoint, she made her last will in writing, and thereby, without taking notice of the power in the settlement, devised all her estates which descended to her by the death of her father, or grandfather, and in which she, or her husband in her right, or any other person in trust for her then had any estate in the two counties and the city first mentioned, or elsewhere in the Kingdom of Ireland. It was held that this was a due execution of the power under the settlement. *Roscommon v. Fowke*, 6 Bro. P. C. 158.

In order to make a general gift of moneys, securities for moneys, and other personal chattels which are in their nature subject to constant change and fluctuation, valid as a power

of appointment, the will must refer to them as the subjects of the power, or they will not pass. *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436.

In *Laugham v. Nenny*, 3 Ves. Jr. 467, the master of the rolls, after holding that certain annuities, the property of a wife before her marriage, which were vested in trustees for her till the marriage, and thereafter upon trusts for the husband to receive the interest and dividends, and after his death the wife to receive them during her life, with power to the husband to dispose of the same by his last will and testament, and, in default, to the child or children of the marriage, of which there were none; where the husband settled no property of his own, and died having made no appointment of the two sums, but by his will, after general introductory words, declared his purpose to dispose of his estate and effects which he had or was interested in, but, without taking notice or affecting to make any disposition of the stock, gave some small legacies, and appointed his wife, who survived him, and another, executors; and his wife died subsequently,—were no part of the personal estate of the husband, further held that they did not pass under the power as an appointment, and the executors of the wife were entitled to recover the same against the surviving executor of the husband.

By an indenture executed previous to her marriage, a woman reserved to herself the power to appoint leaseholds and stock, and made her will executed and attested as required by the power, by which she gave and bequeathed to her husband the whole of her property, both real and personal, and whatsoever she might possess at the time of her decease. This was held not to be an execution of the power. *Lovell v. Knight*, 8 Sim. 275, 1 L. J. Ch. N. S. 47. The vice chancellor said that it was perfectly settled that, wherever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making it, such will shall not be deemed an execution of the power in regard to any specific property.

Where one to whom the income and produce of certain stock had been devised for life, with the power to dispose of a portion thereof by any writing signed in the presence of three credible witnesses, made his will, and thereby gave several legacies, and then devised the rest and residue of his personal estate among his nearest relations, this was held not to be an execution of the power; but the amount of the stock to which the power related must go according to the will of the first testator. *Molton v. Hutchinson*, 1 Atk. 568.

Where a testatrix having a general power of appointment under the will of her father, by her own will, appointed an executor, who was sole trustee of the property over which she had the power of appointment, and she had not made the property, the subject of the power, her own for all purposes, the appointment of an executor not being sufficient evidence of an intention so to do, it was held that she had not appointed under the will, and the gift under the provisions of the will of her father, in default of appointment, took effect. *Re Thurston*, L. R. 32 Ch. Div. 508, 55 L. J. Ch. N. S. 564, 54 L. T. N. S. 833, 34 Week. Rep. 528.

Where a testator had a general power of appointment over stock in the funds which, in de-

fault of appointment, would go to his children, and the donee of the power had no other funded property, a bequest of all his personal estate, "consisting of money invested in any of the public funds, household furniture, etc.," is not a valid execution of the power. In so deciding, the master of the rolls said: "He speaks, among the different articles of personality that he enumerates, of property in the funds; and it is possible that he might have been considering this sum; but it would be too dangerous for the court to presume that when he has used language not applying to it." *Webb v. Honnor*, 1 Jac. & W. 352, 21 Revised Rep. 180.

A testator having, under a settlement, a testamentary power to appoint a trust fund among all or any of his children, made his will in which he gave his executors all his personal estate in trust to pay his debts and funeral expenses, then to pay one daughter a certain sum, and another the whole of his furniture and household effects, and, as to his money in funds and all his residue of personal estate, upon further trust to invest and pay the income to the last-mentioned daughter for her separate use. The vice chancellor said that the point to be ascertained in all cases like this was whether the testator points to the specific fund in existence, or is merely enumerating the different particulars of which he supposes that his property may consist at his death; and that he thought the words of this will favored the latter view; that the more reasonable construction was to hold the descriptive words as indicative of what the testator considered his personal estate might consist of at his death, and not as pointing to a specific fund *in esse*. He distinguished *Re Davids*, Johns. V. C. (Eng.) 495, 29 L. J. Ch. N. S. 116, 6 Jur. N. S. 94, 1 L. T. N. S. 130, 8 Week. Rep. 39, saying that that case turned upon very special phraseology in the will, and that the present case belonged to the other class; and he must hold that the will did not operate as an appointment. *Re Mattingley*, 2 Johns. & H. 496.

A disposition, by will, of all lands of which the testatrix had the power to dispose is invalid to execute a power of appointment, not as to land, but as to money to arise from the sale of lands. The master of the rolls said that the question would have been very different if she had devised the settled land by name; that it might then have been argued that by the devise of the land she meant to describe her interest in it. *Adams v. Austen*, 3 Russ. Ch. 461, 27 Revised Rep. 108.

A will which bequeaths the testator's personal estate, the testator having the power to dispose of, by will, the personal estate of another, in which he describes it as his own, and not as that of the author of the power, is not, *prima facie*, an exercise of the power. And so, where the testator had been vested with the power over lands conveyed to trustees to sell, and the money to arise on such sale and sales, the will, having no reference to the deed or the sums to arise from the sale of the estate conveyed by the deed, is not an execution of the power to dispose of the proceeds of such sales. *Lowes v. Hackward*, 18 Ves. Jr. 168.

See also *Doe ex dem. Davis v. Vincent*, 1 Houst. (Del.) 416; *Maunsell v. Maunsell*, 24 L. T. N. S. 698, 19 Week. Rep. 1003,—*supra* I. b; *Davies v. Thorns*, 3 De G. & S. 347, 18 L. J. Ch. N. S. 212, 13 Jur. 383, *infra*, I. d, 1. 64 L. R. A.

d. Effect of general provision in donee's will.

1. Presence or absence of interest aside from power.

Where a statute has not intervened, it has been generally held that a general provision in the will of the donee of a power of appointment, in which neither the power nor the subject of it is alluded to, will not operate as an exercise of the power. But even at common law, if the testator (the donee of the power) had no property, estate, or interest of his own, so that the general provision in his will would be inoperative except as an exercise of the power, in such case the general provision in the will would be deemed an execution of it. In other words, where the testator had an interest, and also a power to appoint his interest was deemed sufficient to satisfy the general provision of the will, and the power remained unexecuted.

Where a wife, by the will of her husband, had the power of appointment of his estate by will, her will which bears no evidence that she supposed she had an interest in the lands which she devised by it, and does not refer to the power given by her husband's will, must be held to apply to that which was made subject to that power, through which alone, she having no interest, the will made by her could operate. *Weir v. Smith*, 62 Tex. 1.

Where a woman had a power of appointment, under her husband's will, of a large sum of money wholly in personality, and by her own will she disposed of a large amount in specific money bequests, besides making a residuary disposition of "all the rest, residue, and remainder of my estate;" and, wherever she made reference to her property, it was always as "my estate," with a nomination of an executor and a provision by which she gave and conferred upon him or his successor full power and authority to manage and control her said estate, and generally to do all things necessary and proper, in his judgment, in the management of the estate which might come to his hands under this her last will; and her own separate estate would not pay more than one third of her specific money bequests; but, if there were added to her private estate that which came to her from her husband coupled with the power of appointment contained in his will, all the bequests would be paid and a considerable sum would fall into the residuum,—under this state of facts, it was held that the power of appointment conferred upon her by the will of her husband was exercised by this her own will, as the making of a bequest that can only become effectual by the execution of a power certainly evinces an intention to execute it. *Foster v. Grey*, 96 Ill. App. 38.

Where a will devised land to one for life, coupled with a power in the devisee to will and dispose of the same in such manner as, by any instrument in the nature of a last will or testament, she might deem proper to make; and, in the event of such power not being exercised, the property was devised to two daughters of the testator; and the donee of the power executed a will in which she ordered and directed all her just debts and funeral expenses to be paid, and thereafter devised and bequeathed to the two daughters who would take in the event of her nonappointment all her property, real, personal, and mixed, and all her estate of every kind whatsoever and

wheresoever situate, the will containing no reference to the power, nor any description of the subject of it,—it was held that it still was a good exercise of the appointment, as it would clearly be inoperative in so far as it purported to dispose of real estate. *Balls v. Dampman*, 69 Md. 380, 1 L. R. A. 545, 16 Atl. 16.

Where by the residuary clause of a will a testatrix, after providing for the payment of all expenses and legacies, bequeathed the balance of her estate to her two children, and it did not appear that she possessed, at the time she made the will, any estate that was not covered by the power, except one slave who was disposed of by a previous bequest, it was seen that on the face of the will, if it did not operate upon the property covered by the power which was then in the possession of the testatrix, it must, of necessity, fall in its most important provisions. *Andrews v. Brumfield*, 32 Miss. 108.

One of the exceptions to the general doctrine that a general devise or bequest, or a general residuary clause, will not in itself be a sufficient exercise of a power of appointment by a testator, is where one possessing the power to dispose of real estate by his last will, and having no other real estate except that over which he possesses the power, devises by his will generally all his real estate; such devise is deemed to have been made in execution of the power, although the power is not specially referred to, and although the particular real estate embraced in the power is not specially described in the devise. *Pepper's Will*, 1 Para. Sel. Eq. Cas. 436.

If a will contains a devise of all the testator's lands generally, and he has some lands upon which the will may work by his interest, the law will attribute the will to his interest, and the land which he has only the power to devise will not pass, as if the will be of all his lands in a county or place named, and he has lands of his own therein; and where a testator having a power of appointment over certain freehold and copyhold estates was seized of other freehold estates, and devised all his freehold and copyhold estates without reference to the power, this would execute the power so far as the copyhold estates were concerned, but not as to the freehold. *Ibid.*

Where a wife under the will of her husband took a life estate in a house and lot with a power of appointment, a direction in her will "that my executors sell my house and lot after my death" is an execution of the power, where she had no title or claim to any other real estate than that acquired by the will of her husband. *Keefer v. Schwartz*, 47 Pa. 503.

Where a will contains a disposition of property, and there is nothing for it to operate upon except in execution of a power of appointment possessed by the testator, the will will be a valid exercise of the power, although neither the power itself, nor the subject of it, is referred to therein. *Cathey v. Cathey*, 9 Humph. 470, 49 Am. Dec. 714.

A married woman by her will, made in exercise of a power, may pass such hereditaments as are subject to her power, but is incompetent to pass other property; and so such a will is held to be simply an execution of her power of appointment. *DuHourmellin v. Sheldon*, 19 Beav. 389, 2 Week. Rep. 639.

A general devise or bequest will not, independently of the statute (7 Wm. IV. & 1 Vict. 64 L. R. A.

chap. 26) operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate, and that as to both reality and personality, if the court is satisfied, by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power. *Lake v. Currie*, 2 DeG. M. & G. 536, 16 Jur. 1027. The court said that the cases had gone upon very fine distinctions, but that the general rule was clear; and so it was held in this case that where the testator so disposed of all his estate, and he had an estate other than the one over which he had the power of appointment, but which was limited to himself for life with remainder to his sons in fee, he could not have supposed that he was disposing of an estate which belonged absolutely to his son, and, therefore, his general devise must be construed to have reference to that estate over which he possessed the power of appointment.

If a tenant for life of lands in a certain-named place, having the power to revoke the uses and limit new ones, devises by his will all his land in that place, naming it, having no other lands there, the lands shall pass though no mention be made of the power. *Deg v. Deg*, 2 P. Wms. 415.

A testator by his will directed his real estate to be sold, and the money arising from the sale and the residue of his personal estate he gave in trust for his wife for life, and after her decease, as to one moiety, for such person or persons as she should by any deed or writing, or by will, appoint, and, for want of appointment, etc., the real estate was not sold, and the testator's widow received the rents and the produce of the personal estate for her life, and by her will, after disposing of some specific articles which she described to have been her husband's, she gave all the rest, residue, and remainder of her estate and effects of what nature or kind soever, whether real or personal, which she should be possessed of, interested in, or entitled to, at the time of her decease, to a person whom she appointed as the executor of the will. She possessed no other real estate than that directed by her husband's will to be sold. This was held to be a valid exercise of the power of appointment. *Standen v. Standen*, 2 Ves. Jr. 589, Affirmed in *Standen v. McNab*, 6 Bro. P. C. 193. The lord chancellor (Loughborough) said that it was admitted that there would be no doubt, if she had said, "of which I have power to dispose," those last words would not add much after what she said before; but, that, take it according to the strict technical rule in *Clere's Case*, 6 Coke, 17b, a general disposition will not dispose of what the party has only a power to dispose of, unless necessary to satisfy the words of the disposition; that where she had no other real estate, and he was bound to satisfy all these words upon the technical rule, he could satisfy them in no other way, and could not avoid supposing what everyone must be convinced she meant,—that she made no difference between what she had from her husband and her other property.

Where a woman possesses, under the will of her husband, the power of appointment, and has such an interest in the estate of a brother which she is not in a situation to dispose of by

will made during coverture, her will disposing of the residue of her estate will be held to be an exercise of the power. *Stevens v. Bagwell*, 15 Ves. Jr. 139.

Where a person having the power of appointment by will, executed a will in which she did not refer to the power, or describe the particular lands subject to it otherwise than by the words "my estate," yet, if she had no other real estate, the will, of necessity, must be understood to mean the estates included in her power, and is, therefore, a valid exercise of the same. *Wallop v. Portsmouth*, 2 Sugden, Powers, Appx. No. 11.

Where a testatrix not possessed of any property other than that as to which she held a power of appointment executed her will by which she gave all her property and estate whatsoever and wheresoever, and of what nature, kind, or quality soever the same might be, she thereby exercised the power. *Atty. Gen. v. Wilkinson*, L. R. 2 Eq. 877, 12 Jur. N. S. 593, 14 L. T. N. S. 725, 14 Week. Rep. 910.

A power of appointment under a settlement is properly exercised by a will which bequeaths legacies to the persons named therein, and then as to the residue of the property gives, subject to debts and funeral and testamentary expenses, the residue equally between two sisters, where the testatrix had never made any appointment or direction by deed or will of the funds subject to the trust of the settlement, except so far as the will operated as such appointment or direction, and she was not possessed of any property other than that comprised in the settlement. *Re Wilkinson*, L. R. 8 Eq. 487, Affirmed in L. R. 4 Ch. 587, 17 Week. Rep. 839.

Where, under the will of her father, a married woman had power, by deed or will, to appoint a life interest in certain funds to her husband, and by her will she bequeathed certain legacies out of her separate estate, or out of the estate and effects over which she had any disposing power, and then specified the legacies, all of which were given to persons who were not objects of the power, and then proceeded to give, bequeath, and appoint all the residue of her estate and effects whatsoever and wheresoever unto her husband absolutely; and she had no other testamentary power of appointment,—it was held that this was a valid exercise of the power; that the circumstance that this power was the only testamentary power to which she was entitled was, as had been held in many cases (citing *Pidgely v. Pidgely*, 1 Colly, Ch. Cas. 255, 8 Jur. 529; *Banks v. Banks*, 17 Beav. 352, 1 Week. Rep. 511; *Re Teape*, L. R. 16 Eq. 442, 43 L. J. Ch. N. S. 87, 28 L. T. N. S. 799, 21 Week. Rep. 780; *Re Swinburne*, L. R. 27 Ch. Div. 696, 54 L. J. Ch. N. S. 229, 33 Week. Rep. 894, *supra*, I. b), to afford evidence of considerable cogency of an intention to exercise such power. *Re Milner* [1899] 1 Ch. 563, 68 L. J. Ch. N. S. 255, 80 L. T. N. S. 151, 47 Week. Rep. 369.

Where, by a codicil to his will, one having the power of appointment over lands recited in such codicil that on the marriage of his eldest son he had executed a deed conveying his interest in such lands, and that he directed his trustees to deliver to such son the reversionary property of every kind to which he was entitled after the death of his brother, the son binding himself to pay a sum certain to his younger brother and sisters; and the testator had no other property on which the codicil could oper-

ate which would be sufficient to pay the charge to the younger brother and sisters,—such codicil was a good execution of the power. *Jones v. Jones*, 13 Ir. Ch. Rep. 409.

One being entitled to a fee-simple estate in certain designated real property, by a separation deed provided an annuity for his wife with remainder to such uses, etc., as he by deed or will should appoint in favor of his child or children born in his lifetime, and ultimate remainder to him in fee; and thereafter the property was mortgaged, and the owner, by his will dated the same day of the mortgage, devised and bequeathed all his real and personal estate and effects whatsoever, whereof he had the power to dispose, to the plaintiffs, upon trust that the trustee should convert, and, as soon as convenient after his death, make sale and absolutely dispose of, all his real estate so devised to them in trust for the benefit of his children; and after his death the plaintiffs, with the concurrence of the mortgagee, contracted to sell the real property designated in the separation deed to the defendant, which was the only real estate which the testator had at the date of his will. This was an action upon that contract, and one of the questions was whether the plaintiffs and the mortgagee could make a good title subject to the annuity. The court held that the appointment in the present case was a due execution of the power, and that in this case it was not necessary to rely on the statute of wills, it being stated that the testator had no other real estate than that which was the subject of the power. *Cowx v. Foster*, 1 Johns. & H. 30, 29 L. J. Ch. N. S. 886, 6 Jur. N. S. 1051, 2 L. T. N. S. 797.

Where, by a settlement, a single woman, who afterward married, provided therein that, in case she should leave issue that should survive her, then the trustees should, upon her direction as evidenced by her will, convey the premises to and amongst such child or children as she should leave, and in such manner and proportion as by her will should be directed and appointed; and she made her will, and, having a settled intention to advance her husband and his family, as she frequently declared, gave and devised to her infant son all her real estate in a certain county, and willed that her son should enter into full possession of one half of the same at the age of twentyone, or marriage, and into the full possession of the residue thereof at the death of his father; and gave to her husband all the rents and profits until such time as her son should accomplish his age of twenty-one or marriage, and thereafter one half of such rents and profits during his life, and, if the son should die in minority without issue, then she devised all said real estate to her husband forever; and she died on the same day, and a few months after the son died, an infant without issue,—on a bill filed by the husband against the heirs at law of the wife and the trustees to compel a conveyance of the title in fee from the proper parties to the husband, the lord chancellor dismissed the same on the ground that, if the husband had any title to the premises in question, his remedy was proper at law, and not in equity. On appeal to the Parliament, the decree of dismissal was reversed, and the chancery court was directed to state a case to be sent to the judges of King's bench for their opinion upon the point, as to whether the will or instrument purporting to be the will of the

wife was a good appointment of the estates therein contained. *Rich v. Beaumont*, 6 Bro. P. C. 152.

A reporter's note to the above case states that it was rather singular that the House should direct a case for the opinion of the court of King's bench, instead of ordering the judges to attend, and calling for their opinion in the usual way. And that in *Hearle v. Greenbank*, 3 Atk. 707, 1 Ves. Sr. 305, Lord Chancellor Hardwicke said "that this was the only instance of a case made by the direction of the House of Lords, for the opinion of the judges." The reporter further states that it was still more extraordinary that, after such a case was directed, no steps should have been taken on either side to have it argued, for, after very laborious search, he was not able to discover a single trace of any further proceedings in the cause, except an order of the court of chancery directing the case to be settled by the master in case the parties differed in stating it. The syllabus states that "In 3 Atk. 707, the principle of this case was thus stated by the attorney general (*arguendo* in the case of *Hearle v. Greenbank* [3 Atk. 695, 1 Ves. Sr. 305, *infra*, II. f]): 'It is a rule, that where a person has two ways of doing a thing, and it cannot be done one way, it should be done another; *ut res magis valeat quam pereat*; so that, if it cannot be disposed of by way of interest, yet it shall be a good disposition by way of power.'"

Where a wife, by the will of her husband, had a general power of appointment over a certain sum by said will left in the hands of trustees, and by her will bequeathed legacies greatly exceeding the amount of her estate exclusive of the sum over which she had the power, and then bequeathed to her niece all her other personal estate and effects whatsoever and wheresoever over which she had any disposing power, this was a valid exercise of the power. *Lowe v. Pennington*, 10 L. J. Ch. N. S. 83.

The will of a married woman having a power of appointment under her marriage settlement to appoint by will amongst the children and issue of the marriage, by which she gave and bequeathed all her real and personal estate not thereinbefore otherwise disposed of, "which by virtue of any power, or authority, or of any separate right of property," she was competent to dispose of, is a valid exercise of the power; as to hold that it is not would be striking out of the will those words altogether. *Re Boyd*, 63 L. T. N. S. 92.

It is well settled that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee giving freehold estate will be so far deemed an execution of the power; for otherwise the will, as to that property, would wholly fail. *Grant v. Lynam*, 4 Russ. Ch. 292, 6 L. J. Ch. 129, 28 Revised Rep. 97.

A testator by his will directed that a certain sum should be raised and received and held by trustees to invest and pay the interest and dividends to his daughter during her life, and after her decease to assign the same as she should by her will give or dispose of the same. The donee of the power, by her will, after bequeathing some pecuniary legacies, gave all the rest, residue, and remainder of her moneys unto her executors in trust, and then, subject to such certain annuities, she gave the said trust moneys, stocks, funds, and securities unto the children 64 L. R. A.

of her sister, and thereafter gave to the children of her sister all the property, mentioning it, by every conceivable name, which she was or might become entitled to under and by virtue of the provisions and directions contained in the will of her father. It was held that as she, in the first part of her will, disposed of all her personal estate, therefore, the words at the latter end could not refer to what was her own, as they would be superfluous, and the will was an execution of the power. *Maples v. Brown*, 2 Sim. 327.

Where a husband, by deed, for the consideration of love and affection, and for better sustenance, to live comfortably and be better cared for in her affliction, and the sum of \$100 in hand paid, executed to his wife, without words of inheritance, a deed of land to dispose of at her death as she might think proper, by deed or will, to whomsoever she chose to make her heirs of her estate, a will executed by the wife, devising the land to her husband for life and then to others, is a valid execution of the power of appointment, for the reason that, although a *feme covert*, she was competent to execute a power, whether collateral, appurtenant, or in gross, without the concurrence of her husband, and even in his favor; but, as such, she had no right to make a devise of real property, and especially of the land conveyed to her by her husband's deed, for it only conveyed to her a life estate, and her will, therefore, would have been inoperative except as an execution of the power, and for that purpose it would be sustained in equity. *Taylor v. Batman*, 92 N. C. 601.

Where the will of a testatrix devised to her husband, subject to his curtesy, all her estate in trust to pay the income to her daughter during life, and convey and pay over the same to such use as the daughter should by her last will and testament appoint, the will of the daughter, giving to her father all the rest and residue of her estate, real and personal, of every name and nature, is not a valid exercise of the power of appointment. It was conceded that the donee had no real estate of her own on which the devise could operate, and it was contended that the use of the word "real" in the devise was sufficient evidence of an intention to execute the power. The court held that this was not so. *Mason v. Wheeler*, 19 B. I. 21, 61 Am. St. Rep. 734, 81 Atl. 426.

Where the question was raised that there had been no due execution of a power of appointment, the court said that one of three things must be true: That if, under the language of the will creating the power, the whole devise was to the devisee, he would take an estate in fee, and his own will would pass the land by virtue of his title; that, if he took an estate tail and the appointment was void, the land would descend to the eldest son as the heir at common law; and that, if he took a life estate, then he had no interest to pass under his will, and, to make it operative at all, its operation must be attributed to the power; and that in either case those contesting his right to send the property, as he did, by his will, had no foundation for their contention. *Graeff v. DeTurk*, 44 Pa. 527.

The will of one having a power of appointment over certain freehold and copyhold estates, who is seised and possessed in his own right of other freehold estates, which devised all his freehold and copyhold estates without reference to the power, is an execution of the power as to the copyhold estates, but not as to the

freehold estates. *Lewis v. Lewellyn, Turn. & R. 104, 23 Revised Rep. 201.*

A person seized of 3 acres of land each of equal value, held *in capite*, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person or persons and of such estate or estates, as he should limit and appoint by his last will in writing; and afterwards, by his last will in writing, he devised the said third acre to one in fee; and it was held that, having conveyed two parts to the use of his wife, he could not make any devise; therefore the devise ought, of necessity, to inure to the limitation of a use, or otherwise the devise would be utterly void. *Clerc's Case, 6 Coke, 17b, Cro. Eliz. pt. 1, p. 877, Cro. Jac. pt. 2, p. 31, F. Moore, 567.*

Where a testator was invested with a power of appointment over one sixth of certain real property under a certain will; and in his will stated, previous to the devise, that he was, under the will of the other person, possessed of and entitled to one undivided sixth part or portion, and he had an interest and property in another one sixth part of these lands under the will of his father-in-law,—his will is not a valid exercise of his power of appointment. *Lendrick v. Russel, 10 Ir. Eq. Rep. 269.*

Where, by an indenture of settlement, a testator had, upon a certain event, the fee of an estate subject to a term, and by the same settlement was invested with the power in a particular event, to appoint the fee subject to the term by will; and by his will he devised the estate in fee without making any reference to his power of appointment,—the will operates upon his interest, and is not a valid exercise of his power of appointment. *Farmer v. Bradford, 3 Russ. Ch. 354, 5 L. J. Ch. 157, 27 Revised Rep. 89.*

Where a testatrix having a power of appointment, in favor of her children, over two different sums of two different kinds of stock which by her marriage settlement had been assigned to trustees, by her will gave and bequeathed, and, by virtue of every power enabling her in that behalf, appointed, all the property of or to which she was then, or at the time of her death, should or might be, possessed or entitled to have or dispose, to the trustees in the settlement, after payment of her debts and funeral and testamentary expenses, to invest the residue in the funds in government or real securities, and then create a trust in favor of her children; and she died possessed of personal estate more than sufficient to pay her debts and funeral and testamentary expenses,—the will was not an exercise of the power. *Clogstoun v. Walcott, 13 Sim. 523, 7 Jur. 618.*

The rule is that, for a general gift to operate as an execution of a power, it must refer either to the power or to the subject of it; but referring to part of a subject, or to some of many subjects, will not be sufficient to make the will operate as an execution of the power as to such parts, or such subjects, as are not referred to; and so, where a woman had, under the will of her sister, a power of appointment, and she made a bequest, and had property otherwise than that over which she had the power, to which the language of her will properly applied, such will did not operate as an execution of the power of appointment given by the will of her sister. *Hughes v. Turner, 3 Myl. & K. 666, 4 L. J. Ch. N. S. 141.*
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A testator, by his will, devised a hotel to his executors in trust to permit his son to take the income for his own use and maintenance during his life, and after his decease to the use of such persons as he by his last will might appoint, and, in failure of such appointment, to his children or their issue then living. The person to whom this power of appointment was left died leaving a will by which, after directing the payment of his debts, he gave and bequeathed one moiety of all the rest and residue of his estate, whatever and wherever, to his wife, and the other moiety to his brother to hold in trust for his children upon the terms and conditions therein expressed. The court said that the power in this case was clearly not executed; that the hotel was not mentioned in the will of the person clothed with the power, nor was the power referred to, and the terms were satisfied by the property which he left, without including that as to which the power existed. *Bilderback v. Boyce, 14 S. C. 528.*

Where, by a will, the income of a fund was to be paid to the testator's widow during her life, and at her death the whole fund to go to another if he should survive the widow, and, if not, to such person as he should by his last will appoint; and the donee of the power left a will by which, after making certain bequests, he gave the residue of his estate, which was of large amount, to a legatee and his children, but made no express appointment with regard to the fund as to which he had under the first-mentioned will the power of appointment,—such will disposed only of his own private property, and was not a valid exercise of the power of appointment. *Johnson v. Stanton, 80 Conn. 297.*

Where a will gave to trustees a portion of the estate of the testator with directions to pay over the income to his daughter during her life, and at her decease to convey the same to her children, if any, and otherwise to such persons and in such portions as the daughter by her last will should appoint, and, in default of appointment, to her heirs at law; and the daughter thereafter died leaving a will and a large amount of property of her own, giving several legacies and making a residuary bequest, but not alluding to the trust fund, or her power of appointment, but referring to the property bequeathed as "my estate," and her own property was more than sufficient to pay her debts and meet all the requirements of the will,—her will was not a valid exercise of the power of appointment. On the question under consideration two of the five judges dissented. *Holister v. Shaw, 46 Conn. 248.*

Napier v. Napier, 1 Sim. 28, 5 L. J. Ch. 66, 27 Revised Rep. 144, was the case of an exception taken by a purchaser to the title of an estate sold in the cause. The testator, under whom the vendors claimed, devised to his only son, and his daughters, executors, administrators, and assigns, all and singular, his manors, messuages, lands, tenements, and hereditaments, situate, lying, and being in nine several parishes, which he particularly named in his will. In one of these parishes he had lands in fee, and also lands over which he had a power of appointment, and all the lands in that parish were included in the present sale. In five of the parishes he had only lands in fee, and in three of them he had only lands over which he had a power of appointment. His son, the first devisee, was an object of the power; but there were devisees over, in certain events,

to persons who were strangers to the power. It was conceded that the lands in the five parishes, where he had only lands in fee, passed by his will. It was also conceded that the lands in the three parishes, where he had only lands subject to his power, also passed by the will, upon the principle that the will, as to the three parishes, would be otherwise wholly inoperative. It was also conceded that his lands in fee in the one parish passed by his will; and the dispute was as to whether the lands of that parish which were the subject of the power also passed, and it was held that they did not.

Where, by an antenuptial contract, money, choses in action, book accounts, and other personal property of the wife, to a certain amount, were assigned to the husband as so much money, in consideration of which he agreed to pay the wife, during life, the interest on that sum annually for her sole and separate use, with power to her to devise and bequeath the same with the interest due thereon by will the same as if she were sole, and she died leaving a will devising all her estate, real, personal, and mixed, to her daughter; and the husband had neglected to pay her the interest for four years previous to her death,—it was held that she having this interest, and therefore property aside from that, over which by the antenuptial agreement she possessed the power of appointment, and, the general provision in her will making no reference to the power or to the principal sum, the subject of the power, and there being property upon which the will could operate independent of the power, it was not a good execution of it. *Mory v. Michael*, 18 Md. 227.

The question under consideration arose in an action by the executor of the will of the wife against the husband to recover, under the provisions of the will, the whole of the gross sum first mentioned, and also the several annual payments of interest for which the defendant was in default. On a demurrer to the bill, which had been sustained by a *pro forma* decree from which the complainants appealed, and the court held, as stated, that the demurrer should not have been sustained, as the court had jurisdiction to compel the husband to pay the amount due for interest, but, as an exercise of the power of appointment, the will was invalid, as the decision in regard to the interest was the only one essential to the reversal of the decree. Standing alone, this case might not be deemed a binding authority as to the question of the exercise of the power of appointment.

But in *Maryland Mut. Benev. Soc. I. O. of R. M. v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52, in which action, in holding that the will was not a valid exercise of the power, as no intention appeared or was expressed, and it not appearing that the testator had or had not other estate on which his will might operate, so that no inference could arise, from the want of other property, in favor of the supposed appointment,—the court said that the question was fully examined and discussed in the case of *Mory v. Michael*, and quoted from and approved what was said on the subject in that case, which would seem to make it an authority for the proposition laid down in it.

A will which makes no reference to the power of appointment possessed by the testator, or to the subject on which it was to operate, is not a valid exercise of the power, where the testator

had other property, and the will would not be inoperative without the aid of the power. *Patterson v. Wilson*, 64 Md. 198, 1 Atl. 68.

Before the act of 1888, chap. 249, it had been repeatedly decided by the court of appeals of Maryland that the intention to execute a power of appointment by will must appear by a reference in the will to the power or to the subject of it or from the fact that the will would be inoperative without the aid of the power. The will of a married woman who is the donee of a power of appointment, which bequeaths to her husband all her property, of every description, absolutely, and revokes all former wills; but which makes no reference to the power, or to the subject of it,—operates with full effect on the personal property which belonged absolutely to the testatrix at the time of her death; and, as the property within the scope of the power was all personal estate, it is not necessary to look to it for the purpose of furnishing a subject-matter for the bequest, and the will is invalid as an exercise of the power. *Mines v. Gambrell*, 71 Md. 30, 18 Atl. 43.

Where a woman by her father's will had a life estate in the property thereby given her, with a power of disposing of it by will, or appointment in the nature thereof, among her children and grandchildren, or some of them, with a provision that, in case she should die without issue surviving, she should have power to appoint, but only as to one half; and there was no evidence of her intent to execute the power under her father's will; and she was possessed of a large quantity of real and personal property, which she owned independently of what she derived from her father's estate,—her will could not be construed as an execution of the power given her by her father's will. *Meeker v. Breintnall*, 38 N. J. Eq. 345.

In *Birdsall v. Richards*, 18 Pa. 256, the court, after stating what was decided in *Ciere's Case*, 6 Coke, 17 b, *supra*, and approving the doctrine there laid down, held that where one had created a trust whereby he reserved the order, disposal and control of the property for and during the term of his natural life, and, after his decease, to such uses as he should by his last will direct and appoint, and, in the absence of such last will, for the use of such persons as would be entitled to his personal estate in case of his intestacy, that, conceding he had a power as well as an estate, a residuary clause in his will is sufficiently comprehensive to carry the estate, and the will is an election to devise as owner, and not to appoint by virtue of the power.

Where a testator domiciled in one of the United States by his will gave the power of disposition of certain personal property situated at the domicile of the testator to another person domiciled in England, the will of the donee of the power, which refers only to his own estate, is not a valid execution of the power, although in it he says that part of his personal estate may be invested, at the time of the decease, in bonds, mortgages, and other securities in the United States of America; and it is straining the words to say that by them he meant, not his own, but the estate of the donor of the power. *Bingham's Appeal*, 64 Pa. 345.

Where a wife under the will of her husband took a life estate with a power of disposal, with a vested remainder to another, subject to be devised by the due execution of the power, a general devise contained in the will of the wife,

she being also possessed of other real and personal property, which she held and controlled in her own right, will be held not to have been an exercise of the power under the settled rules of construction. *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23. In this case the court said that it had doubts as to the practical justice of the rule, but felt confident that its application to the present case would do no wrong, but that, upon all the circumstances in the case, it would fully effectuate the intention of both the husband and the wife with regard to the disposition of their several estates.

A person, being seised in fee of certain lands, made a settlement of the same by a lease and release to such uses as he should appoint by deed or will, and, in default of such appointment, to the use of himself for life, and thereafter to his children as tenants in common in tail, with cross remainders between them in tail, and remainder to the use of himself, his heirs, and assigns; and thereafter disposed of all his real estate whatsoever, all his leasehold premises, household furniture, money, and all other his real and personal estate whatsoever and where-soever upon certain trusts; and at the time of making his will and at his death was seised in fee of lands besides those subject to the power. The devise was not a good execution of the power. *Davies v. Williams*, 1 Ad. & El. 588, 3 Nev. & M. 821.

By a marriage settlement certain leasehold property was conveyed to trustees in trust for the husband for life with remainder to the wife for life with remainder to the children as the husband should appoint, and, in default, between them equally. Thereafter the husband had freehold property, and was possessed of a life interest in the leaseholds in question under the settlement, in addition to the whole legal interest therein which he had procured to be granted to him, and he had, besides, an absolute interest in other leasehold property. Under these circumstances, he made his will, and gave £1,000 in trust for his daughter; he then gave his freehold and leasehold estates for the benefit of a son, and, in the commencement of his will, he noticed the settlement in order to say that he confirmed it. It was held that this was not an execution of the power; that he might have referred to the power, or he might have been in such a situation as not to be able to use the word "leasehold" without raising the necessary inference that he intended to execute the power; but, from the mode in which he referred to the settlement, and as he had other property upon which the will could operate, it was not an execution of the power. *Tanner v. Elworthy*, 4 Beav. 487, 5 Jur. 1099.

A person entitled to personal property which he had derived indirectly through the will of his father settled his share as to a certain amount thus received from his father upon certain trusts, and as to the residue, in the event of there being any, in trust for himself. A sum certain was settled upon him for life, remainder to his wife for life, remainder among his children as he should appoint, and, in default of appointment, among his children. He made a will giving and bequeathing all the personal estate that he derived through the will of his father to his two daughters exclusive of his other children. It was held that the portion which he had reserved to himself in the settlement satisfied the language of the gift, and it was, therefore, not an execution of his power

to appoint. *Noel v. Noel*, 4 Drew. 624, 7 Week. Rep. 572.

Where one having a power to appoint by will amongst his children certain lands, and having other lands of his own, makes his will, in which, without referring to the power, after giving legacies to his children, he devises all the rest, residue, and remainder of his lands to his eldest son, such a will is not a valid execution of the power. *Doe ex dem. Hellings v. Bird*, 11 East, 49.

A man surrendered a copyhold estate to two persons to the use of his wife for life, and, after his death, to pay the rents and profits to all his children equally, and then, in trust, to such use or uses as he should by deed or will appoint, and, for want of appointment, to his son and his heirs. His wife being dead, he afterwards made his will in the presence of three witnesses, in which he gave all the rest, residue, and remainder of his effects, real and personal, of what nature, kind, or quality soever, to another son. It was held that there was nothing at all descriptive of the thing which he had power to dispose of, but what was applicable to other estates of which he was seised, and of which he could equally dispose; and that the will was not a good execution of the power. *Ex parte Caswall*, 1 Atk. 559.

General words of gift will apply to a power, where the testator could not give the property otherwise than by virtue of the power; but words of gift do not, in general, apply to the execution of a power. And where a testator refers to a power, but has other estates to which the will can apply, such a reference in connection with the general disposition is not an execution of the power. *Lowson v. Lowson*, 3 Bro. Ch. 272.

In *Bradley v. Westcott*, 13 Ves. Jr. 445, 9 Revised Rep. 207, it was held that where the wife, being tenant for life by the will of her husband, by the same instrument was given power of appointment as to certain jewels and other articles of which she should be possessed at her death, a will executed by her of all her personal estate, and all her estate and interest therein, is not an execution of her power, as all the words she employed were applicable to her own personal property. The master of the rolls said that the only case which appeared to be any kind of authority was *Standen v. Standen*, 2 Ves. Jr. 589, *supra*, and that certainly the argument of Lord Rosslyn does go to the length that the very same words that are sufficient to dispose of a person's own property are sufficient to dispose of property over which he has an absolute power of appointment.

Whether a party meant to execute a power of appointment is always a question of intention. At one time it was required that there should be an express reference to the power, but that rule is changed, and the intention may be collected from other circumstances; as, that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative unless applied to the power. In this case it was held that there was nothing of the sort, and that no description of property was disposed of that there was not something to answer other than what was included in the power of appointment; and that, therefore, the power was not exercised. *Bennett v. Aburrow*, 8 Ves. Jr. 609, 7 Revised Rep. 131.

The will of one in whom resides the power of appointment, under a marriage settlement of so

much of an estate as shall not exceed a sum certain, which gave, devised, and bequeathed "the whole of my property, real and personal, consisting of a farm, and whatever may devolve to me by virtue of the marriage settlement," to a trustee, upon trust, after the death of his wife, for his five children in unequal shares, describing the estate mentioned; and thereafter gave to the trustee a discretionary power, either to divide the income of "my entire property" according to the provisions before made, or to sell the whole and divide the proceeds,—will not operate as an exercise of the power of appointment where there was property of his to which the words, giving full effect to them according to the terms of the will, exclusive of the settlement, would apply. *Wildbore v. Gregory*, L. R. 12 Eq. 482, 41 L. J. Ch. N. S. 129, 19 Week. Rep. 967.

A testator settled upon his daughter for life certain property with a power of appointment vested in her in favor of her children. She afterward executed her will by which she directed "that all my property of every kind— . . . in a word all I may be seised of at the time of my death"—should be divided among her children in certain shares, and made no reference in her will to the special power of appointment given to her by her father. It was held that her will was not a valid exercise of that special power. *Re Huddleston* [1894] 3 Ch. 595, 64 L. J. Ch. N. S. 157, 8 Reports, 462, 43 Week. Rep. 139. The court said: "Is there anything to show that she was exercising the power? So far as I can see, there is not a word; whereas she distinctly speaks of 'my' property, 'my' trustees, and all 'I' may be seised of. It may be somewhat technical to rely upon the words 'seised' in a lady's home-drawn will; but the word 'seisin' has such a definite technical meaning in law that one cannot help noticing it in passing. This lady was disposing of property which was her own, and not property over which she had a power, and which was not her own."

An action of debt on a bond conditioned for the payment of a sum of money to such person as the obligee should appoint cannot be maintained against the obligor by the legatee of the person having the power of appointment, under a disposition of all the rest, residue, and remainder of her ready money, personal estates, and effects whatsoever under a residuary bequest contained in her will, as such power of appointment is not executed by a mere bequest of the residue. *Buckland v. Barton*, 2 H. Bl. 136.

A bequest contained in a will executed before 7 Wm. IV. & 1 Vict. chap. 28, came into operation, bequeathing legacies more than the amount of property which she actually owned, will not be considered the execution or exercise of the power of appointment by her in a will, where there was no reference in her will to the instrument creating the power, and no reference therein to the property subject to the power. It was alleged that, as her own property was of inconsiderable amount, it was in a very high degree improbable that she had an intention to give anything else than that of which she could dispose under the power, the pecuniary legacies added together being identical with the amount of the fund over which she had the power of appointment; but it was held that this was not enough to raise more than a conjecture, and, therefore, not enough to form grounds of judicial determination. *Davies v. Thorns*, 8 64 L. R. A.

DeG. & S. 347, 18 L. J. Ch. N. S. 212, 13 Jur. 383.

A daughter having the power of appointment, under the will of her father, to dispose of the principal sum given her for life among any child or children in such shares or proportions as she by will might direct, gave certain sums to each of her four daughters, and a large sum to her son, the latter covenanting to pay the dividends thereof to two of her daughters during their lives as long as they should remain single, and then gave all the residue of her personal estate and effects, after several pecuniary legacies, by virtue of any general power she was able to dispose of by her will, unto her said son. The question in the case was whether the residuary clause in her will was a valid exercise of the power of appointment as to the remainder of the sum that came to her by the will of her father. A vice chancellor had held that it was, but this was reversed, and it was declared that her share in the trust fund, beyond the four sums bequeathed to her daughters and the larger sum bequeathed to her son subject to his payment of annuities to his sisters, was undisposed of, and dividable among all her surviving children under the limitation in her father's will. *Butler v. Gray*, 39 L. J. Ch. N. S. 291, L. R. 5 Ch. 26, 18 Week. Rep. 193.

In a case submitted to the Queen's bench, in which the question was whether one was seised of an estate of inheritance in fee, or was only a tenant for life, the question arose as to whether one having the power of appointment by will, who at the same time had family estates coming from his own ancestors and on which he resided, part of which were under a settlement and part were at his absolute disposal, had by his will, in which he used the words "all my real estate over which I have any disposing power I give to my eldest son, his heirs, and assigns," had exercised the power, and it was held that he had not. *Cooke v. Cunliffe*, 17 Q. B. 245.

Where the will of a person invested with a power of appointment devised, bequeathed, and appointed all her real and personal estate and effects of every kind to her daughter absolutely, and appointed the daughter sole executrix, but referred neither to the power in the settlement by which the same was created, nor to the property, the subject of the power; and it did not appear that the testatrix had no general power of appointment of other property, but it was stated, and not denied, that she had none.—the vice chancellor stated that he was unable to hold that an intention to exercise the special power in the settlement appeared upon the will, and that, the question being one of intention appearing on the face of the instrument, there was no exercise of the power in this case. *Re Richardson*, Ir. L. R. 17 Eq. 436.

An unmarried woman invested with a limited power of appointment, after making specific bequests of particular property without any reference to the power, or the property which was the subject of it, then "bequeathed the residue of her personal estate" among certain persons, objects of the power; and she possessed, in addition to the property specifically bequeathed, a reversionary interest in some trust funds. The will was held not to be a valid exercise of the power. *Humphrey v. Humphrey*, 36 L. T. N. S. 91.

Where a testatrix had power to dispose of certain lands, and money to be laid out in lands, her will, whereby she devised "all and every her

freehold messuages, lands, tenements, and hereditaments" is not a valid exercise of the power, where it appears that she was entitled to two freehold houses in her own right, as the latter would satisfy the terms "messuages, lands, tenements, and hereditaments." *Hoste v. Blackman*, 6 Madd. 191.

In *Davies v. Williams*, 3 Nev. & M. 821, 1 Ad. & El. 588, the court of King's bench, in answer to the question as to whether one who settled lands to certain uses, reserving to himself a power of appointment by will, and by his will devised "all his real estate, whatsoever and wheresoever, in possession, reversion, remainder, or expectancy," and then devised his leasehold and personal estate, "and all other his real and personal estate whatsoever and wheresoever," and who, at his death, was seised in fee of other lands and of the ultimate reversion in the fee of the first-mentioned estate, exercised the power of appointment,—stated that the will did not operate as an execution of the power.

A testator, by his will, gave to his daughter a general power of appointment over a certain sum. The daughter, by her will, after reciting the will of her father and the power thereby given her of appointing the sum, and her intention to exercise it, directed that nine tenths of the sum should be assigned and transferred to her mother absolutely, and that the trustees should transfer and assign five sixths of the remainder to another to stand possessed of the same upon the trusts and for the intents and purposes therein declared concerning her residuary estate; and bequeathed all the residue of her stock in the public funds, and all her moneys and property, the rest, residue, and remainder of her estate and effects, whether under the will of her father or otherwise, to the trustees upon trust to invest the same in the public funds, and to stand possessed thereof, and also of the residue of the said trust funds which should remain after paying the several legacies of stock to her mother and the other person, upon certain trusts therein declared; and she appointed two executors, one of whom was one of the trustees to whom she had directed that the trust fund should be transferred. The mother died before the testatrix, whereby the appointment in her favor failed; and it was held the sum was not well appointed by that part of the will of the testatrix which disposed of the residue of the stock or funds, and that it fell into the residue of the original testator's estate. *Easum v. Appleford*, 5 Myl. & C. 58, 10 Sim. 274, 10 L. J. Ch. N. S. 81.

A testatrix gave and devised her freehold and copyhold estates to the use of one, his heirs, and assigns, upon trust to permit a woman to receive the rents for her life for her own use and benefit, and, after her death, upon trust to sell and dispose of the same, and out of the produce thereof, among other things, to pay a certain sum, and the sum was thereby bequeathed to such person or persons as such tenant for life should by her last will appoint. The latter survived the testatrix, and made her will, whereby she bequeathed the sum, and likewise the whole of her household furniture, plate, and linen, etc., to one whom she appointed her executor, who proved the will, and thereafter filed a bill charging that the last testatrix, at the time of her death, was not possessed of, or entitled to, any personal estate whatever, except a few articles of household furniture, which were sold and the produce applied in payment of the funeral expenses. It was held that the

will was not an execution of the power under the will of the original testatrix. *Jones v. Tucker*, 2 Meriv. 533. The master of the rolls said that "the question is of considerable importance." With reference to the general rule, to which it is sought to make it an exception, it is, assuming the statement to be true, perhaps as strong a case as can be brought before the court. If a person, having no property at all, and only a power over a certain sum of money, gives that single sum, little doubt can arise as to the intention. . . . Here it is alleged that the testatrix had no property, except a few articles of household furniture which she has specifically bequeathed. Some property, however, she had. She speaks of rent due to her, as well as household furniture, plate, and linen. . . . A will of personality speaks at the death. The state of that description of property at the time of the will does not furnish the same evidence as to the intention."

Where a testator by his will left a sum of money for the benefit of a married woman, to be paid to her father, if living, for her use and benefit, and with a power of appointment by her father for her separate use and provision for the benefit of her and her children, and the father made his will giving her a special legacy, and then gave to his trustees and executors all his money, and personal property to convert into money, and directed the residue after payment of debts and expenses, together with the produce and estates which he had directed to be sold, to be distributed into two equal shares, and gave one moiety in trust to his said daughter during the joint lives of herself and her husband, to her separate use, and, after the death of her husband in her life, to pay her a certain annuity for her life, and subject to such annuities as to the capital, in trust for all her children born or to be born, equally, and in case no child should attain a vested interest, in trust for another,—it was held that, as this will had no reference to the power, and from the nature of it could only be considered, not as executing the power, but as a disposal of his own fortune, the father must, therefore, be considered as having in his hands the sum mentioned which he received under the will of the original testator, and as having died without executing the power in such a manner that the court could say how he had executed it. *MacLeroth v. Bacon*, 5 Ves. Jr. 159, 5 Revised Rep. 11.

Where a testator by his will left to trustees a trust fund to pay the dividends to his daughter for her life for her separate use, and, after her decease, for her children, as she should by deed or will appoint; and thereafter a deed was executed between the daughter and trustees, whereby it was declared that the trustees should stand possessed of four other sums of money and the securities therefor, to pay the income to the grantor during her life for her separate use, and after her decease to her husband and children as she should appoint by deed or will; and she afterwards married, and her husband confirmed the settlement, and thereafter, upon the birth of her first child, she made her will providing that, in the event of her leaving children, her husband should enjoy the interest of her property during his lifetime and at his death to his children; and at her death leaving her husband and three children surviving her, she was entitled to a certain sum, being the proportionate part of the income of the several trust funds settled upon her as above

mentioned; and she also had a reversionary interest in some trust moneys contingent on the death of her mother intestate, and her mother survived her,—her will did not operate as an execution of the power contained either in the settlement or in the will of the father. *Evans v. Evans*, 23 Beav. 1, 26 L. J. Ch. N. S. 193, 3 Jur. N. S. 7, 5 Week. Rep. 169.

Where a testator devised and bequeathed his estate to his executors in trust to hold the same during the life of the survivor of his children, and thereafter until his youngest grandchild living at the death of such surviving child should arrive at lawful age, and to pay certain annuities to his children; and further, that on the death of a child leaving issue the said executor should hold the share of the child so dying for the use of the issue in such proportions as the said child should appoint by will, but subject to the trusts before mentioned; and one of said children, by his will, gave his estate in equal shares to his three children absolutely,—each of said children, by virtue of both wills, acquired the absolute ownership of the share appointed to him or her, though possession of the legal estate could not be had until the termination of the trust created by the original will. *Re Lafferty* (Pa.) 57 Atl. 1112.

See also *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479, *supra*, I. a; *Re De Lusi*, Ir. L. R. 3 Eq. 232; *Banks v. Banks*, 17 Beav. 352, 1 Week. Rep. 511,—*supra*, I. b.

2. Circumstances surrounding donee.

But absence of interest in the donee of a power of appointment by will is not the only ground or reason which will render a general provision in the will by which it is claimed the power has been exercised effectual as an execution thereof. In the cases which directly follow, it will be seen that various circumstances surrounding the donee at the time of the execution of the will may show so conclusively an intention on his part to exercise the power as will be held to be a valid execution of it.

It is competent to permit facts to be shown and considered by which a comparison may be made with the amounts disposed of by the will of a testator having a power of appointment by will with the testator's own property, and to infer that he intended to exercise the power from the fact that the gifts in his will would not be available without resorting to the property which was the subject of the power. *White v. Hicks*, 33 N. Y. 383, *Affirming* 43 Barb. 64.

In the above case the court of appeals discussed the question whether it was proper to compare the dispositions of the will with the state of the testator's property at the time it was executed, for the purpose of deducing an intention to dispose of property which the testator did not own, but which he had a right to dispose of under a power; and stated that the terms in which the principle that the intention to exercise the power is to govern in determining in a given case whether it has been executed would admit of such a comparison, and, in many probable cases which might be put, would demonstrate, without the possibility of mistake, that such an intention existed, giving example of one possessed of a mere modicum of property, but clothed with a power to dispose of a large amount, bequeathing pecuniary legacies, sums corresponding with the amount disposable under the power. It would be perfectly evident that he relied wholly on the power of

appointment to give effect to the testamentary act; and yet, if the circumstances could not be inquired into, the intention could not be shown, and the will would be inoperative. The opinion then goes on to discuss the English case of *Andrews v. Emmot*, 2 Bro. Ch. 297, *supra*, I. b, c, at considerable length, stating, as a reason for doing so, that it was the first case met with which determined that the amount of the property, at the date of the will, cannot be inquired into, and because the case is very generally referred to in the subsequent cases as the foundation of the rule. The court said that that case was correctly decided, as the question under discussion was not the prominent question there; but that in *Nannock v. Horton*, 7 Ves. Jr. 302, *supra*, I. b, the principle that the amount of property at the time of making the will could not be regarded in ascertaining whether the power was intended to be executed was carried to an extreme length. In that case Lord Eldon said: "I am not sure, the rule does not oblige the court to act against what probably might have been the intention nine times in ten;" and, speaking of *Andrews v. Emmot*, 2 Bro. Ch. 297, *Standen v. Standen*, 2 Ves. Jr. 589, and *Hales v. Margerum*, 3 Ves. Jr. 299, *supra*, I. d, i, said that they were "'clear and distinct and positive, and express, to the point, that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was executing the power or not,'" and concluding "by saying that 'whatever might have been the intention, I am bound by the authorities to say, this testator did not mean to affect any property but what was his own.'" The court then proceeded further to say that "after this very emphatic judgment of the eminent chancellor, it was not to be expected that any English equity judge would depart from the rule thus laid down." The court then discussed other English cases holding the same way, in one of which the judge delivering the opinion said that he did so only because forced to by the rule only in holding that the testamentary disposition was not an exercise of a power, saying that in his private opinion he thought the intention was to so exercise it, but he felt bound by the rule; and of another, who said that he must, although almost ashamed to say it, decide, against what he firmly and sincerely believed to be the intention of the testatrix,—that the power of appointment had not been exercised, but that he was bound, however, by the authorities; that he could not help himself and must so decide. The court proceeded further to say that these cases which held that the state of the property of a testator cannot be taken into account in determining whether he intended to execute a power over personally were determined since the judgments of the English courts ceased to be authoritative precedents with us, and that they could find no distinct statement of that doctrine prior to the revolution. That *Clere's Case*, 6 Coke, 17b, *supra*, I. d, i, which is often cited in this connection, had very little, if any, bearing upon the question, as the circumstance which, in that case, prevented the devise from taking effect on a testator's interest as owner, was, that he had exhausted his disposing power as owner by the gift of two thirds of his lands to his wife. The court said that this rigid and impolitic rule had been abrogated by the statute 7 Wm. IV. & 1 Vict. chap. 26, § 27, which also contained a similar provision in regard to wills of real estate, parlia-

ment following in the last-mentioned provision the act of 1830 (1 N. Y. Rev. Stat. 737, § 126), and that the New York courts ought not to follow a rule thus condemned, and which had been abolished in the country by whose courts it was established.

Where a will is claimed to be effectual as an execution of a power, all parts of it may be considered and its language and terms construed in the light of circumstances surrounding the testator at the time of the execution of the will; and if, from all this, it can be seen that it was his intention, in the dispositions he made, to execute the power, such intention will have effect, and the power need not be referred to in express terms. All that is necessary is that it can be seen that he intended to dispose, not only of the property which he owned in his own right, but of property which he had the right to dispose of just as effectually as if he did own it, under the power of appointment. *Hutton v. Benkard*, 92 N. Y. 295.

In considering the question whether a power of appointment has been exercised by a devise in a will when the subject of the power is real estate, it is the well-settled doctrine that you may always look at the condition of the property and the facts *dehors* the will to arrive at the intention of the testator; and, where a woman held, under the will of her deceased husband, a life estate in two thirds of the south 30 feet of a lot, with power to dispose of the same as she thought fit, the fact that, after the death of her husband, she purchased the other undivided one third in fee, and the same was conveyed to her in fee, that she also purchased other real estate in fee, and that, at the time of the execution of her will and of her decease, she held the entirety of the said south 30 feet, one third in fee simple absolute, and the other two thirds for life with full power of disposition by will,—there could be no judicial presumption that at the time she made the devise she had forgotten that she owned this 30 feet, or by what tenure she held it, or that she had the power of appointment, under the will of her husband, as to the undivided two thirds. These circumstances, in connection with the fact that the undivided two thirds of this small piece of land would, in the event of it being held that she did not intend to exercise the power, be divided among 222 heirs of her husband, together with the fact that she by the same will bequeathed in general terms as her property a watch and a quantity of furniture which had belonged to her husband, to which she made some additions after his death, and over which, by his will, she also had a power of appointment,—considered together, clearly show an intention on her part to exercise the power. *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136.

Where a woman under her husband's will was vested with a life estate in lands, coupled with the power of fully disposing of the fee by devise or bequest if she so desired, and, by the preamble in her will, she stated that she made it "in pursuance of and more fully to carry out the provisions of the last will of my late husband," this, coupled with the fact that the person who, by the will of the husband, would have taken in default of appointment died previous to the execution of the wife's will, made it apparent that her will disposing generally of all her property was a due execution of the power. *Rnilderick v. Wright*, 148 Ind. 477, 47 N. E. 981.

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Where a woman having, by the will of her husband, the power to dispose of one half of his residuary estate, executed her will, by which she gave to a seminary all the rest, residue, and remainder of all her estate, the question was whether she meant to exercise all her disposing power, and it was held that the inference from the will was that she did not understand it to be necessary or useful to distinguish between an estate in remainder and an unlimited power over such estate, or between property that would go to her heirs if she did not otherwise direct, or property that would go to them on her order; and that the gift to the seminary was a valid exercise of the power. *Kimball v. New Hampshire Bible Soc.* 65 N. H. 139, 23 Atl. 83-85. The court said that her proprietary interest, her actual and rightful possession, use, and management, and her right of appointing legatees are competent evidence of the sense in which she used the words "my estate" in the residuary clause; and that upon this, and all the competent evidence in the case, it was more probable than otherwise that she intended to exercise her entire testamentary authority, of whatever legal nature or natures it might be. And that her intention was not defeated by the rule of construction adhered to by the English courts previous to the passage of the statute 7 Wm. IV. & 1 Vict. chap. 26, § 27.

A settlement provided that the tenant for life might appoint to children, or any of them, two sums, one in consols and the other in new £ 3 per cents. He gave by will, without referring to the power, the money he had in the consols and new £ 3 per cents. The only other property he had was a sum of £144 in consols, his title to which was disputed at the date of the will, and an interest in a trust fund of a son who had died during his life. It was held that the circumstances in connection with the words of the will showed that it was not his intention to describe either of these two last-named interests, and that the will was a good appointment. *Rooke v. Rooke*, 2 Drew. & S. 38, 31 L. J. Ch. N. S. 636, 6 L. T. N. S. 527, 10 Week. Rep. 435.

The will of one having the power to appoint by such an instrument a certain sum, which gives and bequeathes different sums of money, amounting in all to exactly the sum of which he had the power of appointing, but which makes no allusion to that power, and contains no words which would indicate his intention to execute it, is, nevertheless, a good execution of the power; but the lord chief baron in this case at first said that he did not see how he was to get at the real point in the case, unless he was at liberty to look at what was the intention of the testator, and the state of his property at the time of declaring that intention; that he was inclined to think that the will was a good execution of the power, but did not at first decide. But, on a subsequent day, stated that he had looked into the cases, and continued in his former opinion. *Lownds v. Lownds*, 1 Younge & J. 445.

The following two cases would seem to differ from the foregoing:

Where a testatrix in her marriage settlement had a power of appointment by deed or will among the children of her marriage over property settled, in default of appointment, among such of the children of the marriage as, being sons, should attain the age of twenty-one, and, being daughters, should attain that age or mar-

ry; and there were only two children of the marriage,—a son who died under age before the date of the will, and a daughter; and the will gave, devised, and appointed all the real and personal estate of the testatrix whatsoever and wheresoever, and all other real and personal estate of or to which she should at her death be seised or possessed, or over which she should at her death have a power of appointment or disposition by will, unto her trustees upon trust, at their discretion, to sell and, after payment thereof of her debts and funeral and testamentary expenses, to stand possessed of the balance upon trust to invest the same during the minority and spinsterhood of her daughter for her maintenance, and to accumulate the surplus; and on the said daughter attaining the age of twenty-one or marrying, the whole for her life with remainders over,—such will is not a valid execution of the power. The court cited *Von Brockdorff v. Malcolm*, L. R. 30 Ch. Div. 172, 55 L. J. Ch. N. S. 121, 53 L. T. N. S. 263, 33 Week. Rep. 934, *supra*, I. b, and approved the statement in that case that the simple question is, whether there can be found in the will itself such an indication of intention to exercise the power that the court should hold that it has been exercised; that it is a question of intention and a question of intention only; and that there was quite sufficient in this case to distinguish it from the cases of *Re Swinburne*, L. R. 27 Ch. Div. 696, 54 L. J. Ch. N. S. 229, 33 Week. Rep. 394, *supra*, I. b, and *Re Davies*, L. R. 13 Eq. 163, 41 L. J. Ch. N. S. 97, 25 L. T. N. S. 785, 20 Week. Rep. 165, *infra*, I. d, 3. *Re Cotton*, L. R. 40 Ch. Div. 41, 58 L. J. Ch. N. S. 174, 37 Week. Rep. 232.

One having a life estate under the will of another, with a power of disposition, in order to execute such power must indicate the intention to do so on the face of the will by which it is claimed it is executed, because it is clear that the court cannot look beyond the will, whatever is the inadequacy of a testator's property, to satisfy the terms of the will; and, whatever may be the conviction of the court of his intention to execute the power, the state of his personality at the time of the will, or of the death, cannot be examined for the purpose of collecting evidence of his intention. *Jones v. Curry*, 1 Swanst. 66, Wils. h. 24.

8. Under statutes.

The reluctance with which the English and American judges enforced the old rule of the common law,—Lord Eldon saying in one case: "I am not sure, the rule does not oblige the court to act against what might have been the intention nine times in ten" (*Nannock v. Horton*, 7 Ves. Jr. 398, *supra*, I. b)—resulted in the enactment of statutes in several of the states and in Great Britain, to the effect that a general devise or bequest in the will of a testator should be construed to extend to any property which the testator might have power to appoint, and should operate as an execution of such power, unless a contrary intention should appear by the will. These statutes are, in substance, identical. The New York act, which in terms applies to lands, has been held by the courts of that state to extend the same rule to personality. Previous to the adoption of these statutes, however, the states of Massachusetts and New Hampshire had declined to follow the old rule of the common law, and held that a general devise or bequest would operate to execute a gen-

eral power of appointment. (See Massachusetts and New Hampshire cases in *supra*, I. a.) It must be remembered, however, that the statutes and Massachusetts rule apply only to cases in which the power of appointment is general; and that, as will be seen in the cases which follow, in all instances where the power is limited or restricted in its creation the decision of the question whether or not it has been duly executed by the will of the donee thereof must be determined by the original rules.

The presumption of law under the act 7 Wm. IV. & 1 Vict. chap. 26, § 27, is that a general devise or bequest shall operate so as to pass everything over which the testator has a power of appointing, unless a contrary intention shall appear by the will; and so where, by a marriage settlement, certain leasehold property was limited upon trust to pay the rents to the wife during her life, and, after her decease as the husband should by his will appoint, and he made his will, and, after making provisions for his only child, a son, proceeded to give all his other personal property, describing it generally, and his leasehold message or tenement and premises, and all other his estate, property, and effects whatsoever which he should be possessed of or interested in or entitled unto, at his decease, subject to the payment of the legacies, and also subject, as to such parts thereof respectively as were comprised in the indenture of the marriage settlement, to his wife absolutely,—this was held to be a valid exercise of the power of appointment in the settlement. The testator died leaving his widow and his son, the only child, him surviving, and thereafter the son died leaving a widow, and administratrix, and three children, and it was claimed on behalf of the administratrix that the words "subject to the settlement and the trusts thereby declared," and that the settlement was expressly ratified and confirmed in all respects in the very clause contained in the bequest of the wife, amounted to a clear indication of intention on the part of the testator that his will should not operate as an execution of the power; but the court held that, by adopting such construction, he would be forcing the words of the will, that construction amounting, in effect, to this,—that, by subjecting the bequest in his will to the trust in the settlement the testator meant to exclude from the operation of the will the entire property comprised in the settlement; that the trusts of the settlement were for the widow for life, and, after her decease, for such person as the testator should by will appoint, and that he did appoint by his will; that in this construction of the will the bequest is as much subject to the trusts of the settlement as if no appointment had been made, and the property had been left to go as in default of appointment. *Hutchins v. Osborne*, 4 Kay & J. 252, 3 DeG. & J. 142, 27 L. J. Ch. N. S. 421, 4 Jur. N. S. 830, 6 Week. Rep. 246.

Whether wise or not, or well founded or not, the notion in act 7 Wm. IV. & 1 Vict. was, that it is more probable that the testator's general intention will be carried out by including in a sweeping general devise all lands over which he had any sort of testamentary power, than by excluding those over which he had only a power, just as a testator may be taken to intend to pass, by such a general devise, real property which he had almost forgotten. *Walker v. Banks*, 1 Jur. N. S. 606.

In *Phillips v. Cayley*, L. R. 43 Ch. Div. 222, the court referred to a decision by Mr. Justice

Kay in *Charles v. Burke*, 60 L. T. N. S. 830, a note of which is appended to the report, in which he stated that that judge avoided a difference from Mr. Justice North in *Re Marsh*, L. R. 38 Ch. Div. 630, 57 L. J. Ch. N. S. 639, 59 L. T. N. S. 595, 37 Week. Rep. 10, *infra*, II. c. by deciding the point before him on different grounds which were satisfactory to his mind; but that he certainly did very much doubt the soundness of Mr. Justice North's decision in the case last mentioned, and called attention to the fact that Mr. Justice Chitty, in *Re Phillips*, L. R. 41 Ch. Div. 417, 58 L. J. Ch. N. S. 448, 60 L. T. N. S. 808, 37 Week. Rep. 504, *infra*, I. e., while distinguishing that case from *Re Marsh*, said that it seemed to him that the words of the power in the two cases were so exactly alike that the distinction was one of considerable difficulty, and that, in view of the opinions of these two judges, while he would ordinarily deem it his duty to follow the decision of the judge of co-ordinate jurisdiction he had no hesitation in declining to do so here and acting upon what his own opinion was, and that opinion differed from that expressed by Mr. Justice North in *Re Marsh*.

Where a person has a power of appointment of a sum named, a bequest of all his personal estate and effects whatsoever and wheresoever will be an exercise of the power under the statute 7 Wm. IV. & 1 Vict. chap. 26, § 27. *Bush v. Cowan*, 32 Beav. 228.

Under the statute 7 Wm. IV. & 1 Vict. chap. 26, a bequest of the residue of the personal estate of the testator is a valid exercise of the power of appointment by the testator of a sum of money. *Clifford v. Clifford*, 9 Hare, 673.

Where, by her marriage settlement, the wife's father settled certain real estate to her use for life, and, in default of issue of the marriage, to the use of such persons as she should by will appoint; and the settlement contained a power to the trustees to sell the real estate and invest it in government securities to like uses; and, by his will which he had previously executed (and afterwards by a codicil confirmed, subject to the settlement, and shortly thereafter), devised the property subject to the settlement and all his other real estate to the use of his said daughter for life, and in default of her having any issue, to such uses as she should by will appoint; and, her father and husband having both died, there having been no issue of the marriage, the trustees at her request sold all the settled real estate and transferred the proceeds, government stock, to her.—It was held that her will, made shortly after the transfer of the stock to her which bequeathed all the residue of her personal estate and effects whatsoever to two persons absolutely, her personal estate outside of the government stock mentioned not amounting to enough to pay the pecuniary legacies, must be construed with regard to § 27 of the wills act and 1 Vict. chap. 26, and read as an appointment of all the government and other funds and personal property which she had; and that it operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and her father's will, and passed the stock. *Chandler v. Pocock*, L. R. 15 Ch. Div. 498, 49 L. J. Ch. N. S. 442, 43 L. T. N. S. 112, 28 Week. Rep. 806.

A testatrix having, by the will of her father, power by her will to appoint any sum or sums of money not exceeding altogether a certain

amount, who, by her will, devised and bequeathed all her estates, real and personal, which she might die possessed of or entitled to unto her daughter, whom, and her husband, she appointed executors of her will, thereby exercised the power of appointment; and, by force of the 27th section of the act 7 Wm. IV. & 1 Vict. chap. 26, the general devise and bequest in her will operated as such exercise to the extent of the amount limited in the power of appointment contained in her father's will. *Re Jones*, L. R. 34 Ch. Div. 65, 56 L. J. Ch. N. S. 58, 55 L. T. N. S. 597, 35 Week. Rep. 74.

Under the statute 7 Wm. IV. & 1 Vict. chap. 26, § 27, which enacts that a general devise shall include all property over which the testator had a general power of appointment, a will purporting to exercise a general power executed before a deed-poll, which assumes to exercise it in a different manner, has the effect of being a valid exercise of the power by virtue of § 24, which provides that every will shall, as to the property comprised in it, speak and take effect as if it had been executed immediately before the testator's death. *Alrey v. Bower*, L. R. 12 App. Cas. 263, 56 L. J. Ch. N. S. 742, 56 L. T. N. S. 409, 35 Week. Rep. 657.

Under the statute 7 Wm. IV. & 1 Vict. chap. 26, a will of one having the power to appoint a share of the estate given under the will creating the power, which directs the payment of the testator's debts, and then gives pecuniary legacies, and declares that if, after the payment of the debts and funeral and testamentary expenses, there is not sufficient remaining to pay and satisfy all the legacies in full, the latter shall abate ratably, operates as an execution of the power, and there is a good appointment to the executor. *Wilday v. Barnett*, L. R. 6 Eq. 193, 16 Week. Rep. 961.

Where a woman having a life interest in the whole, and a general power of appointment over a moiety, of the residuary estate of her late husband, made her will by which she directed that her debts and funeral expenses should be paid and discharged, and gave the rest, residue, and remainder of her moneys in the funds, and all moneys due her on mortgage or otherwise, and all her personal estate wheresoever and whatsoever of which she should die possessed, or have any title to or interest in, to her two sisters and two brothers equally, and one brother and one sister died in the lifetime of the testatrix, this was held to be an appointment which, under the old law, as well as the new, would make the appointed funds assets for debts to the extent of any deficiency of the appointor's personal estate. The vice chancellor, in deciding the case, said: "It must also, I think, be considered settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective; and even that, where a testator having such a power makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet been decided that an appointment of an executor without more would, since the wills act (1 Vict. chap. 26), make the fund assets; and so to hold would appear to give a very unnatural construction to § 27 of the wills act as to the

execution of powers by a general disposition. Having regard to the 27th section, it seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual. The difficulty lies in extending this rule to cases where the direction is ineffectual." *Re Davies*, L. R. 18 Eq. 163, 41 L. J. Ch. N. S. 97, 25 L. T. N. S. 785, 20 Week. Rep. 165. This case has, since the decision was made, not infrequently been cited as an authority on the subject of whether there had been a valid execution of the power or not, but an examination of it indicates that the only question in the case was whether the next of kin of the testatrix, or those of her husband, the donor of the power, took the portion bequeathed to the brother or sister who died before the testatrix, and whose legacies therefore lapsed. And it is not easy to see why the foregoing quoted language of the vice chancellor can be claimed to be authority, as there did not seem to be any question but what the appointment was a valid one; but the real question in the case was as to the effect of it.

By a marriage settlement certain property was assigned to trustees upon trust for the husband for life, with remainder to the wife for her life, and after the death of the survivor upon trust for the issue of the marriage, and in the event of there being no issue of the marriage, and if the husband should survive his wife, then, after the decease of the husband so surviving and such failure of issue, upon such trust and subject to such powers as the wife by her last will and testament should from time to time, notwithstanding her coverture, direct or appoint, with a provision that, in default of appointment, it should go to the persons entitled under the statutes of distribution. There was no issue of the marriage, and the wife died leaving her husband surviving, after having made a will by which she bequeathed a certain sum to a person therein mentioned, and appointed her brother executor of her will. At the date of her will, and at her death, the property subject to the trust of the settlement amounted to about the sum named in her will, and she had no other property in her own right which she had any power to dispose of by will, save, only, these funds. It was held that her will was a good execution of the power; that the fact that the words of the will imported a mere pecuniary bequest, and contained no disposition of the residue, was of no consequence, and the testatrix knew of what her property consisted when it was settled it was a share of money, and she made a will giving a sum of money to a person; that she obviously considered that the bequest would be paid out of the property of which she had the power of disposing; and that the distinction between property and power did not exist in the present case as it did in *Evans v. Evans*, 23 Beav. 1, 26 L. J. Ch. N. S. 103, 3 Jur. N. S. 7, 5 Week. Rep. 169, *supra*, I. d. 1. *Shelford v. Acland*, 23 Beav. 10, 26 L. J. Ch. N. S. 144, 3 Jur. N. S. 8, 5 Week. Rep. 170. The master of the rolls then proceeded further to say that the statute 7 Wm. IV. & 1 Vict. chap. 26, had clearly no application to *Evans v. Evans*, which was not the case, as this was, of a general power of appointment to which alone the statute refers; and that in this case he did not think it necessary to have recourse to that statute to support the validity of this bequest as an execution of the power.

er; and that this case was governed by the decision in *Curtels v. Kenrick*, 3 Mee. & W. 461, 7 L. J. Exch. N. S. 169, *infra*, II. a. 1.

Where a testatrix invested with the power of appointment had no personal estate of her own sufficient to pay legacies which were bequests of personal property in her will, such bequests were an exercise of the power of appointment of personal estate under the 27th section of the act, 7 Wm. IV. & 1 Vict. chap. 26. *Hawthorn v. Shedden*, 3 Smale & G. 293, 25 L. J. Ch. N. S. 833, 2 Jur. N. S. 749.

Where the donee of a power of appointment by will, by her will, gave one half of her property which she might be possessed of or entitled to at the time of her decease, this was held to be a good appointment under 7 Wm. IV. & 1 Vict., providing that a will which gives the personal estate of a testator is that of which he is possessed or to which he is entitled. *Frankcombe v. Hayward*, 9 Jur. 344.

A power of appointment by will to any persons without limitation is a general power of appointment within the meaning of the wills act, and a general devise or bequest will be a valid exercise of it. *Re Powell*, 39 L. J. Ch. N. S. 188, 18 Week. Rep. 228.

Where there is a power given by deed to dispose of property by executing an appointment, the law always requires evidence of an intention to execute the power, in order to make any alleged appointment under the power effectual as a valid appointment; but the wills act has, in the 27th section, altered the law in this respect, and has said that, where there is a general power of appointment, a general disposition of property by will shall be held to be an execution of that power and to pass the property, unless a contrary intention appears by the will. That enactment supplies an intention, and construes a will as an appointment, unless the will itself declares a contrary intention. *Moss v. Harter*, 2 Smale & G. 458, 18 Jur. 973, 2 Week. Rep. 540.

The provision of the 27th section of chapter 26, 7 Wm. IV. & 1 Vict., which, in effect, enacts that a general power of appointment by will may be exercised by a general devise, was not intended to overlook or alter the distinction between property and power; but, on the other hand, it was intended to recognise that a general power of appointment, though in technical character certainly different from property, is, in substance and practice, so nearly resembling it that injustice might easily be done by preserving technical rules and insisting on their application. The act says, in effect, that one who has a general power of appointment—that is, a power to dispose of property in any way he thinks fit—is really the owner in fee simple of the property the subject of the power, and, that being so, it is only right and fair that he should be at liberty to devise the property, and to exercise over it the right of ownership, instead of exercising the power of appointment. *Re Byron* [1891] 3 Ch. 474, 60 L. J. Ch. N. S. 807, 65 L. T. N. S. 218, 40 Week. Rep. 11.

Ky. Gen. Stat. 1888, chap. 113, § 22, provides: "A devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." By virtue of the provisions of this section, where

property had been devised to one for life and after his death to such uses as he might appoint by will, a devise by the donee of the power of "what little property I have after the payment of my debts" is a valid exercise of the power of appointment. *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, 609.

In *Bolton v. DePeyster*, 25 Barb. 539, Mitchell, P. J., in alluding to the provision of the New York Revised Statute (1 Rev. Stat. 737, chap. 126), said that by that statute "lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power shall appear, expressly or by implication;" and that this clause was introduced to put an end to the uncertainties previously existing whether a power was intended in each particular case to be exercised or not; that it laid down a clear rule which he was of opinion the courts must apply also to personal estate.

In *Hutton v. Benkard*, 92 N. Y. 295, the court quoted and approved *Bolton v. DePeyster*, 25 Barb. 539, and what was said by Mitchell, P. J., in that case, and further said that clearly, in the nature of things, there was no reason why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power; and that, hence, it was of opinion that the rule laid down in § 126 of 1 N. Y. Rev. Stat., 737, in reference to the execution by will of a power as to real estate, should also be applied to personal estate.

In *Lockwood v. Mildeberger*, 159 N. Y. 181, 53 N. E. 803, the power was created by the will of a testatrix by which she bequeathed one sixth of her residuary estate to her executors in trust to apply the income to the use, maintenance, and education of a granddaughter, and upon her death the one sixth was bequeathed to the living issue of the granddaughter then surviving, and in default of such issue to the then surviving issue of the testatrix, etc., but providing that, if such granddaughter should die without leaving lawful issue, she was empowered to dispose of one half of the said sixth power to any surviving husband by a last will and testament. The granddaughter was fifteen years of age at the time of the death of the testatrix, and nearly sixteen years later, married, and on that date executed a will by which, after making certain general and specific bequests, she devised to her husband certain real estate, and then gave the residue and remainder of her estate, real and personal, to any child or children that might be born to her in equal shares, and then provided that, if she died without issue, then all said rest, residue, and remainder of her estate should go to her husband. It was held that by the former § 126 of the New York statute of powers, now § 156 of the real property law (Laws 1896, chap. 547), the common-law rule, that whether a particular disposition should be treated as the execution of a power was a question of intention, and that the several provisions of a will should be carefully considered for the purpose of ascertaining whether the party really meant to execute the power or not, had been changed by this legislative enactment, by which it was provided that lands embraced in a power to devise shall pass by a will purporting to convey

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all the real property of the testator, unless the intent that the will shall not operate as an execution of the power shall appear, expressly or by necessary implication; and that the will was a valid exercise of the power of appointment. In doing so, the court followed *Hutton v. Benkard*, 92 N. Y. 295, that the rule laid down in the section mentioned touching the execution by will of a power as to real estate should be applied to personal estate also.

And in *Hogle v. Hogle*, 49 Hun. 313, 2 N. Y. Supp. 172, the court adopted the rule laid down in *Bolton v. DePeyster*, 25 Barb. 539, and followed in *White v. Hickes*, 33 N. Y. 383, affirming 43 Barb. 64, *supra*, I. d. 2, that the provision of the Revised Statute, that a general devise will be a good exercise of a power to dispose of real estate by will, unless a contrary intention was expressed or be ascertained by a necessary implication, should apply also to personal estate. In this case a woman who had the power to appoint a portion of an estate, who specifically bequeathed certain personal property, which was all that she had, and then made a general devise and bequest, was held to have intended to execute the power.

In *Thomas v. Snyder*, 43 Hun. 14, it was held that the general language of a will is an adequate execution of a power conferred upon the testatrix to dispose of property by will.

Where a testatrix, who, by the will of another, had a life estate in certain property, with the power of disposing of the same by will, executed her will, in which she gave, devised, and bequeathed her property, and directed to what persons and in what shares her estate should be given, this was a valid exercise of the power. *Kibler v. Miller*, 57 Hun. 14, 10 N. Y. Supp. 375.

A testator, by his will, gave and bequeathed to his wife for life all his estate, both real and personal, and authorized and empowered her to lease, sell, give, and devise the whole or any part thereof, as, also, to convey title to real estate, as might seem proper to her. His property at the time of the making of the will, and at the time of his death, consisted of money and securities and the house and lot where he and his wife resided. By her will the wife gave, devised, and bequeathed her property in equal shares to her brothers and sisters. It was held that the word "devise," in the will of the husband, gave the power to dispose of all his property to the wife by will, and that her will was an execution of that power; that, although the word "devise" is commonly applied to the gift of real estate, it is not always; and that it is frequently used in the same sense as bequeathed, and, among unprofessional persons, applies to all kinds of property,—real, personal, and mixed. *Kibler v. Huver*, 10 N. Y. Supp. 375.

A testator, previous to making his will, executed a deed of trust, whereby he transferred to the trustee certain real and personal property to receive rents and income during his life, and after his death to convey and assign it to such person or persons, and in such shares, as should be designated and appointed by his last will and testament. Thereafter he made his will, in which, after giving a single legacy, he gave and bequeathed to an uncle all the rest, residue, and remainder of his estate, both real and personal property, of what nature and kind soever and wherever situate, which he might own or be in any manner entitled to at the time of his death, and this was held to be

a good execution of the power of appointment contained in the prior trust deed. *New York Life Ins. & T. Co. v. Livingston*, 133 N. Y. 125, 30 N. E. 724, Affirming 39 N. Y. S. R. 159, 14 N. Y. Supp. 902.

Where, by his will, a testator directed his trustees to invest a sum and apply the income thereof to the use of his sister during her life, and, upon her decease, to the use of another for life, unless she should by her last will and testament have made a different disposition of the sum which she was thereby empowered to do; and she died after the testator, leaving a will by which she gave all her property to the person who, by the will of the original testator, was to have the remainder for life absolutely,—this was held to be a valid exercise of the power, although no other testamentary disposition of her property, or of any part thereof, was made by her, and the will did not contain any reference whatsoever to the power of appointment. *Bigelow v. Tilden*, 18 Misc. 689, 43 N. Y. Supp. 858.

By a clause in the will of a testator a trust fund was created for the benefit of a son during his life, and after his death to his children, and, on default of children, to such person or persons and in such manner or form as he should by his last will and testament limit or direct. It was not apparent that the trust fund was any different from other individual property of the donee. He had no children, and left all his property to his wife after a few legacies to others. The court said: "The subject of a reference to the power in the disposition of property is thoroughly discussed in *White v. Hicks*, 33 N. Y. 383, *supra*, I. d. 2, where the conclusion is reached that a general bequest includes a personal estate which the testator had the power to appoint by will, and that the will will be held to execute such power where there is no contrary intention apparent from the will." *Re Watson*, 34 N. Y. S. R. 906, 12 N. Y. Supp. 115. The language shows clearly that this was under the New York statute.

The true rule as to whether a power of appointment has been duly exercised is, that a gift of all one's real or personal estate will not include real or personal estate settled on testator for life, with remainder as he should by deed or will appoint, and, in default of appointment, for his children; there must be a reference, either to the power intended to be executed, or to the property which is the object of the exercise. *Vaux's Estate*, 11 Phila. 57. The court said that, if there were statutes in Pennsylvania similar to 7 Wm. IV. & 1 Vict. chap. 26, § 27, the will in this case would be held a valid execution of the power, and, as practically the same statute was enacted in 1879, such a will would undoubtedly now be held to exercise the power.

The effect of the act of June 4, 1879, of the Laws of Pennsylvania is such that where one invested with the power of appointment devises and bequeaths his estate, he devises as well that estate covered by the power; and in this case, where he gave this joint estate according to the intestate law, he gave it to those persons who, according to that law, would have taken his estate. *Howell's Estate*, 185 Pa. 350, 39 Atl. 966.

While the will of the donee of a power of appointment which purports only to pass the estate of the donee would, previous to the statute 64 L. R. A.

of Pennsylvania of June 4, 1879, have been insufficient as an exercise of the power, that statute, which provides that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."—makes such a will a valid execution of the power, and this notwithstanding the statute was passed after the date of the will, if the testatrix died after it went into effect. The argument that, inasmuch as the statute was not in existence when the will was executed, the testatrix could not have had it in contemplation when she made the will, ignores the purpose of the act, which was to make a general will execute the power in all cases when a contrary intent does not appear upon the face of the will. *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336.

The common-law rule that, where a will which it is claimed executes a power of appointment neither refers to the power nor to the property embraced in it, and there is nothing to show an intention on the part of the testator to execute it, it does not exercise the power, has, to a certain extent, been altered by the statute in Virginia (Code, § 2526) which enacts that "a devise or bequest shall extend to any real or personal estate (as the case may be) which the testator has power to appoint, as he may think proper, and to which it would apply if the estate were his own property; and shall operate as an execution of such power, unless a contrary intention shall appear by the will." And where a testatrix was empowered to appoint the property as she chose (i. e. to whom she chose), the residuary clause in her will operates, by force of that statute, as an execution of the power, a contrary intention not appearing by the will. *Machir v. Funk*, 90 Va. 284, 18 S. E. 197.

A power to dispose of property by will is not exercised where the donee, by his will, in no manner refers to it, and the will contains provisions inconsistent with the authority and purpose for which the power was created, and the provisions of the will naturally apply to the individual property of the donee without regard to the property and estate which is the subject of the power, all being consistent with the apparent object of the creator of the power, because there will be a necessary implication of an intent on the part of the testator and donee of the power not to exercise it. *Stewart v. Keating*, 15 Misc. 44, 36 N. Y. Supp. 913.

This is under 1 N. Y. Rev. Stat. 737, § 126, that a general disposition will be an exercise of a power, unless an intention not to do so is expressed, or appears by necessary implication.

Where, by a settlement, one declared that the trustees therein named should stand possessed of certain railroad stock upon trust for such person or persons, and for such purposes, as he should at any time by will or codicil expressly referring to this power appoint, and, by his will, gave and bequeathed his personal estate and effects to his three trustees and executors upon trust for conversion, and for payment of his funeral and testamentary expenses, debts, and legacies, and thereafter made four codicils to his will which did not alter the general bequest

of personal estate, except by varying the trustees or executors; and neither the will nor the codicils contained any reference to the power in the settlement,—such a will was held by Kekewich, J., and by the court of appeal, not to operate under § 27 of the wills act (7 Wm. IV. & 1 Vict. chap. 26) as an execution of the power. *Phillips v. Cayley*, L. R. 43 Ch. Div. 222, 59 L. J. Ch. N. S. 177, 62 L. T. N. S. 86, 38 Week. Rep. 241.

Where a wife was invested with a power of appointment if she should die during the life of her husband, and was also possessed in her own right of a separate estate, and made a will during the life of her husband and with his assent, and she survived him, her will was good as a devise of her separate estate, but was invalid as an execution of the power. *Noble v. Willock*, L. R. 8 Ch. 778.

This was under 7 Wm. IV. & 1 Vict. chap. 26, §§ 8, 24.

Property comprised in a limited or special power of appointment exercised by will is not within § 27 of the wills act (7 Wm. IV. & 1 Vict.), which refers exclusively to general powers of appointment, and does not apply to limited or special powers. *Doyle v. Coyle* [1895] Ir. Rep. 1 Ch. Div. 205.

Where a codicil to a will gave to the daughter the power of appointment of profits of certain property which by the will had been given to her to dispose of by will into the surviving family of the testatrix, as she might think proper; and the donee of the power executed a will which did not contain any allusion to the will or codicils of the donor of the power, and did not purport to be made in exercise of the power,—the will of the donee was not a valid exercise of the power, and it was not assisted by the 27th section of the wills act, inasmuch as that relates only to general powers, while this could not be treated as a general power, as the appointees, the objects of the power, must be members of the surviving family of the donor. *Elgood v. Cole*, 21 L. T. N. S. 80, 17 Week. Rep. 953.

In *Hurlstone v. Ashton*, 11 Jur. N. S. 725, the question was whether a person having a power of appointment over a sum of consolidated bank annuities, who, by her will, directed the disposition of one seventh of that amount in Indian bonds, had exercised the power; and it was held that she had not. The vice chancellor said that § 27 of the wills act was clear in its interpretation that what the words of the section meant was, whereas, before the intention of a testator was frustrated by using words which imported "property" and not "power," it should not be so any longer; and that the same rule should prevail as to real and personal estate; and that a general gift of either included all; but that he was surprised, however, to find the decision of *Hawthorn v. Shedden*, 3 Smale & G. 293, 25 L. J. Ch. N. S. 833, 2 Jur. N. S. 749, *supra*, and also to find it approved by Sugden in his book on Powers, 8th ed. p. 310; and that he would have great difficulty in deciding this case if it had been on all fours with that one; but that there the gifts were all pecuniary, while here there was a gift of Indian stock, and the case was, therefore, not so strong, although there was an appointment of executors. He further stated that in the case of *Shelford v. Acland*, 23 Beav. 10, 3 Jur. N. S. 8, 26 L. J. Ch. N. S. 144, 5 Week. Rep. 170, 64 L. R. A.

supra, a doubt was expressed whether the words of the statute go to the full extent which the vice chancellor, in *Hawthorn v. Shedden*, seemed to think they did.

Where one having the power of appointment of real estate, and also of a sum of money, to all or any, or one or more, of the children or more remote issue of his marriage, before the birth of any child executed his will bequeathing all his property in trust, if he should leave one child, that such child should take all his landed and personal property; but, in the event of his leaving a son and daughter, he bequeathed and devised all such property to his son, except the amount of which he had the power of appointment, which he bequeathed to his daughter; and he thereafter died leaving two sons and two daughters,—it was held that the will did not operate as an execution of the power as to the real estate, as the provision in regard thereto was either void for uncertainty or conditional on events which had not happened, *i. e.*, having one son and one daughter. It was held, further, that it was not an execution of the power over the sum of money, under the statute of 7 Wm. IV. & 1 Vict., as that statute was only applicable to general powers, and not to special powers in favor of particular objects. *Russell v. Russell*, 12 Ir. Ch. Rep. 377.

A power to appoint amongst children is not within the 27th section of the statute 7 Wm. IV. & 1 Vict. chap. 26; and a mere general devise or bequest will not operate as an execution of such power. *Cronin v. Roche*, 8 Ir. Ch. Rep. 103.

Where, by a voluntary settlement, a testatrix had reserved a power of appointment by will, and by her will she devised and bequeathed all her real and personal property to pay debts, funeral expenses, and certain legacies, and the residue to a residuary legatee, the general bequest did not operate as an exercise of the power under § 27 of the wills act. The court said that the words in that section, "power to appoint in any manner he may think proper," were not merely a power of appointment unrestricted in its objects, but they meant that "the power must be an unlimited power to appoint,—that is to say, unlimited in its manner of exercise. It must be a power to appoint by any instrument, whether deed or will. It would be absurd to say that a power to appoint by deed, and not by will, was a power to appoint in any manner." *Re Tarrant*, 58 L. J. Ch. N. S. 780.

While the statute of 7 Wm. IV. & 1 Vict. chap. 26, § 27, will operate upon property over which there is a general power of appointment, a revocation in general terms, which contains no reference to the will, does not operate to revoke a will made in execution of the general power. *Re Merritt*, 1 Swabey & T. 112.

A settlement which confers upon a married woman a power of appointment to any person or persons (not being her present husband or any friend or relative of his) does not create a general power, and a general devise and bequest of the property to which the power has reference, contained in a will, although made by the testatrix and donee of the power, after the death of her husband, possessing other real estate, will not pass the same under the provisions of § 27 of chap. 26, 7 Wm. IV. & 1 Vict. *Re Byron* [1891] 3 Ch. 474, 60 L. J. Ch. N. S. 807, 65 L.

T. N. S. 218, 40 Week. Rep. 11. It was argued for those who claimed that the will was a valid exercise of the power, that the words "friend and relative" should be stricken out as too vague, and that, if this were done, the word "husband" would alone remain, but he was dead when the power came to be exercised, so that his exclusion was inoperative, the power being in fact a general one at the time the donee proceeded to exercise it; and the court held that there was no reason why a general power, originally limited by exception, might not become a general power free from exception by subsequent events, and that, if the words of limitation had been confined to the words "her husband," the argument would have been sound; but stated that it could not adopt the argument that the words, "or any friend or relative of his," were so vague that they should be rejected.

See also *Re Williams*, L. R. 42 Ch. Div. 93, 58 L. J. Ch. N. S. 451, 61 L. T. N. S. 58, *supra*, I. b; *Cofield v. Pollard*, 3 Jur. N. S. 1203, 5 Week. Rep. 774; *Thomas v. Jones*, 2 Johns. & H. 475, 31 L. J. Ch. N. S. 732, 8 Jur. N. S. 1124, 7 L. T. N. S. 154, 10 Week. Rep. 583; *Hodsdon v. Dancer*, 16 Week. Rep. 1101, —*infra*, I. e; also cases in *infra*, II. a, I, 2; *Cloves v. Awdry*, 12 Beav. 604, *infra*, II. b, 1; *Re Wells*, L. R. 42 Ch. Div. 646, 58 L. J. Ch. N. S. 835, 61 L. T. N. S. 588, 38 Week. Rep. 290; *Re Brace* [1891] 2 Ch. 671, 60 L. J. Ch. N. S. 505, 64 L. T. N. S. 523, 39 Week. Rep. 508, —*infra*, II. d; *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581, *infra*, II. k.

e. Will executed before creation of power.

At common law a will devising real estate took effect at the date of its execution, while a will of personality—a will being ambulatory in its nature—was held to speak as of the time of the death of the testator. And so, as to real estate, the will devised that, only, which belonged to the testator at the time of its execution; but, as to the personality, it was a disposition of the property belonging to him at the time of his death. And, by analogy, a will executed before the creation of a power of appointment would not operate to execute the same as to real estate, but would do so as to personal property.

But now by statutes in both the United States and England a will is made to speak and take effect as if it had been executed immediately before the death of the testator with reference to the real and personal estate disposed of by it, unless a contrary intention shall appear by the will. Since which a will, whether of real or personal estate, made previous to the creation of a power of appointment, will, if unrevoked, be a valid execution of the power, unless a different intention appears by the will or by circumstances surrounding the testator. The effect of the common-law rule, and also of the statute, will be seen in the cases in this subdivision. The effect of the statutes is to some extent considered in *supra*, I. d, 3.

A woman, in contemplation of marrying the widower of her deceased sister, executed a settlement which provided, among other things, that if she should survive her intended husband (which happened), then from and after his death and a failure of children the property should be in trust for her but if she should die in his lifetime, then from and after his death and such failure of children, in trust for such 34 L. R. A.

person as she by her last will should appoint, and, in default of such appointment, in trust for such person or persons as would be entitled to her personal estate under the statute. The trust never arose, the marriage being unlawful. By her will, after providing for a portion of the trust moneys mentioned in the settlement, she gave and bequeathed one moiety of the residue to such persons as her husband should by deed or will direct or appoint. The husband made a will by which he gave all his real and personal estate to his wife, with the exception of a small bequest, and died leaving her surviving. It was held that his will did not operate as an execution of the power contained in her will, as no power created by the latter had any existence until her death had given validity to the instrument itself, as no one could execute a power of which he was intended to be the donee named in the will of a person who survived him, either under the old law, or under the 27th section of the wills act (7 Wm. IV. & 1 Vict. chap. 26). *Jones v. Southall*, 32 Beav. 31, 32 L. J. Ch. N. S. 130, 1 New Reports, 152, 9 Jur. N. S. 93, 8 L. T. N. S. 103, 11 Week. Rep. 247.

In *Re Phillips*, L. R. 41 Ch. Div. 417, 58 L. J. Ch. N. S. 448, 60 L. T. N. S. 808, 37 Week. Rep. 504, Chitty, J., in deciding that a power given by a voluntary settlement in which the settlor directed his trustees to invest and deal with the trust premises in all respects as he should from time to time order and direct by any writing (but not by his last will and testament or any codicil thereto, unless he should expressly refer to the said trust fund and premises), where he had, by a will made previous to the indenture or declaration of trust, appointed certain persons executors and trustees, and, after certain pecuniary and specific bequests and certain devises of real estate, bequeathed all his leasehold and personal estate and effects, whatsoever and wheresoever, to his executors and trustees upon certain trusts thereby declared concerning the same, and, after making the first voluntary settlement, he, by a further deed indorsed on the former one, settled additional funds upon similar trusts to those declared by the original deed, and thereafter made three codicils to his will, none of which, however, affected the residuary bequest contained in the will, or referred to the deed of settlement,—was not exercised by said will and codicils, said: "Perhaps I ought to have said that the case is, in my opinion, entirely distinguishable from the case of *Re Marsh*, L. R. 38 Ch. Div. 630, 57 L. J. Ch. N. S. 639, 59 L. T. N. S. 595, 37 Week. Rep. 10 (*infra*, II. c); but, if it is not distinguishable, I should have felt myself in a little difficulty in holding that I was bound by that decision."

Where, by the will of a testator, he empowered each of his children, by his or her will, or codicil thereto, to appoint to or in favor of his or her wife or husband the whole or any part of the yearly income of his or her share in his, the testator's, residuary estate for the life of such wife or husband, or any lesser interest; and directed that a sum of money thereby directed to be raised should be held upon the same or the like trusts, and with and subject to the same or the like powers and provisions,—the will of one of the sons of the testator dated previous to the date of the will of the latter, which gave all the residue of the property over which, at the time of his (the son's) death, he should have a disposing power, to trustees upon trust

for sale and conversion, and directing them to pay the yearly income arising from his trust estate to his wife, for life or widowhood, will not operate as a valid appointment under the power conferred upon him by the will of his father. *Re Hayes* [1900] 2 Ch. 332, 69 L. J. Ch. N. S. 691, 83 L. T. N. S. 152, 49 Week. Rep. 21.

By a settlement lands were conveyed by a woman and her husband. A power of appointment generally was reserved to the wife to appoint by will the proceeds of lands to be sold by the trustees of the settlement, and, in default, to her executors, etc. Thereafter she made her will, wherein, after reciting that by the first settlement the premises thereafter mentioned and devised were settled and conveyed to her with power to appoint, she, "in pursuance of such deed enabling her in that behalf," devised and appointed certain specified property to her eldest son, and certain other real estate to her second son, and certain other real estate to another son; and subsequently, by another settlement, she, in "pursuance of the power vested in her" by the first settlement, appointed that the same trustees should stand possessed of the sums of money to be produced by such sale for such persons and purposes as she should by will appoint. The court said that his impression was that the will was revoked by the subsequent settlement, but that, if not revoked, it did not in his opinion, execute the power in the subsequent settlement, because it expressly referred to the power contained in the first settlement, and was, therefore, inoperative to pass any part of the property. *Thompson v. Simpson*, 50 L. J. Ch. N. S. 461, 44 L. T. N. S. 710.

In *Holmes v. Coghill*, 7 Ves. Jr. 499, 6 Revised Rep. 166, Affirmed in 12 Ves. Jr. 206, 8 Revised Rep. 323, it was decided that where a power exists in a person, to be executed by will, and which he exercises by his will; but the power is afterwards discharged and a new power created,—a codicil to the will, that has the effect of republishing it and making it speak as at the time of the republication, is not a valid execution of the new power.

And in *Hope v. Hope*, 5 Giff. 13, 18 Jur. 823, 2 Week. Rep. 674, it was held that where a person had power, under the will of his father, to appoint certain property among all or any of his children as he might see fit, such power is not exercised by his will, which contains no express reference to it, and which was made previous to the creation of the power, and in which there was no mention at all of the property which was the subject of the power, notwithstanding that he made two codicils to his said will, neither of which contained words purporting to execute any power of appointment.

So in *Murray's Estate*, 5 W. N. C. 296, a will made in August, 1874, was held not to be a valid execution of the power conferred upon the testatrix by the will of her father, dated nearly a year later.

And where a testator, by his will, devised and bequeathed all the residue of his property, real, personal, and mixed, of which he might be possessed at the time of his death, or over which he might at the time of his death have the power of testamentary disposition; and thereafter, by a trust deed, conveyed most of the property devised in his will, with other property, to trustees with certain trusts, among them to himself for life, and after his decease for such uses

and purposes as he by his last will and testament should direct and appoint concerning the same, and he never revoked the will, the power of appointment reserved by the deed of trust was not executed by the former will. *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914.

And in *Re Ruding*, L. R. 14 Eq. 266, 41 L. J. Ch. N. S. 665, 20 Week. Rep. 936, it was held that, while the intention of the person possessing the power of appointment is a thing to be considered in deciding the question as to whether an appointment has been made by will, where a person who had previously made a will containing a general residuary bequest which ordinarily, under the wills act (7 Wm. IV. & 1 Vict. chap. 26, § 27), would operate as an exercise of the power, after the making of the will makes a settlement of certain personalty between himself and two trustees therein named, reserving to himself a power of appointment by will, and the circumstances attending the making of the settlement are such as indicate no intention on his part to change it, the will which antedates such settlement will not be considered an appointment thereunder.

But afterwards in *Boyes v. Cook*, L. R. 14 Ch. Div. 53, 49 L. J. Ch. N. S. 350, 42 L. T. N. S. 556, 28 Week. Rep. 754, where a testator made his will, whereby he gave all his real estate and the residue of his personal estate to his wife and two others in trust, to sell and stand possessed of the proceeds upon trust to invest the same and pay the annual income to his wife during her life or widowhood, and, after her decease or second marriage, in trust for his children in the manner therein stated; and thereafter, differences having arisen between him and his wife, a separation deed was executed, whereby he conveyed all his real and personal property to trustees upon trust to sell and convert the same into money, to pay one third of the income to himself for his life, and, after his death, to stand possessed of the same in trust for such person as he should by his last will appoint, and, in default of the appointment, upon the same trusts as were thereafter directed respecting the remaining two thirds, which were for the benefit of the children; and he died without having revoked or altered his will; and the question arose whether the residuary gift in the will operated as an execution of the general appointment reserved in the subsequent separation deed, and it was held that it did—James Lord Justice, delivering the opinion of the court of appeal, said that it was difficult to distinguish *Re Ruding*, L. R. 14 Eq. 266, 41 L. J. Ch. N. S. 665, 20 Week. Rep. 936 from the present case, and that, if necessary, that case must be overruled.

Under the combined operation of the 24th and 27th sections of the act 7 Wm. IV. & 1 Vict. chap. 26, a will, though made before the power was created, is a good execution of it. *Stillman v. Weedon*, 16 Sim. 26, 18 L. J. Ch. N. S. 46, 12 Jur. 992.

This, of course, because by § 24 of that act the will is made to speak as of the instant before the death of the testator.

By a deed of settlement lands were conveyed to a trustee to the use of the intended wife and her heirs until the marriage should be solemnized; and from and after the solemnisation thereof to the use of such person or persons and upon such trusts as the wife, whether covert or sole, and without consent, should by any deed or writing, or by her last will, or any codicil

thereto, limit, direct, or appoint. The wife, several months previous to the execution of the settlement, had executed a will, and, after the execution of the settlement, but before the marriage, she executed a codicil to the will, whereby she devised lands in trust for the children of the marriage, and, in default or failure of children, in trust for her husband for life. This was held to be a good execution of the power, notwithstanding the fact that the marriage between herself and her husband had not yet taken place, and was, therefore, contingent. *Logan v. Bell*, 1 C. B. 872.

Where a testator had made his will disposing of all his property, and thereafter settled a sum upon trust for his wife for life, with remainder to himself for life, reserving to himself power to appoint the same by will, a specific bequest in the will which was made previously to the execution of the deed creating the power of appointment nevertheless operated as a due execution of the power. *Patch v. Shore*, 2 Drew. & S. 589, 1 New Reports, 157, 32 L. J. Ch. N. S. 185, 9 Jur. N. S. 63, 7 L. T. N. S. 554, 11 Week. Rep. 142.

The will of a married woman, made the day after her marriage, in which she stated that, "In pursuance and exercise of the power of appointment vested in me by the settlement executed previously to my marriage, and of every other power enabling me, I hereby appoint, give, and bequeath all the property settled by me on my marriage and over which I have any disposing power unto my dear husband," is not confined to the property comprised in her marriage settlement, but operates to exercise a power given her by the will of another who died after the execution of her will, and by his will bequeathed to her certain East Indian securities in trust for life, with remainders over. *Re Old*, 54 L. T. N. S. 677.

Where a testator made his will and codicils thereto, and specifically devised and bequeathed several legacies, and devised and bequeathed his estate, part freehold and part copyhold, and gave all other real and personal estate of which he should die possessed or of which he should have power to dispose, upon certain trusts; and thereafter, by a voluntary settlement, conveyed his freehold estate to trustees upon trust to himself for life and after his death upon trust for another, and after the death of the survivor upon such trusts, etc., as he by his last will, or any codicil or codicils thereto, should appoint, and, after making such settlement, he executed another testamentary instrument,—it was held that, by the terms of the last will and testament and codicils thereto, and from the fact that he afterwards executed another testamentary instrument, he must have intended by the latter to have exercised the power of appointment. *Pettinger v. Ambler*, L. R. 1 Eq. 510, 35 L. J. Ch. N. S. 389, 14 L. T. N. S. 118, 33 Beav. 321. The master of the rolls said, however, that it must be understood that, if the testator had not made a will after the settlement, he should have held that the first will was an execution of the power.

In *Thomas v. Jones*, 2 Johns. & H. 475, 31 L. J. Ch. N. S. 732, 8 Jur. N. S. 1124, 7 L. T. N. S. 154, 10 Week. Rep. 853, the vice chancellor, speaking of the wills act, said: "The 24th section enacts that every will shall be construed, with reference to the real and personal estate comprised therein, to speak and

take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and by the 27th section (for the two are connected together) it is enacted that a general devise of real estate shall be construed to include any real estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. The 24th section draws down the will to the date of the death of the testator, thus getting over the difficulty as to after-acquired property. . . . It seems to me to be the true construction of the statute, coupling the 24th and 27th sections together, that a will may operate as an execution of all powers in the testator immediately before his death. If that construction, which was come to in *Stillman v. Weedon* [16 Sim. 26, 18 L. J. Ch. N. S. 46, 12 Jur. 992, *supra*], be sound (and Lord St. Leonards does not dissent from it), a person *aut juris*, must be held to intend his will to operate on powers which he had not at the date of executing it, but which he acquired before his death."

An unmarried woman by her will gave all the residue and remainder of her estate and effects, describing them, generally, to trustees for the benefit of one who afterwards became her husband. Four years thereafter a settlement was executed in consideration of an intended marriage between her and the residuary legatee in her will, whereby certain shares mentioned in the will and certain sums of money then at interest were settled upon trusts for her benefit for life with remainder to her intended husband for life, and, after the decease of the survivor, in trust for all and every "the person or persons, child or children," as she should by will appoint, and, in default, to her next of kin. The marriage took place, but afterwards proved bigamous as far as the husband was concerned, and was, consequently, invalid. It was held that, under the 24th section of the act (7 Wm. IV. & 1 Vict.), the will, although executed some years before the settlement, must be taken as speaking from the death of the testatrix, and that, as the gift was a general gift, the general bequest was, under § 27 of the same act, a good execution of the power. *Coffield v. Poilard*, 3 Jur. N. S. 1203, 5 Week. Rep. 774.

Where a testator disposed of his real estate by will, and, four years thereafter, real estate was settled to such uses as he by his will should appoint, and he made a subsequent will which did not pass real estate, the first will was a good execution of the power contained in the subsequent settlement under the provision of the wills act (7 Wm. IV. & 1 Vict. chap. 26, §§ 24, 27). *Hodsdon v. Dancer*, 16 Week. Rep. 1101.

A person conveyed to a trust company, as trustee, his one-third share in real property and existing leases of portions of it, and also personal property, in trust to pay the net income to him during his life, and provided that the death of the trustor should terminate the trust, and the trust estate, with the accretions, should vest absolutely in the persons appointed by this last will and testament of the trustor or, if he failed to make such appointment, in his heirs at law *per stirpes*, and the trustee should convey and deliver the trust estate as directed. Thirteen days before executing this trust deed

he made his will disposing of the same property. It was held that the will was a valid exercise of the power of appointment referred to in the subsequent trust deed. *United States Trust Co. v. Chauncey*, 32 Misc. 858, 66 N. Y. Supp. 563.

Where a trust is created to manage the property for the use and benefit of the grantor during his life, and, upon his death, to convey to such person or persons as he may by his last will and testament designate and direct, his will executed before the creation of the trust, but which is to go into effect after the date of the instrument creating the trust, although executed before, fully satisfies the language referring to persons whom the speaker may by his last will and testament designate; as a will, whenever executed, is, in its effect, future as to any act done by the testator in his life. *Howard v. Carusi*, Mac-Arth. & M. 260.

Where by a will the estate of the testator was bequeathed to a trustee for the use of another during his life, and at his decease to such person or persons as he, in writing, might appoint, and the will of the donee of the power was made before the will creating the power was probated, there being nothing to show that the donee when he made his will knew of the power, and there was no reference to the subject of the power, or to the power itself, in his will, and the intention to execute it did not in any way appear,—such will does not operate as an exercise of the power. *Harvard College v. Balch*, 171 Ill. 275, 49 N. E. 543.

A woman made her will, by which she devised to her daughter by a former husband certain real estate for life, with remainder to the daughter's issue, and, in default of such issue, to her collateral heirs, and afterwards executed a codicil, which, among other things, confirmed the same. Thereafter, by indenture by way of marriage settlement, in contemplation of her marriage with the executor of her will, she conveyed to the trustee to dispose of during the joint lives of the daughter and her intended husband as she herself might appoint by will or codicil, and that until such new direction or appointment the will above mentioned should be taken as an appointment by will as if made under the settlement. It was held that, by virtue of the marriage settlement agreement, and the conveyance and transfer to the trustee therein contained, the will and the codicil thereto became, in legal effect, incorporated therein, or annexed thereto, so that they became and were a valid declaration of the trust upon which the property was to be held by the trustee, and an effectual appointment of the property, both real and personal, in case the testatrix should die in the lifetime of her intended husband without making any other appointment or disposition thereof; that the consummation of the said intended marriage, being the very event in contemplation of which the said marriage settlement was entered into, did not in any manner alter the effect of the last will and codicil in this respect; that they remained, according to the intent of the said marriage settlement, valid and effectual as such appointment of the property conveyed and assigned to the trustee. *McMahon v. Allen*, 4 E. D. Smith, 519.

Where by the provisions of a will a married woman was clothed with power of appointment by will or deed, and, in the exercise of such power, she executed her will, and therein declared her appointment, and afterward con-

veyed the property to another, taking back a mortgage for a portion of the purchase money, and thereafter took from her grantee's heirs a reconveyance of the property to a trustee for her own use and benefit with the same power of appointment and disposition as was contained in the original will, and died leaving her will previously made unrevoked,—the will was a valid exercise of the power, and the land passed under it as though such conveyance had never been made. *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. 616.

A testatrix by her will disposed of various estates, including one which she, after the making of her will, by an indenture of settlement, made by virtue of an agreement with the beneficiary of the settlement, granted to trustees, reserving to herself a power of revocation and new appointment by her will to the amount of a certain sum, and thereafter executed a codicil to her will disposing of one half of said sum, being the amount of a legacy in her will which had lapsed and confirmed her will. It was held that this was a good exercise of the power to charge to the amount mentioned in the settlement. *Meredyth v. Meredyth, Jr.* Rep. 5 Eq. 565.

Where a married woman had, by her marriage settlement, a general power of appointment over two sums, and by her will she gave and appointed both sums, and all other her moneys and securities, whatsoever, over which she had any power or disposition under or by virtue of the settlement, or otherwise howsoever, to two trustees, and thereafter, after certain specific bequests, bequeathed all other her goods and chattels and separate personal estate and effects, whatsoever, not thereinbefore disposed of, and over which she had any power of disposition, unto two as tenants in common; and after her death her mother died leaving a will dated nearly two years before the death of her daughter, the donee of the power, by which she gave her a legacy and a share of her residue for her separate use,—it was held that the legacy to the donee of the power from her mother passed by virtue of her will, and was a valid exercise of her power of appointment, and that it passed under the residuary clause, and not under the words "moneys and securities." *Re Mason*, 11 Jur. N. S. 835, 6 New Reports, 193, 13 Week. Rep. 799.

Where, by a marriage settlement, the survivor of the intended husband and wife was clothed with the power of appointment and thereafter another settlement was made and indorsed on the antenuptial settlement, between the husband and his wife of one part and the trustees of the first settlement of the other, by which personal estate was settled, by reference to the former settlement, on trusts similar to those declared therein, including the power of appointment; and thereafter the wife died, and the husband after her death made a codicil to his will by which he confirmed the same,—while the making of the will was not an exercise of the power in the settlement which had then all been made, inasmuch as the power in that settlement was only a power in the survivor alone, and, when he executed the will, they were both alive, and it followed that it could not be an exercise of the power in the settlement that had not then been made, yet, as the codicil had the effect of repeating the will, and making it as good and effectual as if it had been executed for the first time after the death of the wife, it was clear

that the powers were well executed. *Re Blackburn*, L. R. 43 Ch. Div. 75, 59 L. J. Ch. N. S. 208, 38 Week. Rep. 104.

A woman, being then a widow, made her will, and thereafter made a codicil thereto, disposing of her property, and afterwards entered into a marriage settlement and therein assigned a large part of her property (all personal) to trustees in trust for herself for life, and after her death to be distributed to certain persons named in the instrument of settlement in the manner therein directed reserving the power of disposition by her last will and testament, or a writing in the nature thereof. She made no will other than the will and codicil which she had made previous to the antenuptial settlement, and never canceled either. The court, after holding that her subsequent marriage did not revoke the will, held that the property assigned to the trustees was not subject to it, but must be distributed according to the directions of the marriage settlement, as in case of her intestacy; that, while the provisions in the deed of settlement to take effect at her death were liable by the terms of the instrument to be defeated by her will, she evidently intended that, if so defeated, it should not be by one made previously to the settlement, but subsequently, and that the former will could not be deemed an execution of the power. *Webb v. Jones*, 36 N. J. Eq. 168. The syllabus to this case is misleading, as it states that the will was a good execution of the power, the reverse being decided.

A power of appointment contained in the will of a husband, providing that his wife shall have and hold his property during her natural life, and shall dispose of it as she sees fit, is not executed by the will of the wife, made five years before the death of the husband. *Lepley v. Smith*, 13 Ohio C. C. 189.

A will made many years before a deed cannot be interpreted as an execution of a power of appointment contained in that deed. *Fry's Estate*, 11 Phila. 305.

A will is not a valid execution of a power contained in a trust deed executed six years subsequently to the will. *Dunn's Appeal*, 85 Pa. 94.

1. What law governs in ascertaining intent.

As will be seen by reference to the cases in *infra*, II. a, the question whether the testamentary instrument by which the donee of a power of appointment assumes to exercise the same is a valid will duly executed, is to be decided by the law of the domicile of the donee of the power. But whether the will of the donee of a power of appointment, valid by the law of his domicile as to its formal execution, by its terms exercises the power, must, it would seem, be decided by the law of the domicile of the donor or creator thereof.

And so where, by the will of a testator residing in Pennsylvania, he created a power of disposition of personal property in that state to a person domiciled in England the question whether the donee of the power had executed the same by his will as authorized by the will of the donor, is one which must be decided by the law of the domicile of the donor and the situs of the property where they concur. *Bingham's Appeal*, 64 Pa. 345.

The law of the domicile of the donor of the power given by will, must govern as against the law of the domicile of the donee, in determining whether or not the will of the latter is an exe-

cution of the power. *Cotting v. DeSartiges*, 17 R. 1. 689, 16 L. R. A. 367, 24 Atl. 530.

And so, the establishment by express statute, both in England where the will was made and in the state where the testator was domiciled, of the rule that a general devise is sufficient to execute a power of appointment, cannot prevail in respect to a trust fund held under the will of the donor, whose domicile was in another state, as against the contrary rule, which, in the absence of a statute, prevails in the latter state. *Ibid.*

A married woman having a general power of appointment of property by the will of her father, she being domiciled in a state other than that of her father, and the property being situated in the state of the father's domicile, executed a will which was admitted to probate in the state of her domicile and proved as a foreign will in the state of the domicile of her father and where the property was situated, and which was valid as an exercise of the power of appointment by the law of the state where the property existed, but would not have been sufficient to constitute an effectual appointment by the law of the state of her domicile. It was held that her will was a good execution of the power. The court declined to consider whether, if it had been sufficient by the law of her domicile and insufficient by the law of the state where the property existed, it would have been an equally good execution. *Sewall v. Wilmer*, 132 Mass. 131.

In each of the foregoing cases the subject of the power was personal property. And in each case the statement was made that the situs of the property was identical with the domicile of the donor of the power; but whether that was an essential, or an incident, does not appear, although considerable stress seems to have been laid upon that circumstance.

II. Validity of attempt to exercise power.

a. Validity of donee's will.

1. General rule.

The necessity of a proper formal execution of a will by which a power of appointment is claimed to have been executed, and the varied circumstances under which it will appear whether a will was or was not thus duly executed, appear in the cases which follow.

Where a power of appointment was created to be executed by will, a writing importing a will, but void as such, cannot operate as an appointment. *Atty. Gen. v. Barnes*, 2 Vern. 597, Prec. in Ch. 270, Gilb. Eq. Rep. 5.

The will of a testatrix which has no witness is not the valid exercise of a power given to a wife to dispose of personal property after her life estate by a will "duly executed and attested." *Sanders v. Franks*, 2 Madd. 147, 17 Revised Rep. 202.

In order to introduce a will in evidence which authorizes a married woman, by a power in her marriage settlement, to show a title to personal property, it must have been proved in the ecclesiastical court. *Stone v. Forsyth*, 2 Dougl. K. B. 707.

Where a married woman is by a deed of trust invested with a power to give the trust property therein conveyed to her husband, or their children, by will, in order to found a title to any portion of the trust property thereon a duly executed will by the donee of the power must be shown. *Thrasher v. Ballard*, 33 W. Va. 285, 25 Am. St. Rep. 894, 10 S. E. 411.

A writing in the form of a letter, sealed on the outside only, purporting to be made in execution of a power, and concluding, "as witness my hand and seal," with a signature purporting to be that of the donee of the power, and two other names in other handwritings, but with no mention of attestation, with no evidence thereof but such as is afforded by the document, is not shown to be a due execution of the power. *Burnham v. Bennett*, 1 DeG. & S. 513.

At the death of a person having a power of appointment, two sheets, apparently the third and fourth sheets of a will which were in the handwriting of and signed by the person possessing the power and duly attested, which had been refused probate will not be deemed a valid execution of the power to appoint by writing purporting to be a will. *Gullan v. Grove*, 28 Beav. 64.

Where, by a marriage settlement, power of appointment of property was reserved to the intended wife, to be executed by will after her marriage, and she executed her will, and the marriage thereafter took place, this will was not a due execution of the power, as it became void by her marriage subsequent to its execution. *Hodsdon v. Lloyd*, 2 Bro. Ch. 534.

Where, by an indenture, it was provided that certain leasehold property was to be assigned to such person or persons, and in such manner and form, as the settlor, at any time or times during the term of his natural life, by any deed or deeds, writing or writings, under his hand and seal, to be attested by two or more credible witnesses, should direct, limit, or appoint of or concerning the same; and he thereafter made his will, not under seal, but executed by him and attested in conformity with the requisitions of the statute 7 Wm. IV. & 1 Vict. chap. 26, whereby he exercised the power of appointment contained in the indenture,—this was held not to be a valid execution of the power, as, in order to be such, it must comply with all the conditions of the indenture, one of which was that it should be under seal, and this notwithstanding the statute before mentioned, which provides that, in the execution of wills, one given form shall be observed, and that such form shall be an equivalent for every arbitrary form of execution which the donor of a power may prescribe, as it was not at the expense, but in favor, and for the benefit, of such donors, and in order that their intentions might not be disappointed by the neglect of useless forms that this legislative provision was made, that in this settlement the power was not to appoint by will at all, but by deed or writing, with certain required formalities. The vice chancellor said, further, that he must add that, while he could not hold that this power had been duly executed, he must at the same time add that he feared, nine cases out of ten, the intention, both of the donor and of the party executing the power, who, of course, intends to execute it effectually, would be defeated by such a decision. *West v. Ray*, Kay, 385, 2 Eq. Rep. 431, 23 L. J. Ch. N. S. 447, 2 Week. Rep. 319.

Where, by a marriage settlement, the woman had the general power of appointment of a sum by deed or will executed in the presence of three witnesses, and, having appointed one half the sum to her husband during coverture and after her death to her son, by deed, thereafter made a voluntary disposition of the remaining half by will, but did not execute it in the presence of three witnesses,—the will was not an

appointment, as it was not for a valuable consideration, but only a voluntary disposition, and, not having been executed in the presence of three witnesses, it did not pursue the power and was void as an appointment. *Sergeson v. Sealey*, 2 Atk. 412, 9 Mod. 370.

Where a power to appoint personal property is required to be exercised by a will signed and published in the presence of and attested by two witnesses, if the donee, although acknowledging to the two witnesses her signature to an instrument, did not sign it in their presence, and the witnesses at different times signed the attestation to the effect that the testatrix had signed and delivered the will in their presence, the power was not well exercised. *Simeon v. Simeon*, 4 Sim. 555.

A marriage settlement provided that the wife might, by her last will and testament duly executed, raise a certain sum only for the purpose of paying the debts of the husband and wife, or making a provision for the children of the marriage, except an eldest son. The wife executed it by a will signed in the presence of only two witnesses. Lord Hardwicke at first held that since the statute of frauds no wills relating to lands could properly be said to be duly executed unless in the presence of three witnesses; and that to determine otherwise would be a dangerous innovation; that, though the will prescribed by the author of the power is a creature of his own, and the execution of it in the presence of two witnesses might have been good if he had thought to have ordered it so, yet, as he had expressly directed that it should be executed duly, he must be understood to have referred to some known rule, which, as he had himself mentioned none, could be construed to be no other than the rule of common law; and that the statute of frauds had furnished us with. *Wilkes v. Holmes*, 9 Mod. 485.

Where the power is given to appoint the uses of land by deed or will, and is attempted to be exercised by will, the will intended in the creation of the power is such a one as is proper for the disposition of land; and so, where a power is created to be executed in the nature of a will, it is meant that such instrument must be executed the same as a will, and must therefore be subscribed by the witnesses in the presence of the testator. *Longford v. Eyre*, 1 P. Wms. 742.

And so where lands were conveyed to trustees to convey under a power of appointment which was to be exercised as the person to whom the power was given should direct, and he assumed to exercise it by a will which was attested by but two witnesses, and was therefore void, such an instrument will not operate as an exercise of the power. *Wagstaff v. Wagstaff*, 2 P. Wms. 258.

Where a married woman possesses the power to dispose of personal property by will "to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses," a writing purporting to be her will, and to be signed, but which fails to state that it was published by her in the presence of two witnesses, is not a valid execution of the power. *Allen v. Bradshaw*, 1 Curt. Eccl. Rep. 110.

But in *Burdett v. Spilsbury*, 10 Clark & F. 340. Reversing the court of exchequer chamber and affirming that of the King's bench, 9 Ad. & El. 396, 1 Perry & D. 670, it was held that, where lands were limited to such uses as a woman should appoint by her last will and testament in writing to be, by her, signed, sealed,

and published in the presence of, and attested by, three or more credible witnesses, an instrument executed by the person possessing the power and assuming to exercise it, in which it is declared that it is the last will and testament of the person so executing it, and is witnessed by three persons, is a due exercise of the power by will, notwithstanding it does not contain a history of the solemnity of the attestation.

Where, by virtue of a settlement, a married lady possessed the power of appointment of the uses of a freehold estate, and she devised an estate comprised in the settlement, after her husband's death, to certain persons, and signed and sealed the will in the presence of two witnesses, but the attestation did not mention the word "published," it was held that this was a valid execution of the power, as a will cannot be made without being published. *Vincent v. Sodor*, 4 De G. & S. 294, 20 L. J. Ch. N. S. 433, 15 Jur. 365, 5 Exch. 683.

In this case the prerogative court had refused probate to the will because it was, upon the face of it, not executed according to the terms of the power, and the privy council reversed the sentence of the probate court on the ground that the ecclesiastical court had only jurisdiction to grant probate, and that it must be left to a court of equity to determine the due execution of the power. *Barnes v. Vincent*, 5 Moore P. C. C. 201.

Where a power was given to a testatrix to dispose of a freehold estate by any writing under her hand and seal, attested by two or more witnesses, or by her last will and testament in writing, to be, by her, signed, sealed, and executed in the presence of, and attested by, three or more witnesses, the will of the donee, in which she professed to exercise the power, which was signed by her, but was attested by two witnesses only, is not a valid exercise of the power. *Bainbridge v. Smith*, 8 Sim. 86, 5 L. J. Ch. N. S. 300.

Where by the terms of a marriage settlement the wife has the power, by her last will in writing, or other writing under her hand and seal, to be attested by two or more credible witnesses, to appoint the transfer of certain stock, a paper in her handwriting, not signed or sealed, nor attested by witnesses, is not a good execution of the power. *Ross v. Ewer*, 3 Atk. 156.

In *Collard v. Sampson*, 4 De G. M. & G. 244, 17 Beav. 543, 1 Eq. Rep. 262, 22 L. J. Ch. N. S. 729, 17 Jur. 641, it was held that a purchaser under a contract of sale of real estate would not be compelled to perform where the title came through the exercise, by an unsealed will, of a power to appoint "by deed or deeds, writing or writings, under hand and seal."

A power to appoint by any instrument in writing, signed, sealed, and delivered in the presence of two witnesses, is not duly exercised by a will executed in all respects according to the provisions of 7 Wm. IV. & 1 Vict. chap. 26, but which is not under seal. *Taylor v. Meads*, 4 DeG. J. & S. 597, 11 Jur. N. S. 166, 5 New Reports, 348, 34 L. J. Ch. N. S. 203, 12 L. T. N. S. 6, 13 Week. Rep. 394.

Where, by the instrument by which a power was created, it was required that the power of disposing of the property by the donee should be by a writing under her hand and seal in the presence of two witnesses, in the nature of a last will and testament, a will claiming to execute the power in writing, and executed in the presence of two witnesses, but without seal, is 44 L. R. A.

no defective in one of the requisites of the power purporting to be executed by it that it would generally be deemed incurably defective as an execution of the power. *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436.

In *Dormer v. Thurland*, 2 P. Wms. 506, it was held that, where a settlement provided that one might exercise the power of appointment by his last will, the chancellor held that a will which was not sealed was yet good as an exercise of the power; but, being in doubt, referred it to the King's bench, and that court held that the will was valid.

'All that the statute (24 & 25 Vict. chap. 114) does is to make a will executed abroad, by a British subject, a good will if it be such a document as is recognized to be a will by the law of that place; but it does not at all touch or interfere with the negative provision in the wills act (7 Wm. IV. & 1 Vict. chap. 26), that no testamentary appointment can be made unless it is attested by two witnesses; and so, an unattested codicil cannot be treated as being a good and valid appointment, either at law or in equity. *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581.

Section 10 of the wills act (7 Wm. IV. & 1 Vict. chap. 26) applies as well to powers created since, as to those created before, the statute, and by it the legislature intended to say that appointments are often required to be made by will in a mode different from that prescribed by the law as to wills in general, and the courts held it to be necessary that the power should be strictly pursued, and this caused difficulty, and a frequent failure of execution; and they then provided what was deemed a sufficient protection to the execution of wills, and said that any power to appoint by will shall be deemed duly executed if the donee complies with the statutory formalities, no matter what additional security or solemnity the donor may have annexed to its exercise. *Hubbard v. Lees*, L. R. 1 Exch. 255, 4 Hurlst. & C. 418, 35 L. J. Exch. N. S. 169, 12 Jur. N. S. 435, 14 L. T. N. S. 367, 14 Week. Rep. 694.

In *Monday's Goods*, 1 Curt. Eccl. Rep. 590, it appeared that a married woman having a power of appointment under a marriage settlement, by her will bequeathed the whole of her separate property to her husband, with the exception of a small legacy, and afterwards survived him. Upon her decease, and upon affidavits stating that she died without any known relation, the King's advocate prayed administration with the will annexed to be granted to the nominee of the Crown, but, there being no proof that the will was executed agreeably to the power, neither the settlement, nor a copy of it, being before the court, the motion was rejected.

By virtue of a marriage settlement, the wife's undivided share of certain freehold, copyhold, and leasehold estates of her father, bequeathed by his will upon trust for sale and conversion, was vested in trustees to pay the income therefrom to the wife during her life, and after her decease to the husband if he should survive her, and after the decease of the survivor in trust for all the children of that or any future marriage as the wife should, after the decease of the husband in case she should survive him, by any deed or deeds, writing or writings, or by her last will or testament and any codicil or codicils thereto, "or any writing in the nature of or purporting to be a will or codicil," direct or appoint. After the death of her husband she signed a written document which was expressed

to be her "last will," and which, if valid as such, would have been an execution of the power, but, not having been sufficiently executed, it was not admitted to probate. The court said that the question in this case, which appeared to be of first impression, was as to the meaning of the words "purporting to be a will or codicil." That the peculiarity of the case was that the instrument creating the power contemplated the execution of it, first by a deed or writing not testamentary, then in the next place by a will or codicil,—that is to say, by a regular testamentary instrument, one which is not only in the nature of and purports to be, but which in a legal sense is, the will of the testator. But then the settlor is minded to extend the scope of the power, and he does so by saying that it may be exercised "by any writing in the nature of, or purporting to be, a will or codicil." To say that those words mean only a will or codicil is to destroy the effect of that addition; and the instrument was held to be a valid execution of the power. *Re Broad* [1901] 2 Ch. 86, 70 L. J. Ch. N. S. 601, 84 L. T. N. S. 577.

Where by a settlement made previous to marriage a woman had a power of appointment of certain stock, and made her will after her marriage whereby she disposed of the same, and afterwards made two testamentary papers, one of which was on unstamped paper and only signed by her; and thereafter, thinking it was material that her will should be upon stamped paper, on the same day made the second testamentary paper, in both of which she willed the stock to her husband for his sole use, the remaining part that was left, which he did not want for his own wants and use, to go to her brother and sisters; and thereafter, having fixed the two papers together with a wafer, requested two witnesses to attest the same, which they did, and she declared the same to be her will, and delivered the same to the person whom she had named in her original will as executor, who kept it until after her death,—it was held that these papers were a valid exercise of the appointment, and that the husband took the stock absolutely. *Sprange v. Barnard*, 2 Bro. Ch. 585.

Where the owner of an estate in land, either in law or equity, reserves to himself the power to dispose of it to such uses, as he by will shall appoint, that must be such a will as, within the statute of frauds, would be proper for a devise of land; but where two sons of full age, with their father, covenant and grant to trustees to charge the estate of the father with a sum for the benefit of younger children as the father shall appoint, his will, attested by two witnesses and not being such as would pass lands, is a valid exercise of the power. *Jones v. Clough*, 2 Ves. Sr. 365.

Where the language of a power did not require an attestation, but only that the will should be signed and published in the presence of two witnesses by the person invested with it, and did not require sealing, an instrument in the form of a will, admitted to have been signed by the person possessing the power, with the names of three witnesses upon it, and also appearing to have been signed by the person possessing the power with a testamentary intention, is a good execution of the power to dispose of personal estate by a will to be signed and published by the appointer in the presence of two or more credible witnesses. *Warren v. Postlethwaite*, 2 Colly. Ch. Cas. 108, 14 L. J. Ch. N. S. 422, 9 Jur. 721.

A will by which the testator assumes to exercise

the power of appointment given by a previous indenture, by which the testator reserved a life estate, and after her death for such person or persons, interest or interests, as the testator, by any deed or deeds, writing or writings, should direct or appoint, is a writing within the provisions of the act 7 Wm. IV. & 1 Vict. Buckell v. Blenkhorn, 5 Hare, 131.

Previous to considering the effect of the statute upon the facts of this case, the vice chancellor said: "It cannot, at this day, admit of doubt that the will would, before the late statute (7 Wm. IV. & 1 Vict. chap. 26), have been a writing within the terms of the indenture of the 1st of September, 1843, and that such will would, therefore, before that statute, have been a due execution of the power reserved by that deed, provided the will had been executed with the formalities which the deed required."

Where two modes were prescribed by the donor of the power of appointment, the one to be by will duly executed according to law, the other by a testamentary paper in the nature of a will, to be executed in the presence of two witnesses, without anything more, a testamentary paper attested by three witnesses, which specifically refers to the power in the deed, and professes to be in execution of it, and which has been admitted to probate, seems to be sufficient to gratify either mode of executing the power. *Schley v. McCeney*, 36 Md. 266.

Where, by a marriage settlement, a woman was invested with a power of appointment by her last will and testament, in writing, or by any codicil or codicils thereto, by her "signed and published in the presence of and attested by three or more credible witnesses," a delivery is equivalent to publication of the will; and where the attestation stated the will to be signed, sealed, and delivered by the testatrix in the presence of three subscribing witnesses, such will was a due execution of the power. *Curtels v. Kenrick*, 7 L. J. Exch. N. S. 169, 3 Mees. & W. 461.

Where, by a marriage settlement, a power of appointment is created to be executed by will, the court of chancery is concluded by the decision of the ecclesiastical court that an instrument whereby the donee of the power assumes to execute the same is a will, and bound to consider it as a valid execution of the power if it appears to have been executed with the formalities prescribed by the power. *Douglas v. Cooper*, 3 Myl. & K. 378.

While a *feme covert* has the power of disposing of a sum of money, or any other thing, by a writing purporting to be a will, yet, after the wife's death, proving it in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum or other thing in pursuance of the power. *Henley v. Phillips*, 2 Atk. 48.

Where a married woman, by the settlement on her marriage, was invested with the power of appointment, to be executed by a will signed and published in the presence of, and attested by, three witnesses, her will concluding with this declaration, "this is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. *Stanhope v. Keir*, 2 Sim. & Stu. 37, 2 L. J. Ch. 186.

But in *Re Wrey*, 17 Sim. 201, 19 L. J. Ch. N. S. 183, the court held that, where the power to appoint by will which was required to be signed and published by the testator in the presence of,

and attested by, three or more credible witnesses was given, and, the will of the testator was signed by him in the presence of, and attested by, the three witnesses, but without the attestation taking notice of the publication, the power was, nevertheless, well executed.

Where the power was vested in a testatrix to appoint, under her marriage settlement, certain real estate for such estate or estates as she might appoint, to be sealed and delivered by her in the presence of, and attested by, two or more credible witnesses at any time during her life, such power is well exercised by a will made before the wills act, and delivered and signed and published in the presence of three witnesses. *Orange v. Pickford*, 4 Drew. 363, 27 L. J. Ch. N. S. 808, 4 Jur. N. S. 649, 6 Week. Rep. 738.

In *Bartholomew v. Harris*, 15 Sim. 78, 15 L. J. Ch. N. S. 106, the requirement was that the will, in order to be a good appointment of a sum of stock, should be signed and published by the donee of the power in the presence of, and attested by, two or more credible witnesses. The will of the donee appeared, on the face of it, to have been signed by him, but did not, either in the body or at the conclusion of it, purport to have been published by him; and the clause attesting his execution was signed by three witnesses, and was as follows: "We, the undersigned, attest to have seen the above testator sign the above will." This was a sufficient attestation, and made it sufficiently appear that the will was signed as well as published, and was therefore a good execution of the power.

Lands which, by a marriage settlement, were limited to such uses as the wife, by her will, to be by her signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, should appoint, are legally conveyed and appointed by an instrument commencing thus: "I, L., do publish and declare this to be my last will and testament;" and ending: "I declare this one to be my last will and testament. In witness whereof I have to this my last will and testament set my hand and seal the 12th day," etc.; the attestation being "Witness C. B., E. B., A. B." *Doe ex dem. Spilsbury v. Burdett*, 4 Ad. & El. 11, 6 Nev. & M. 259, 6 L. J. K. B. N. S. 73.

And so, too, a will expressed to be "signed, sealed, published, and declared" is a good execution of a power to appoint by deed or will "signed, sealed, and delivered." *Mason v. Heywood*, 7 L. J. Ch. N. S. 145.

See also cases *infra*, II. 1.

2. What law governs.

(a) Formal validity of donee's will.

As has already been stated (*supra*, I. f.), the question whether a will by the terms of which it is claimed that a power of appointment has been exercised, has been properly executed, is dependent for decision upon the law of the domicile of the donee of the power. And it may be safely said that the weight of judicial authority is to that effect; or, at least that a will well executed according to the law of the domicile of the donee of the power will be deemed a valid will, in considering the question as to whether it exercises a power of appointment.

Where an English lady had the power of appointment over personal property in England, consisting of government funds, and married a resident of France, and thereafter became 64 L. R. A.

domiciled in the latter country with her husband, and there made a holographic will unattested, which was a valid will according to the law of her domicile, but not according to the law of England; but which, on account of its being a good will by the law of her domicile, had been admitted to probate in England, and which in terms was a good exercise of the power,—her will was a valid execution of the power of appointment. *D'Huart v. Harkness*, 34 Beav. 324, 5 New Reports, 440, 34 L. J. Ch. N. S. 311, 11 Jur. N. S. 633, 13 Week. Rep. 513.

A person who, by the provisions of a will, was entitled to the income of a trust fund, with power by her last will to appoint, the fund, in default of such appointment, to go to such person or persons as would at the time of her decease be her next of kin in case she had died intestate and unmarried; who at the date of the will giving her such power was the wife of a French subject domiciled in France,—after the death of her husband married another French subject domiciled in France, and thereafter made a holographic will in the French language, whereby she bequeathed to her then husband everything which she possessed, or might thereafter possess; and afterwards made a holographic codicil to such will, the will and codicil both being unattested, and died; and letters of administration with the will annexed were afterwards admitted by the probate division to the attorney of the husband. It was held that, as a power to appoint by will simply, may be executed by any will which, according to the law, is valid, though it does not follow the forms of the statute provided by §§ 9 and 10 of the act 7 Wm. IV. & 1 Vict. chap. 26, § 27, and this will having been held valid for the reason that, although unattested as required in this section, yet it was, by the law of France where it was executed, a valid will upon which letters of administration had been granted in England by the proper tribunal, it was competent for the testatrix to execute the power by a will in this form, notwithstanding the sections mentioned; and that the same rules of construction would be applied to it as to a will executed in England in the same terms and of the same date, including that directed by § 27 of the said act; and that, therefore, the general bequest was an exercise of the power in favor of the husband. The court approved *D'Huart v. Harkness*, 34 Beav. 324, 5 New Reports, 440, 34 L. J. Ch. N. S. 311, 11 Jur. N. S. 633, 13 Week. Rep. 513. *supra*, and distinguished *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581, *supra*, II. a. 1. *infra*, II. k; and *Hummel v. Hummel* [1898] 1 Ch. 642, 67 L. J. Ch. N. S. 363, 78 L. T. N. S. 518, *infra*, on the ground that in those cases the wills owed their validity to the act 24 & 25 Vict. 114. *Re Price* [1900] 1 Ch. 442, 69 L. J. Ch. N. S. 225, 82 L. T. N. S. 79, 48 Week. Rep. 373.

Where by a settlement a sum was settled by an English woman married to a French subject upon trust to pay the income thereof to her during her life, and after her death in trust for all such or any such one or more of her issue by any husband, whether children or more remote issue, born within legal limits, as she should by deed or will appoint, the trustees of the settlement being English, and the trust funds in England; and she, while in France, executed a will in the English form, reciting the power of appointment and purporting to exercise it, among other things, in favor of her daughter; and the probate court had held that she was a domiciled French woman, but that

her will was a due execution of the power, and must be admitted to probate (see *Huber's Goods* [1896] Prob. 209, 65 L. J. Prob. N. S. 119, 75 L. T. N. S. 453, *infra*), and issued and granted letters of administration with the will annexed to the daughter,—such a will is a valid exercise of the power of appointment reserved by the testatrix to herself by the settlement. The court agreed with Sterling, J., in *Re Price* [1900] 1 Ch. 442, 69 L. J. Ch. N. S. 225, 82 L. T. N. S. 79, 48 Week. Rep. 373, *supra*, who came to the same conclusion in a similar case where the power was general, and said that, if a foreign testatrix can exercise a general power, *a fortiori* can she exercise a special power. *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51.

In *Huber's Goods* [1896] Prob. 209, 65 L. J. Prob. N. S. 119, 75 L. T. N. S. 453, a proceeding in the probate court for the granting of letters of administration with the will annexed, where the will was that considered in *Pouey v. Hordern* [1900] 1 Ch. 492, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51, *supra*, and, in considering whether the letters should be issued, the president of the probate divorce and admiralty division of the high court of justice held that the letters must be granted as it was impossible to say that the will was not valid, considered as an execution of the power,—the court followed *Alexander's Goods*, 29 L. J. Prob. N. S. 93, 6 Jur. N. S. 345, 2 L. T. N. S. 56, 8 Week. Rep. 451, *infra*, in which case—as is stated in a note—*Cresswell, J.*, compared and discussed what he had said in *Crookenden v. Fuller*, 1 Swabey & T. 441, 29 L. J. Prob. N. S. 1, 5 Jur. N. S. 1222, 1 L. T. N. S. 70, 8 Week. Rep. 49, and also, after stating that the marginal note to *Tatnall v. Hankey*, 2 Moore P. C. C. 342, *infra*, that “a will disposing of personal estate situate in this country, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the party making it,” further stated that the judgment of the judicial committee, as reported in *Moore*, did not bear out that proposition, such judgment being that the judicial committee was of the opinion that the court below had the jurisdiction which it repudiated, and that, so far, the sentence of the prerogative court must be reversed; and that he had been furnished with a copy of the actual report made by the judicial committee, which did give the express opinion of the very point stated in the headnote, *viz.*, that the validity of the will in question, so far as regards the appointment of the residue of the personal estate, did not depend upon the law of the domicile of the donee of the power and testatrix at the time of her decease, and said that this express opinion of the judicial committee was conclusive, and relieved him from all difficulty. The same note states that the following is from *Dodd & Brook, Probate Court Practice*, pp. 227, 228: “The judgment of the judicial committee in *Tatnall v. Hankey*, as reported by Mr. Moore, turns wholly upon the jurisdiction of the court of probate in respect of testamentary appointments, and determines merely that the court below had the jurisdiction which it repudiated. The report made by their lordships to the Queen in council goes somewhat further than Mr. Moore's. . . . Their lordships did agree humbly to report their opinion to Your Majesty against the appeal, . . . that the validity of the will of the said Harriet Drummond, deceased, so far as regards the ap-
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pointment of the residue of the personal estates of the said Charles Boone, deceased, does not depend upon the law of the domicile of the said Harriet Drummond at the time of her decease.”

In *Alexander's Goods*, 29 L. J. Prob. N. S. 93, 6 Jur. N. S. 345, 2 L. T. N. S. 56, 8 Week. Rep. 451, Sir C. Cresswell held that where a will bequeathed to trustees a sum of money upon trust to pay the dividends to the testator's daughter for life, and thereafter to any husband of hers who should survive her for his life, in case she should by her will so direct and appoint, and the daughter thereafter married, and by her will executed the power in favor of her husband, she being a resident of England, but at the time of her death domiciled in Scotland, it being valid according to the law of Scotland, but not that of England, was a valid exercise of the power of appointment; saying that he took the opportunity of correcting what fell from him in *Crookenden v. Fuller*, 29 L. J. Prob. N. S. 1, 1 Swabey & T. 441, 5 Jur. N. S. 1222, 1 L. T. N. S. 70, 8 Week. Rep. 49, in reference to this question, which he found was not warranted; that in that case one of the arguments urged in favor of the will was, that it was, except a certain portion, made in pursuance of a power, and, therefore, that the rule of law which requires a will to be executed in accordance with the law of the domicile did not apply to it. That the decision in *Crookenden v. Fuller* did not turn on that point; but that he expressed an opinion that, if it did, the court would have to see that the will was duly executed in conformity with the law of the domicile, before it granted probate.

Where a person having a general power of appointment over real estate which was afterwards sold under an act of Parliament, and the proceeds, liable to be laid out in the purchase of land, were invested in certain stock, the donee of the power, who was domiciled in France, made her will in the French language, by which she disposed of all her property and chattels. It was held that such a will disposed of all her personal property over which she had the general power of appointment, and that the fund invested in stock was personal in form, and passed by the will. *Re Harman* [1894] 3 Ch. 607, 63 L. J. Ch. N. S. 822, 8 Reports, 549, 71 L. T. N. S. 401. The court said that, treating this as an English will, it exercised the general power of appointment conferred on the testatrix by the will creating the power. But that it was not an English will. That it was the will of a French woman; and, in construing it, the court must have regard to French law, and to the rules of construction by which a French court would be guided in determining the meaning and effect of such an instrument.

A woman who had been adopted when a child in poor circumstances by a wealthy lady, and had been left a fortune, which was in the hands of the guardian and trustee under the will of her mother by adoption, executed a deed of trust to a trust company with the knowledge and approbation of her intended husband, whom she afterwards married, by which she directed one half of her property, which was still held by the guardian and trustee under the will of her said mother, to be paid over and delivered to the trust company as soon as it was freed from the trust created by the mother's will, to be held by the company in trust for her during her life, the income to be paid to her, and from and after her death to convey, assign, and deliver the same to such person or persons as she by her last will and testament, or by instrument in
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the nature of a will, executed in the presence of two witnesses, might limit, nominate, and appoint; and finally, in case she should die without executing a will or instrument as aforesaid, to convey the same to her heirs and next of kin. After the marriage she and her husband took up their residence in Switzerland, where the wife made a holographic will in which she stated that, in case she should die without posterity, she nominated and constituted her husband, naming him, her sole legatee of everything. Thereafter, while temporarily stopping in France, she made a holographic codicil by which she bequeathed certain small legacies to friends, and expressed her desire "that all my fortune, as well that placed in the Safe Deposit & Trust Company, Baltimore, Maryland, U. S. of America, as the rest thereof, be handed over at my death to my husband, Alfred Olivet, my sole legatee," and the next day she wrote a letter to her former trustee and guardian announcing what she had done in reference to her will and codicil. The will and codicil were a valid will according to the law of Switzerland, but not according to the law of Maryland. It was held that it was a valid execution of the power reserved in the deed of trust, which did not require that a will valid according to the general law should also be executed in the presence of two witnesses. *Olivet v. Whitworth*, 82 Md. 258, 33 Atl. 723.

Where a testator, a citizen of one of the United States, left a sum in trust to invest the same and pay the income to his wife during her life, and upon her decease one half of the sum to such person and in such manner as she by her last will and testament, duly executed according to the law of her domicile, might order and appoint; and his widow, the donee of the power, thereafter married, and removed, and was domiciled in France,—her will, executed there according to the laws of that country, would, so far as the character of the instrument is concerned, be a valid execution of the power. *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336.

Where the right to dispose of personal property has been reserved to a married woman by an indenture made, previous to her marriage, between her and her husband in contemplation of the marriage, a will not under seal, without the intervention of a third party as trustee, is a valid exercise of the power, although at the time of entering into the contract and of the marriage the parties resided in another state, by the laws of which state a disposition by will under contract would be ineffectual unless made under seal. *Ela v. Edwards*, 16 Gray, 91.

As will be seen by the two cases next following, it was held that a will which in its execution did not comply with the provisions of §§ 9 and 10 of the wills act (7 Wm. IV. & 1 & 2 Vict.) was ineffectual to execute a power of appointment which was to be exercised by a duly executed will; and in the one case, that this was so, notwithstanding it might be admissible to probate as a foreign will under another statute.

All that the act 24 & 25 Vict. chap. 114, does, is to make a will executed abroad by a British subject a good will if it be such document as is recognized to be a will by the law of that place; but it does not at all touch or interfere with the negative provision in the wills act (7 Wm. IV. & 1 & 2 Vict. chap. 26), that no testamentary appointment can be made unless it is attested by two witnesses. And in *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581, *supra*, II. a, 1, *infra*, II. k, it was held that a

codicil to a will executed by such a person domiciled in France, unattested, was ineffectual to execute a power of appointment, which was to be exercised by a duly executed will.

By her father's will a woman had a general power of appointment over a share of his residuary estate, and after his death she married an Austrian subject, who afterwards deserted, and never subsequently lived with her, and she died without issue in France, having there made a disposition of her property by writing signed by her, but not attested, which was in form a valid will according to French law. It was held that the writing did not operate as an execution by the daughter of her general power of appointment by will, as it had not been attested as required by §§ 9 and 10 of the wills act (7 Wm. IV. & 1 Vict. chap. 26), and this notwithstanding it might be admissible to probate under § 1 of 24 & 25 Vict. chap. 114. *Hummel v. Hummel* [1898] 1 Ch. 642, 67 L. J. Ch. N. S. 363, 78 L. T. N. S. 518.

The court cited and approved *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 292, 32 Week. Rep. 581, *supra*, II. a, 1, *infra*, II. k, and assumed to distinguish *D'Huart v. Harkness*, 34 Beav. 324, 5 New Reports, 440, 34 L. J. Ch. N. S. 311, 11 Jur. N. S. 633, 13 Week. Rep. 518, *supra*, admitting that the two cases were apparently conflicting.

But it must not be supposed, however, that it necessarily follows that a will executed by one domiciled in a foreign jurisdiction, but not in accordance with the law of that jurisdiction, is, therefore, invalid when it is otherwise effectual as an exercise of a power of appointment. In a case decided by the privy council in 1838, it was stated that the principle which governs the constitution of powers, and their very nature, is that, whatever is given by the donor of a power, in execution of that power, passes to the appointee, or the party in whose favor the power is executed by the donor, but is conveyed, not by force of the appointment, or by any act of the donee, but by the act of the donor of the power, by virtue, in fact, of the power, and not of the appointment under it; and it was held that a will disposing of personal estate situated in England, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is a good exercise of that power, although executed by a party domiciled in a foreign country, and not according to the testamentary law of that country. *Tatnall v. Hankey*, 2 Moore P. C. C. 342.

The donor of a power may prescribe the particular mode in which it is to be exercised, and unless the mode prescribed is strictly complied with, there can be no valid execution of the power; and so, where the mode prescribed by the donor of the power is expressed in the words "by her last will and testament duly executed," by these words are meant a will duly executed according to the laws of the state which is the domicile of the donor, and in which the property which is the subject of the power is situated. In this case the donor of the power resided and her property was in South Carolina, and the donee of the power resided in the state of North Carolina. The donee of the power executed a will valid by the state of her domicile, but not by the laws of the state of the residence of the donor. It was held that this was not the will contemplated by the donor of the power when she created it and was, therefore, invalid as an exercise of it. *Blount v. Walker*, 28 S. C. 545, 6 S. E. 558.

A vigorous dissent was written by Simpson,

Ch. J., citing and approving *D'Huart v. Harkness*, 34 Beav. 324, 5 New Reports, 440, 84 L. J. Ch. N. S. 311, 11 Jur. N. S. 633, 13 Week. Rep. 513, and distinguishing *Bingham's Appeal*, 64 Pa. 345, on the ground that in the present case the question was one of intention on the part of the donor as to the form in which the power should be executed. That she had a right to give the donee the power to make an appointment by her will duly executed in any state, valid according to its laws; and the question was whether she did grant such a power; while in *Bingham's Appeal* the question was one of law, as to the proper construction of the alleged executed power, to wit, whether the will, as executed by the donee, not mentioning the estate over which he had the power, carried said estate.

This is probably the only case holding that the will, in order to be "duly executed," must be executed according to the law of the domicile of the donor of the power; and that, if it is not, it will be insufficient to exercise the power, although executed according to the law of the domicile of the donee thereof.

The will of a person resident in France, which, though unattested, is a good testamentary disposition by the law of that country, but which would not be entitled to probate in England, is insufficient as a power of appointment of property contained in an English marriage settlement, the property also being situated in England. *Re Daly*, 25 Beav. 458, 27 L. J. Ch. N. S. 751, 4 Jur. N. S. 525, 6 Week. Rep. 533. In this case the donee of the power was a married woman living separate from her husband, but without any legal separation, and the court held that her domicile was that of her husband, which was in England.

Where formalities are required by the instrument creating a power of appointment, such as that it must be attested by two or more credible witnesses, such a power is not exercised by the will of the donee thereof domiciled in France, valid according to the French law, but invalid according to English law, because not attested by witnesses; such a case being one where the provision of the act 7 Wm. IV. & 1 Vict. chap. 26, does not apply; as a will, in order to exercise the power, must comply with the terms of the instrument creating it. *Barretto v. Young* [1900] 2 Ch. 339, 69 L. J. Ch. N. S. 605, 83 L. T. N. S. 154.

But in several of the states statute and Code provisions have been enacted to the effect that a will will operate as an exercise of a power of appointment if it conforms in all respects to the requirements of the law of the state regarding the execution of wills, although it may not meet all the provisions of the instrument creating the power.

See also *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906, *infra*, III.

(b) *Essential validity of donee's will.*

In the two cases following the question which arose as to what law governs their disposition was neither as to which law governed as to the formal execution of the will, nor as to whether the intent of the donee to execute the power was expressed, but as to whether the will was essentially valid as an execution of the power; and even this is vaguely evident in the report of the first case, the question there decided seeming to be, what law governed as to what was the effect of an appointment. In *Re Eald*, 76 L. T. N. S. 483, 66 L. J. Ch. N. S. 524, 45 Week. Rep. 499, the real question in 54 L. R. A.

the case was whether the English or Scotch law was to govern. The question was whether the appointed funds were assets going to creditors, or whether they went to the appointees, and, in holding that they were well appointed, the court decided that a general power of appointment created by a Scottish will must be governed by Scottish law, whatever might be the domicile of the donee of the power, the court saying: "The Scotch law applies, even though the person exercising the power may have been a domiciled Englishman, and may have exercised it by an English will."

In *Re Megret* [1901] 1 Ch. 547, 70 L. J. Ch. N. S. 451, 84 L. T. N. S. 192, in contemplation of a marriage between a domiciled English woman and a domiciled Frenchman, a settlement of personal property belonging to the intended wife was executed in English form, the trustees were English, and the property subject to it was and remained English. The settlement gave the wife a general testamentary power of appointment over the settled property, which was given to her for her separate use in default of appointment. There was issue of the marriage, a son and three daughters. The wife made a will in English form, and executed according to English requirements, whereby she appointed the whole of the trust fund. The will, however, was executed in a manner that to some extent would not be permitted by the law of France if it were her own absolute property. It was held that the will was a good exercise of the power given by the settlement. The court cited and approved what was stated in *Pouey v. Hordern* [1900] 1 Ch. 192, 69 L. J. Ch. N. S. 231, 82 L. T. N. S. 51, *supra*, II. a, 1, (a), and also in *Re Bald*, 66 L. J. Ch. N. S. 524, 45 Week. Rep. 499, 76 L. T. N. S. 462.

b. *When limited to a class.*

1. *Exclusion of member of class.*

If the creator, or, as he is usually termed, the donor, of a power of appointment by will, has, in the instrument creating the power, designated a class of persons among whom the subject of the power is to be appointed, the provisions of a will which excludes any of the class will not be a valid execution of the power.

Under a will a person had the power of appointing, by deed or will, a sum of money amongst all and every, or such one or more exclusively, of the others or other of his children, as he should direct, and, in default of appointment, the sum was given among the children equally; and by his will he gave, devised, and bequeathed all his freehold and other messuages, etc., and all his household goods, etc., and all other his real and personal estate and effects whatsoever and wheresoever, or of what nature or kind soever, and whether in possession, reversion, remainder, or expectancy, unto his son, according to the nature of the several estates and effects respectively. There were two other children, and the court held that, if this had been a power to appoint in any manner he might think proper, the power would have been properly executed, but that it was not, but was a power to appoint amongst his children in such manner as he should think proper, and is of quite a different nature. That the power did not come within the provision of the act of Parliament (7 Wm. IV. & 1 Vict. chap. 26, § 27), and was, therefore, not executed by the will. *Cloves v. Awdry*, 12 Beav. 604.

A testator, after bequeathing all his personal

property to his wife absolutely, inserted this clause in his will: "Having full confidence that she will leave the surplus to be divided at her decease justly among my children." The power of appointment thus created was not exercised by a will of the wife, in which she bequeathed the same to some of the children only, as it was not even an ostensible attempt to execute her power. *McKonkey's Appeal*, 13 Pa. 259.

Where a married woman, by her will purporting to be in pursuance of a power with which she was invested, appointed a certain fund to her three children in such manner as her husband should appoint, and he, by his will, appointed the whole fund to two only, such appointment was bad on account of the exclusion of the third. *White v. Wilson*, 1 Drew. 298, 22 L. J. Ch. N. S. 62, 17 Jur. 15, 1 Week. Rep. 47.

Where the language of a will was, "my will being that my said daughter shall in such case have power to dispose of the same [residue] among her brothers and sisters, and their children, in such proportions as she may think fit, but to no other person or persons whatsoever," it was claimed that this was not intended to qualify or limit the power of appointment previously conferred, but was meant only as a more emphatic designation of the objects to which the appointment was to be confined; but the court held that the language was too direct and unequivocal to admit of this construction; that the testatrix used the words "among her brothers and sisters," which was inconsistent with the exclusive appointment, standing as the words do, without any qualification to its natural import and significance. The position of the word "such," in the sentence, confines the direction of the donee to the proportions; and the donee having failed to leave any part of the fund to three of the designated class, it was held that the power had not been properly executed. *Lippincott v. Ridgway*, 10 N. J. Eq. 164.

Where a testator, by his will, gave his real and personal estate to trustees upon trust for his three daughters, with the provision that, in case either should leave issue, then she or they should appoint their share or shares unto such child or children in such manner and form as she or they should choose; and one of them, by her will, appointed a part of the fund to the son of a deceased daughter,—this was held to be a valid exercise of the power, as the expression "issue" is the largest possible, and includes descendants at any distance. *Harley v. Mitford*, 21 Beav. 280.

Where a power is given to appoint among children or issue, although there is no express gift over in default of appointment, it is not disputed that in such case there is an implied gift to a class as objects of the power, it being considered that the object is to give to them, subject to the exercise of the power. Where a testator, by his will, provided that in a certain contingency the property should go in such manner, and among such issue, as his granddaughter should by deed or will appoint, and the donee of the power appointed property by will among some only of her issue living at her decease, such appointment was void for exclusiveness. The court said that the nearest case to this was *Harley v. Mitford*, 21 Beav. 280, *supra*, in which it was held that an exclusive appointment was authorized; and said that, without saying a word as to whether, if that case had come before him, he should have so decided, he should decide this case against the exclusive power. *Stolworthy v. 64 L. R. A.*

Sancroft, 10 Jur. N. S. 762, 33 L. J. Ch. N. S. 708, 10 L. T. N. S. 223, 12 Week. Rep. 635.

The donee of a power of appointment under the will of his father, which bequeathed to the executors thereof a portion of his residuary estate upon trust to pay, upon the death of his son, the capital thereof to such son's children in such proportion as the son should decide by his last will and testament, has not only the right to apportion the capital between all his children,—as well those of his then existing marriage as those of any future marriage,—but has, also, the right to dispose of the property in favor of one or more of his children to the exclusion of the others. *McGibbon v. Abbott*, L. R. 10 App. Cas. 653, 54 L. J. P. C. N. S. 39, 54 L. T. N. S. 138. This was an appeal from the Queen's bench of Canada, and, in delivering the opinion of the privy council, Sir Barnes Peacock said that the courts in Lower Canada are not bound by the current of decisions in England, as the judges in England before 1874, and Lord Alvanley in the case of *Kemp v. Kemp*, 5 Ves. Jr. 861, 5 Revised Rep. 182, considered themselves to be bound in deciding whether a power was exclusive or nonexclusive; that even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject and the law was amended by act 37 & 38 Vict. chap. 37. He said, further, it would be lamentable if their lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of the father in this case as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an act of Parliament in England to remove.

Where a wife, by her will, devised and bequeathed her property to her husband's trustee, with full power to her husband to use, sell, control, exchange, and reinvest, using the interest and income therefrom as he might choose for the support of himself and their children and grandchildren during his life; and he was also empowered to dispose of any or all of said property, or the proceeds from the sale thereof, as he might choose, among the children and grandchildren during his lifetime, and at his death to dispose of it, or what remained of it, among the children and grandchildren by will in such proportions to each as he might choose, giving the same power to divide the estate among their heirs, children, and grandchildren as she herself had,—under such a power, the husband had no right or authority to exclude any child or grandchildren absolutely from sharing in the estate; but where, by his will, he gave a portion to each of them, and after making his will, he made a codicil in which he stated that, one son having received his full share of the estate of his wife, as well as his own, he willed that that son should have no part of either of said estates,—his wife's or his own,—it was contended that the recital in the codicil, to the effect that he had already received his full share of the estate, could not be considered. This was held to be error; that by the will and codicil the husband clearly evinced his intention to execute the power vested in him by the will of his wife, and if it were true, as stated in the will, that the son had received his full share, he had no semblance of right to another, and *prima facie* the power

of appointment had been fairly and legally executed. *Hatchett v. Hatchett*, 103 Ala. 556, 16 So. 550.

Where a sum was bequeathed by a will to trustees for a woman for life, and on her death in trust for her three children in such shares as she should by will or codicil appoint, and, in default of appointment, in trust for her three children equally as tenants in common; and she by a codicil to her will appointed two sixths of the fund in trust to pay the income to her son, and after his death for his children, and, in default of children, in trust, to be equally divided between all her children and grandchildren then living *per capita*, and one sixth for each of her two daughters; and then declared that she made no appointment of the other two-sixths parts of the whole sum bequeathed by the original testator, as she wished those parts to pass directly to her two daughters so as to give them an immediate, vested, and disposable interest therein; and also declared that neither her son nor his children (if any) should take any share or interest in the said unappointed parts of the said trust funds,—as to those two-sixths parts there was no exercise of the power, and they went to her son and two daughters as unappointed. *Re Jack* [1899] 1 Ch. 374, 68 L. J. Ch. N. S. 188, 80 L. T. N. S. 321. The court said that it appeared that the donee of the power had acted under a mistake, and appeared to have thought that if she did not appoint the balance of the fund, it would go to the two daughters; but that it was impossible to say that, under the codicil of her will, she did, in effect, appoint the balance of the fund by implication when she had expressly said that the balance was unappointed.

Where a testator, by his will, gave his wife the power of appointment of his estate among his children in certain proportions, the will of the wife, which disposes of the estate in a different manner or proportion, is not a valid execution of the power. *Ketchin v. Rion* (S. C.) 47 S. E. 376.

2. Inclusion of nonmember.

On the other hand, where the appointment has been so limited to a class, an attempt to exercise the power by a will which includes persons or parties not of the designated class will also be invalid as an execution of the power; and when, and under what circumstances, the appointment will be held void as a whole, or only as to those not objects of the power, will be found in the cases in this subdivision.

Where a testator, by his will, gave to his wife all his estate, both real and personal, in trust to manage the estate, at her discretion, for the support of herself and to raise and educate the children, with the power to her to dispose of it among all of the children as their circumstances might seem to require, the will of the wife, giving the property to the grandchildren of her husband and other remote descendants, was not a valid exercise of the power, and the appointments under it were inoperative and void. *Little v. Bennett*, 58 N. C. (5 Jones, Eq.) 156.

Where one possessing the power of appointment under a will, by her will bequeathed certain legacies, which was held to be a valid exercise of the power, and bequeathed a sum to one who was not an object of the power, and thereafter appointed the balance of the fund to which the power related,—it was held that the sum bequeathed to the one not an object of the power was unappointed, and did not pass to the 64 L. R. A.

legatee of the balance of the fund, but, aside from that, the balance did pass to such legatee (who was a proper object of the power), freed from a charge of debts which the will sought to impose upon it. *Re Jeaffreson*, L. R. 2 Eq. 276, 12 Jur. N. S. 660, 14 Week. Rep. 759.

Where a person possessed of the power of appointment by will over a trust fund, limited to her children only, by her will proceeded to appoint to three of her children one fourth each, and the remaining one fourth to a grandchild, and all the rest, residue, and remainder of her personal estate and effects, and over which she had any power of disposal by her will, to two of her three children before mentioned, the appointment of the one fourth to the grandchild was invalid, as such grandchild was not an object of the limited power, and the same went, by virtue of a residuary clause in the will, to the two children, who took the residuum of her other shares, and also any personal estate. *Re Hunt*, L. R. 31 Ch. Div. 308, 55 L. J. Ch. N. S. 280, 54 L. T. N. S. 69, 84 Week. Rep. 247.

Where, by the instrument creating the power of appointment, such power is made a special one, and the donee of the power assumes to appoint to persons who are not the objects of the power, such an appointment is invalid. And where such power is exercised by will, if it is apparent that the intention of the testator was that if, for any reason whatever, anyone of the beneficiaries under her will, could not take any part of that which was given to him by the will, that which he could not take should go over to the other beneficiaries under the will who were capable of taking it. *Re Swinburne*, L. R. 27 Ch. Div. 696, 54 L. J. Ch. N. S. 229, 33 Week. Rep. 394.

Where a power of appointment by will limited the objects of the appointment to the children of the donee of the power, naming them, such power cannot be exercised by the will of the donee in favor of her grandchildren, and such an attempted exercise of the power will not be rendered valid by the provision of the Code, that "when a disposition under an appointment or power is directed to be made to the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren or other descendants of such person." *Thorington v. Hall*, 111 Ala. 323, 56 Am. St. Rep. 54, 21 So. 835.

Where one has a power of appointment under the will of a testator which is not a general power, but the donee is not enabled to select the object of the original testator's bounty, nor even the class out of which those objects could be selected, as where they were the children of the donee who might be living at his death, and the issue of any child or children then deceased, there having been no such issue, the children of the donee are the sole objects of the power, and an appointment outside of them—that is, to grandchildren—will not be a valid exercise thereof. *Horwitz v. Norris*, 49 Pa. 213.

A power of appointment to children does not embrace grandchildren, and the exercise of it in their favor is without authority, and void. *Cruise v. McKee*, 2 Head, 1, 73 Am. Dec. 186.

A power of appointment to children does not authorize an appointment to grandchildren. *Jarnagin v. Conway*, 2 Humph. 50.

A power to appoint to children will not authorize an appointment to grandchildren, or other persons, unless such an intention appears from the instrument creating the power. *Hood v. Haden*, 82 Va. 588.

A power of appointment limited to the children of the donee of the power is not well exercised by a bequest, in the will of such donee, to a son-in-law. *Ratchliffe v. Hampson*, 1 Jur. N. S. 1104, 4 Week. Rep. 67.

Where one has the power of appointment under a will limited to nephews and nieces, such power is not well exercised by a disposition of the property to which the power related to great nephews and great nieces. *Falkner v. Butler*, 1 Ambl. 514.

Where a testator in his will provided a trust for his six children for life, with power to each to appoint by a last will and testament his or her share of the residuary estate to any one or more of his or her child or children, or descendants, to the exclusion in whole or in part of any other or others of such child or children, or descendants, such power is not well executed by an appointment to issue of living children of the donees. *Fotterall's Estate*, 12 Pa. Co. Ct. 548.

Where a testator by his will, gave to his wife a power of appointment among the brothers and sisters of himself and his wife, and their descendants, and she, by her will, after reciting the power whereby, in exercise thereof, she gave a small legacy to each of the brothers and sisters of herself and her late husband, devised and bequeathed to another sister all the residue of her husband's and her own real and personal estate; but afterwards revoked this will, and by another, which did not recite the power, directed her debts and funeral expenses to be paid out of her personal estate; and, subject thereto, she gave to one of her nephews, the son of one of her sisters, who was living at her decease, and to one of her nieces, the daughter of one of her husband's brothers, who was living at her decease, a leasehold messuage and premises known by a particular name, which had formed part of her husband's residuary estate; and all of the husband's brothers and sisters were living at the time of his decease,—it was held that, while it was certain that, if any brother or sister had died before the wife, their children or grandchildren would be descendants, it was not so certain that the same word applied to, or meant, children or grandchildren of a brother or sister alive at the death of the wife; that the former meaning was certain, and that, being found consistent with a rational construction of a will, the use of the word "descendants" must be confined to that which was the most accurate meaning of it; and that the will of the wife entirely failed as an appointment. *Tucker v. Billing*, 2 Jur. N. S. 483.

Where a power of appointment conferred by will was therein made upon the condition that the person to whom the power was given should exercise it only in the event of his having children, an attempt on his part to exercise it without having children will be nugatory. *Earle v. Barker*, 11 H. L. Cas. 280, 13 L. T. N. S. 29, Affirming 33 Beav. 353.

A testator, by his will, settled one fourth of the proceeds of the sale of his residuary real and personal estate for the benefit of his daughter and her husband for life, and afterward for her children, with a gift over in default of children attaining a vested interest, with a general power of appointment to the daughter of a sum to be raised upon the estate; and she made her will stating that, in the exercise of such power, she gave and bequeathed said sum equally amongst eight persons, as tenants in common; and declared that if any of them should die in her lifetime leaving a child or

children, such child or children were to be entitled to his or their parent's share, and appointed an executor. Two of the appointees having died in the lifetime of the testatrix, it was held that she had not indicated an intention to make this sum, so attempted to be disposed of by her, hers for all purposes, and that, so far as concerned the lapsed shares, they went as in default of appointment. The court followed *Re Davies*, L. R. 13 Eq. 163, 41 L. J. Ch. N. S. 97, 25 L. T. N. S. 785, 20 Week. Rep. 165, *supra*, I. c. and distinguished *Re Pinède*, L. R. 12 Ch. Div. 667, 48 L. J. Ch. N. S. 741, 41 L. T. N. S. 579, 28 Week. Rep. 178; *Re Ickeringill*, L. R. 17 Ch. Div. 151, 50 L. J. Ch. N. S. 364, 29 Week. Rep. 500, *infra*, V. c. and *Coxen v. Rowland* [1894] 1 Ch. 406, 63 L. J. Ch. N. S. 179, 8 Reports, 525, 70 L. T. N. S. 89, 42 Week. Rep. 568, *supra*, I. a. *Re Boyd* [1897] 2 Ch. 232, 66 L. J. Ch. N. S. 614, 77 L. T. N. S. 76, 45 Week. Rep. 648.

In *Grant v. Lyman*, 4 Russ. Ch. 292, 6 L. J. Ch. 129, 28 Revised Rep. 97, the court held that, where the author of the power uses the term "family," the donee, who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin; and so, where the power was to appoint to such of the donor's family as the donee might think proper, the will of the donee giving to a relation of the donor, but not one of her next of kin, is a good execution of the power.

See also cases *infra*, II. g.

3. Illusory appointment; remoteness.

By the old English rule, when the appointment had been limited to a class by the donor of the power, to be exercised by will, the will of the donee of the power, in order to be a good execution of it, must not only have disposed of some portion of the subject of the power to every member of the designated class, but there must have been a substantial gift to each; and a nominal gift to one or more was said to be illusory, and would render the will invalid as an execution of the power. But under the later authorities, both in the United States and England, the doctrine of illusory appointment has been dispepelled; and, where the proportion of the subject of the power to be given to each member of the class named is left to the discretion of the donee of the power, a nominal gift to some of them will be a good execution thereof.

A widow who, by the will of her husband, had a power of appointment of personality among his sons as she should think fit, by her will gave personal estate to one of the sons, and only a small pecuniary legacy to the other two. Her will was held not to be an exercise of the power. *Jones v. Jones*, 10 Jur. 960.

The reason for this holding would seem to have been that the exercise of the power was illusory.

Where a testator, after disposing of a part of his estate, devised and bequeathed to his wife generally all the rest of his property and estate whatsoever, real and personal, during the term of her natural life, upon certain conditions, and then empowered her, by her last will and testament, or other instrument signifying her intention, to make some provision or portion to their orphan child, naming her, whom he commended to her good and generous heart, a devise by the wife, in her will, of two

thirds of the estate of her husband to such child is a valid execution of such power, and is not excessive. The testator having left the nature and amount of the provision to the discretion of his wife his confidence in her must be held to have authorized any disposition in favor of the person for whose benefit the power was to be exercised, be it much or little. The court said further: "For after all that has been said and written on the subject of the execution of powers, the only principle which can be safely extracted from the cases is that, where a power of appointment is to be exercised according to the discretion of the person to whom it is committed, no appointment, however unjust and unreasonable it may seem, can be regarded as excessive; but, where any limitation is placed to the exercise of his discretion, the courts will control the execution of the power." *Fronty v. Fronty*, 1 Ball. Eq. 517 Appx.

In *Cruise v. McKee*, 2 Head, 1, 73 Am. Dec. 186, the court said that where one invested with a power to apportion property amongst a class, with full discretion as to the amount given to each, gives to one a merely nominal share, such appointment will be set aside as illusory, as a fraud upon the donor of the power, as the latter certainly intended, by making all the objects of his bounty, or of the power, that each should have a substantial share. This was entirely unnecessary to the decision of the real question involved, and, while some English cases have held this doctrine, it is believed not to be in line with most of the authorities on the subject.

Where a testator provided, by his will, that at the death of his wife one half of the property in her possession was to be divided equally between his heirs, and one half to be divided between her heirs, in the manner that she might decide; and she by her will, alluding to this provision of her husband's will, stated that she desired and decided and appointed that one niece should take all of the said one half, except that she bequeathed a comparatively nominal sum to each of her other heirs,—this was a valid execution of the powers of appointment conferred upon her by the will of her husband, as, while under this power each heir of the wife must take some thing, the portion which each must take was left to her discretion. The court condemned the doctrine of what is known as illusory appointment, and stated that, inasmuch as the doctrine had been discredited and reluctantly enforced by the English courts of equity until the steadily increasing dissatisfaction was recognized by a statute entirely forbidding its application, and in view of the further fact, that no case, as it seems, can be found in which it had ever been applied by an American court they were of the opinion that, in the light of all the authorities cited, and in consideration of the reasons which might make against the rule and its enforcement, they would not be warranted in ingrafting this doctrine of illusory appointment upon the laws of the state. *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885.

Where a testator made his will devising to a grandson for life, and after his decease to his heirs, a tract of land containing 311½ acres, to have and to hold the same to the grandson during life, and after his decease to his heirs and their heirs and assigns respectively forever, in such manner and shares as the grandson might see fit to divide it among them, which

he should have full power to do, as he pleased; and the grandson, having two sons and two daughters, his only children, devised to one son 130 acres, to another 190 acres, and to each of the daughters a little more than 3 acres,—this was held to be a valid exercise of the power of appointment, and that the equitable rule of an illusory appointment, which was found in England so unsatisfactory and so difficult to administer, would not be introduced in this state. *Græff v. De Turk*, 44 Pa. 527.

A power to distribute among a class in such shares and in such manner as the donee sees fit is well exercised, though the share of one of the distributees is nominal and unsubstantial. *Van Syckel's Estate*, 24 Pa. Co. Ct. 241.

Where a wife, by her will, conferred upon her husband the right of disposing of a number of slaves among their children in such manner and proportion as he might think proper, and the husband, by his will, distributed the slaves some to each of the children, but in unequal proportions, it was held that a general power was given, and that the will of the husband was a valid exercise of the same. *Cowles v. Brown*, 4 Call (Va.) 477.

Where, by a marriage settlement, the wife has the power of appointment to the children of the marriage, and by her will gives a sum, over which the power extends, to her son for life, and after his death as he shall by his will appoint, and, in default of his appointment, to her daughters as tenants in common, the appointment to the son is invalid for remoteness, but the daughters, under the provisions of the will, will take as tenants in common. *Wollaston v. King*, L. R. 8 Eq. 165, 38 L. J. Ch. N. S. 392, 20 L. T. N. S. 1003, 17 Week. Rep. 641.

c. When donee's will creates a trust.

When the will of the donee of a power of appointment, which creates a trust, will operate as a valid execution of the power, and under what circumstances it will not, appear in the following cases:

Where, by a marriage settlement, a general power of appointment by will, "expressly referring to this power or the subject thereof," was reserved to the husband, his will, giving the residue of his property to trustees on certain trusts differing from those declared by the settlement, in default of appointment, will be deemed a valid exercise of the power. *Re Marsh*, L. R. 38 Ch. Div. 630, 57 L. J. Ch. N. S. 639, 59 L. T. N. S. 595, 37 Week. Rep. 10.

See *Walker v. Banks*, 1 Jur. N. S. 606, *supra*, I. d. 3, and *Re Phillips*, L. R. 41 Ch. Div. 417, 58 L. J. Ch. N. S. 443, 60 L. T. N. S. 808, 37 Week. Rep. 504, *supra*, I. e.

By a will property was given to a granddaughter for life, and after her death upon trust for her children, or some of them, or some of their heirs, executors, or administrators, as she should by deed or will appoint. The donee of the power had six children, all of whom were living at the death of the original testator. The donee of the power assumed to exercise it by her will, by which she gave an annuity to one of her daughters, and, subject thereto, bequeathed the trust to her other children in equal shares for life, and, after his or her deaths, as they should respectively by will appoint, with limitations over, in default of appointment, in favor of their respective

children. The master of the rolls held that this was a good appointment, saying that he must follow *Phipson v. Turner*, 9 Blm. 227, 2 Jur. 414, *supra*, I. b., even if it were wrongly decided, as he could not overrule it at that distance of time; and that, as to the question of remoteness, it did not arise, as all the children of the donee of the power were in existence at the time of its creation. *Slark v. Dakyna*, L. R. 15 Eq. 307.

Where a testatrix having a general power of appointment of a sum certain, and a special power to appoint the residuum of certain other property by her will professes to give all her real and personal estate whatsoever and wheresoever, of which she has any power to appoint or dispose of, to trustees upon trust to sell, and out of the moneys to pay all her debts, funeral and testamentary expenses; and then proceeds to dispose of the surplus in favor of persons who were the objects of the special power,—it must be supposed that she intended that her own debts should come out of that portion of the property over which she had a general power,—that property which was, in effect, her own,—and the rest to pass to those who were the objects of the special power; and the will must be considered to have been a valid exercise of the complete power of appointment. *Ferrier v. Jay*, L. R. 10 Eq. 550, 39 L. J. Ch. N. S. 686, 23 L. T. N. S. 302, 18 Week. Rep. 1130.

Where a testator, by his will, invested his wife with the power to provide in her will, in such manner as she chose, for an improvident son; and she, by her will, created a trust for him, evidently because she was not able to put confidence in the receipt by the son of an absolute gift; and a consideration of both wills revealed the fact that the husband had great confidence in his wife's judgment, but that neither he nor she had any confidence in the son's ability to control money if given to him outright, and that his general conduct had been unsatisfactory to both of them,—the creation of such trust for the son was a valid exercise of the general power of appointment as to him, given to the wife by the will of her husband. *Kemp v. Kemp*, 36 Misc. 79, 72 N. Y. Supp. 617.

While the attempt, in the exercise of a power of appointment, to create a trust which is to accomplish that which is not within the terms of the power, will not be permitted, the fact that a trust is created will not affect the validity of appointment, where such trust really effectuates the intention of the donor by confining the benefits to the selected objects. *Bolyes's Estate*, 5 W. N. C. 363; *Fotterall's Estate*, 12 Pa. Co. Ct. 548.

Where a testator, by his will, empowered his wife to divide by will all his real and personal estate among his children as she should think proper, giving to each such a share as her judgment should dictate, and she, by her will, gave and devised the real estate to two of the children, and charged the real estate so devised with legacies to the other children, this was a valid exercise of the power contained in her husband's will. *Darling v. Edson*, 4 Pa. Super. Ct. 498.

And so where, by the will of a testator, his wife is clothed with the power of appointment to a class; and she, by her will, assumes to create a trust for one of that class,—the will is not invalid as an exercise of the power, but the creation of the trust is; and the member of

the class for whom the trust is sought to be created will take an absolute gift. *Ibid.*

Where a testator, by his will, empowered his wife to devise the estate, both real and personal, to their children, or their proper heirs, as she might deem right and equal in her best judgment, which should be final, a devise in her will of all the real estate she owned at the time of making her will, to her executors to be rented during the minority of the youngest child, and then to be sold by them and converted into money to be invested for the benefit of the children, is not warranted, and is not a good exercise of the power. *Doe ex dem. Davis v. Vincent*, 1 Houst. (Del.) 416.

A will of a testator gave to his wife all his real and personal estate for life, and otherwise empowered her, by her last will and testament, to give and bequeath all or any part of such estate which might remain at her death to their four children in such shares or proportions as she in her discretion should think fit. A son died leaving a widow, and also a son, to whom, by his last will, he bequeathed and devised all his property. The widow of the original testator bequeathed and devised three fourths of the estate to her other three children in equal proportions, and then attempted to further exercise her power of appointment by bequeathing one-fourth part of her real and personal estate to a trustee to invest and pay one third thereof to her son's widow for her use, and the remaining two thirds for the education and support of her grandson. It was held that, in the exercise of her power of appointment, she was without authority to create the trust diverting a part of the income to her grandson, and that it was an invalid exercise of the power, and that, under the will of the deceased son, the one-fourth portion passed absolutely to his widow. *Townsend v. Townsend*, 27 Misc. 268, 58 N. Y. Supp. 420.

Where the will of a wife, who was invested with the power of appointment of a sum of money, bequeathed and appointed the same to her husband absolutely, but followed it with a request that, after reserving for his own absolute use and benefit a certain part of that sum, he should make such disposition of the remainder by will, deed, or settlement as he might deem most desirable, to carry out her wishes often expressed to him by word, it was held, although the wife had never by word or otherwise expressed to him any intention or wish as to the disposition of the remainder, yet, as to such remainder, a trust was intended, and, that being the case, the husband was excluded; but, as the will also contained a subsequent bequest to him of, "all and singular, other the testatrix's property," such subsequent bequest was a bequest of the residue of her property, and passed to the husband the property over which he had the power of appointment, notwithstanding her intention to except it from the former appointment in his favor. *Bernard v. Minshull*, Johns. V. C. (Eng.) 276, 28 L. J. Ch. N. S. 649, 5 Jur. N. S. 931.

Where a testator gave the residue of his estate to his widow for life, and after her death directed that it should pass to and become the estate of such of his children and grandchildren, or either, as his widow by will should appoint, and, in default, should pass to his children and descendants as though he died intestate, the will of the widow creating

trusts for life of five ninths of the estate, with remainders over, was, as an exercise of the power of appointment, unwarranted and void. *Myers v. Safe Deposit & T. Co.* 73 Md. 418, 21 Atl. 58.

d. When power exhausted; revocation.

In several instances the donee of a power of appointment by will or deed has attempted an execution by one or the other instrument, sometimes reserving, and in other instances not, a right to revoke the appointment thus attempted, and has thereafter attempted to revoke the same and reappoint by will. Under what circumstances the power will be held to have been exhausted by the first appointment, or, on the other hand, when the last will be deemed a revocation of the first appointment and valid as a new execution of the power, will be seen by an inspection of the cases in this subdivision.

An intended wife was possessed of two estates, one of which was her own inheritance and the other was derived from her deceased brother. Both were conveyed by agreement, by the settlement, to trustees to hold for such uses as the husband and wife should jointly appoint by a deed, and, in default of appointment, as to one half to pay the rents and proceeds to the husband during the joint lives of himself and his wife, and as to the other half to pay the rents and proceeds to the wife for her separate use during their joint lives, and, upon the death of either, the survivor to take the rents and proceeds for life, subject to these life estates. The estate derived from the brother was limited to such uses as the wife should appoint either by deed or will, and, in default of appointment, it was limited to go to her first and other sons in tail male, with remainder to her daughters as tenants in common in tail general, with cross remainders between them in tail with provisions for default of issue. With a view to correcting an important omission, a deed of appointment exercising that power was duly executed by the husband and wife and the trustees, by which they proceeded to limit and appoint both the estates to such uses as both husband and wife should by deed jointly appoint, and, in default of any such appointment, so far as regarded the estate derived from the brother to such uses as the wife should appoint by deed or will; and, in default of any such appointment, the estate was limited as therein stated as to issue, and, in default of issue, as the wife should by deed or will appoint, and, in default of appointment, to the uses limited by the original settlement. But in this deed of appointment a more serious blunder was made by omitting in the settlement of the estate derived from the brother all the limitations for the lives of the husband and wife and the life of the survivor. Ignorant of this, the wife made her will by which she recited the power contained in the original settlement, and by virtue of that and every other power entitling her to do so, devised all the settled lands. Thereafter the last blunder was discovered, whereupon the husband and wife executed a fresh deed to repair the same between the husband and wife of the one part, and the surviving trustee of the original settlement of the other part. Thereafter the wife died without issue and without having altered or republished her will, or revoked it, unless the last deed operated as a revocation, and it 64 L. R. A.

was held that it did, and that the will was inoperative as an exercise of the power. *Walker v. Armstrong*, 21 Beav. 284, 25 L. J. Ch. N. S. 402, 2 Jur. N. S. 221, 4 Week. Rep. 280.

In *Jowett v. Board*, 16 Sim. 352, 18 L. J. Ch. N. S. 53, 12 Jur. N. S. 933, it appeared that a married woman, by virtue of her marriage settlement, had the power of disposing of certain freehold property settled to her separate use, and she exercised that power by a will executed according to the power, and thereby made a specific appointment in the nature of a specific devise, and a disposition of the residue in full execution of the power. After that she purchased a leasehold tenement which was assigned to a trustee virtually for her separate use, giving her a power of appointment. She then, in execution of the leasehold power, made a codicil by which she disposed, in the nature of a specific bequest, of the leasehold. She then purchased the reversion in fee of the leasehold and that reversion was conveyed to a different trustee in fee, in trust for her separate use, with a power of appointment. She then made a second codicil, which in terms referred only to that portion of the specific property which was the subject of the settlement, and it was executed in pursuance of the settlement power, although it purported to be made in pursuance of that power, and of all other powers vested in her, and, in pursuance of the settlement power and of all other powers in her vested, she revoked the testamentary appointment in the nature of a specific bequest which she had made by her will, and made a different disposition of the property; but there was nothing in the last codicil which tended to show that she intended that there should be any other alteration whatever in the effect of her testamentary appointment, save and except that which was confined to the specific object of revoking the first bequest. It was held that the second codicil did not republish the will, and, therefore, that the reversion in fee in the leasehold did not pass by the residuary devise in the will, but the testatrix died intestate as to it.

A tenant for life under a settlement, having the power of appointing the fee by deed or will, exercised the power fully by deed, the instrument containing a power enabling her to revoke, and newly appoint, a power only to be exercised by deed. She afterwards duly executed by deed, as with respect both to revocation and new appointment, to exhaust the power. The latter deed also contained a power enabling her to revoke and newly appoint, a power, however, only exercisable by deed. Thereafter she exercised the power reserved to her by the latter deed so, as with respect to both revocation and new appointment, to exhaust it; the last deed containing a power enabling her to revoke and newly appoint, only exercisable by deed. Thereafter she duly executed and fully revoked the latter deed, or at least the portions of it which consisted of new appointment as distinguished from mere revocation, but did not by such deed newly appoint; and thereafter she made her will, whereby she assumed to exercise the same power of appointment. By the terms of the original settlement, in default of the execution of the power, the fee in remainder after her life estate was settled upon the defendant, who claimed that, if the first deed did not exhaust the power of appointment, the last deed, by its revocation of the same

without the making of a new one, did, and there was no power left to appoint by will. The vice chancellor held that this was so, and, accordingly, the appointment by will was bad, and that the estate consequently descended to the defendant in fee. *Evans v. Saunders*, 1 Drew. 415, 654, 22 L. J. Ch. N. S. 471, 17 Jur. 338, 1 Week. Rep. 220, 529.

This decision was reversed by the high court of chancery, which held that a power which, in any mode or to any extent whatsoever, has been exercised, but exercised revocably, and the revocable appointment made under which has been well revoked without having been acted on, is generally, if not universally, in the same force, and exercisable in the same manner, as if the revoked appointment had not existed, and that a power cannot necessarily be exhausted by a revocable act, though executing otherwise, the power to the utmost, more than by a conditional act or by an act of merely partial execution; and that after the last deed the power was still existing subject to execution, and was executed by the will. *Evans v. Saunders*, 6 DeG. M. & G. 654.

This decision of the high court of chancery was afterwards unanimously affirmed in 8 H. L. Cas. 721.

A woman, having a power of appointment derived from the will of another, by her will gave the fund over which she had such power, and some specific articles, to trustees in trust for her residuary legatee thereafter named, and then gave her general residue to that person. Thereafter she, by a codicil, revoked the bequest as to the residue, and gave it to that person and another. It was held that the first-named legatee took the fund under the appointment; in other words, that the appointment was exercised by the first gift of the residue. *Roach v. Haynes*, 6 Ves. Jr. 153, Affirmed in 8 Ves. Jr. 584.

Where a woman had the power of appointment by deed or will by virtue of her marriage settlement, and afterward was, by the will of her father, invested with the power of appointment over an estate thereby given to her for life; and she executed the power over the residuary property given to her by the will of her father by deed in her lifetime, reserving the power of revocation; and thereafter made her will exercising the power of appointment with which she was invested by the marriage settlement, "or otherwise,"—such appointment by the will is not a revocation of the former appointment made by the deed, and the latter is valid. *Pomfret v. Perring*, 5 DeG. M. & G. 775, 3 Eq. Rep. 145, 24 L. J. Ch. N. S. 187, 1 Jur. N. S. 173, 3 Week. Rep. 81.

A testator, by his will, gave his wife several powers of appointment by deed or will over a certain particular estate, if converted under a trust, for the conversion of the same. The wife executed a deed of appointment in her lifetime in general terms, and afterwards made a will in which she purported to appoint the particular estate so previously appointed by deed, which will made no mention whatever of the previous appointment, and had no recitals or mention of any intention to exercise the power of revocation contained in the deed and to make a new appointment. The court said that her will seemed to have been made with a total forgetfulness or ignorance of the previous appointment, was inconsistent with it, and therefore invalid. *Cooper v. Martin*, 12 Jur. N. S. 887, 15 L. T. N. S. 268, 15 Week. Rep. 64 L. R. A.

5. Affirmed in L. R. 3 Ch. 47, 17 L. T. N. S. 587, 16 Week. Rep. 234.

Where one having a power of appointment under a marriage settlement executes his will in the express exercise of the power contained in the settlement which was to be exercised by deed or will, and thereafter executes a deed settling the property in a different manner, such deed is sufficient evidence of a contrary intention, within § 24 of the wills act (7 Wm. IV. & 1 Vict. chap. 26), which provides that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will;" but, as the deed did not purport to revoke it, the will, under § 19 of the same act, providing that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances," remained in force, and operated as to all that portion of the property which had been imperfectly appointed by the deed. *Re Wells*, L. R. 42 Ch. Div. 646, 58 L. J. Ch. N. S. 835, 61 L. T. N. S. 588, 38 Week. Rep. 299.

A testator, by his will, gave leaseholds to trustees absolutely on certain trusts, but the trustees were to pay out of the rents an annuity of £60. Subsequent to the date of the will, the testator executed a deed of settlement by which these leaseholds were conveyed absolutely to other trustees. It was held that this was an ademption of the bequest. By the deed of settlement, he reserved to himself the power to carve out of the leaseholds annuities in favor of the persons to whom he had given annuities in his will. He afterwards confirmed the will by a codicil; but it was held that this confirmed it as altered by the ademption of the particular property which was no longer his own, but vested absolutely in trustees on the trust of the deed, and that, under the circumstances, there had been no execution of the power contained in that deed. *Cowper v. Mantell*, 22 Beav. 228, 2 Jur. N. S. 745, 4 Week. Rep. 500.

Where a woman, with her husband, had the power of appointment under a deed to be executed by will or deed, and she and her husband executed the same by deed, reserving the right to revoke and reappoint during their joint lives by any deed executed by them, and for the survivor of them, by any deed or by will to revoke the uses therein declared, and appoint and declare other uses; and, after the death of her husband, she made a will by which she devised all the real estate to which she would be entitled at her decease, and bequeathed the residue of the personal estate to which she should then be entitled, or over which she might have any disposing power,—such a will is not a valid exercise of the power of revocation and new appointment by virtue of § 27 chap. 26, 7 Wm. IV. & 1 Vict. *Re Brace* [1891] 2 Ch. 371, 60 L. J. Ch. N. S. 505, 64 L. T. N. S. 525, 39 Week. Rep. 508.

Where one having the power of appointment had exercised it by will, and thereafter, by a codicil, absolutely revoked the appointment, and attempted to make a new one, which latter gift was void by reason of the testator not having the exclusive power of appointment which the codicil assumed to make, the effect is the revocation of the old appointment without making a new one. *Quinn v. Butler*, L. R. 6 Eq. 225.

c. Appointment by survivor of two or more donees.

A general power of appointment over an equitable estate, given to the survivor of three persons, to be executed by deed or will, is well exercised by a will made during the lives of two of the persons (the third being dead), by the one who afterwards proved to be the survivor. *Thomas v. Jones*, 1 DeG. J. & S. 63, 1 New Reports, 138, 32 L. J. Ch. N. S. 139, 9 Jur. N. S. 161, 7 L. T. N. S. 610, 11 Week. Rep. 242, Affirming 2 Johns. & H. 475, 31 L. J. Ch. N. S. 782, 8 Jur. N. S. 1124, 7 L. T. N. S. 154, 10 Week. Rep. 853. In this case the chancellor said that it was a general power that might be used for the benefit of the person entitled to exercise it. That it was, therefore, equivalent to ownership; in fact it was a right of exercising ownership, that would certainly belong to one of the three designated, but was uncertain as to the individual in whom it might become vested. And that to assert that the right to exercise such a power, until the person of the donee be ascertained, was simply to beg the question at issue, and to affirm a conclusion, with regard to a contingent right to a power, which is wholly untrue with respect to a contingent right to an equitable estate.

But where a power was contained in a marriage settlement, whereby the trust fund was limited in trust for such of the children of the marriage as the husband and wife should jointly appoint, or, in default of such appointment, then as the survivor at any time or times "after the decease of the other" should by deed or will appoint; and the husband, during his wife's lifetime, made a will referring to the power, and binding the fund in favor of some of the children, and survived the wife,—it was held that this was not a valid exercise of the power of appointment. *Cave v. Cave*, 8 DeG. M. & G. 131, 2 Jur. N. S. 295.

f. Appointment by infant.

Where by the terms of a marriage settlement it was provided that under certain circumstances, the intended wife, who was described therein and who was then an infant, should have a power of appointment; and she thereafter, while still a minor, exercised the power,—such appointment was valid. *Re D'Angibau*, L. R. 15 Ch. Div. 228, 49 L. J. Ch. N. S. 756, 43 L. T. N. S. 135, 28 Week. Rep. 930.

A testator conveyed to trustees for his daughter, a married woman, who was an infant, his real and personal estate and the income thereof for life, with the general power by her deed or writing to give and dispose of the same notwithstanding her coverture; and she afterwards, during her infancy and coverture, assumed to exercise the power by providing for an annuity for her infant daughter, and bequeathing her a sum certain, to be paid to her when she was twenty-one, and providing for its disposition if she died before the age of twenty-one without issue, and devising the residue of her real and personal estate. It was held that her will was a valid execution of the power as to the personality, but not as to the realty, that as to the personality, being above the age of seventeen, she might, if sole, make a will, and the will of her father which created the power directed that she

should have the same free from her coverture,—it was the same as if she were sole; but, as to the real estate, the chancellor said that it was a considerable question, and never determined that he knew of, that he could find no case where a power given generally could be executed by an infant; and that he would make none; that from the penning of this power there was a strong objection against her executing it during infancy, for her father, having the coverture in view, had excluded that, giving her power to dispose notwithstanding that; and that he would also have excluded the case of infancy had he so intended; and that then the rule was, *Expressio unius exclustio alterius*; that he might not think there was any occasion for giving her power during infancy, as she was then about nineteen; his plain view being to secure it free from the husband's power, and that he might not induce or cajole her to part with it. Secondly, that this was a power coupled with interest, for she had the trust in equity for life, with the trust of the inheritance in her in the meantime, which would remain in herself if not disposed of, and descend to her daughter; so that this was directly a power over her own inheritance which cannot be executed by an infant. *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. Sr. 305.

g. Exercised at different times and by different acts; partial appointment

The following cases show that a power of appointment need not necessarily be exercised completely at one time and by a single act; and also that a partial execution is valid to its extent:

A general power of appointment may be executed at different times and by different acts; and, where certain property was settled by a deed executed by a husband to a trustee, whereby he, in consideration of considerable property brought to him by his wife, settled the property upon the trustee to her use during life, with power, to the use of such persons as she by her last will or testament, or other deed in writing, should appoint; and thereafter there was a partial execution of the power by the deed of the husband and wife and trustee,—a subsequent execution of it by the wife in her last will, which does not make the same provision for her husband as that contained in the deed executed by him and her and the trustee, will be void so far as it is in conflict with that deed, where the excess can be clearly ascertained, and her will, by virtue of the power of appointment, passed that portion of the personal property which had not been previously disposed of; but the life estate given to the husband by that deed was a valid execution of the power of appointment to that extent, and was a previous disposition of the personal property embraced by it, which could not be revoked or taken away by the subsequent will. *Johnson v. Yates*, 9 Dana, 491.

Where a testator had bequeathed to his widow personal property, with power to dispose of the same by will or otherwise, and also devised to her a house and lot for life, her will disposing of the personal property, and devising the house and lot, is a valid appointment of the personal property, and her will should, to that extent, be admitted to probate; but, as she had no power, under the will, to dispose of the house and lot, the probate of her

will assuming to do so should be refused. *Ford v. Ford*, 2 Duv. 418.

A power reserved by a married woman in a marriage settlement to appoint by her last will and testament, notwithstanding her coverture, copyhold lands and rent charge, and also all other property, real or personal, which she had, or which might descend or come to her during coverture, is legally exercised by the devise of a moiety of such copyhold lands and rent charge. *Wright v. Englefield*, 1 Amb. 468, 2 Eden, 239, Affirmed in 1 Bro. P. C. 486.

Where a woman possessing the power to appoint by her will in favor of a class of persons, and, if one of the class should die without issue, then to the survivors, made her will reciting correctly the authority given her to appoint, appointing the whole estate to the six permitted devisees, but in unequal proportions, and providing, if one should die without issue, his share should go to the other five, thereby completely and perfectly executing the authorized appointment in all respects within the limits of the power; and thereafter the one thus mentioned died, and she made her codicil endeavoring to give his share a new direction, and send it to persons not authorized in the creation of the power,—there was no question that such a direction was outside the power, and not a good exercise of it, and the question in the case was whether the whole appointment was void, and the equal division of the original testator operated, or the unauthorized appointment was simply a nullity, and left the valid appointment of the will undisturbed. It was held that the will made a good appointment, and was a valid exercise of the power, and that it could not be said, in regard to all the circumstances, that the codicil operated as a revocation of the devise over, as it was itself null and void. *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193.

Where the donee of a power of appointment to children assumes to exercise the same by in part disposing of the property under the appointment to grandchildren, and the question of fraud is not in the case, the appointment, so far as it is exercised in favor of the children, is valid, and the appointment to the grandchildren is void. *Cruise v. McKee*, 2 Head, 1, 73 Am. Dec. 186.

Where a husband, by the will of his wife, had a life estate in her property, with the power of appointment to dispose of it as he should think best between their three children, two of whom died, one leaving a child; and the husband, by his will, disposed of the whole of the property left by his wife to the surviving child, charging it with the payment of a certain sum to the grandchild,—the will was a good power of appointment, but the charge in favor of the grandchild was void. *Herrick v. Fowler*, 108 Tenn. 410, 67 S. W. 861. In this case the same rule was laid down in regard to a power in a deed from another person to the husband as donee, the conditions of which were the same as those of the will of the wife.

Where a man, by his will, gave a certain sum to be disposed of by his wife to and amongst his three daughters in such proportions, etc., as she should think fit, either by will or other writing, or any other disposition; and the mother, on the marriage of one daughter, by verbal agreement gave her her share, and, in further pursuance of her power, gave her an additional sum, and then gave another

daughter, who was dead and to whom she was executrix, her share of the principal sum, and declared that, as the third daughter had behaved undutifully, she would have only what remained, and died leaving her son sole executor and residuary legatee,—it was held that it was a good appointment of the gift to the first daughter, also of the additional sum, and also of the sum bequeathed to the last one, but that the appointment to the deceased daughter was void, as it could only vest in her executrix, who was the person exercising the power. *Madison v. Andrew*, 1 Ves. Sr. 61.

Where the donee of a power of appointment among her children, by her last will and testament assumed to appoint it to a son for life, and thereafter to his children as he should appoint, and in default of his appointment, to a daughter absolutely; and, after giving certain legacies appointed, devised, and bequeathed all her real and personal estate, not specifically and absolutely appointed or bequeathed, to the same daughter absolutely—it was conceded that the appointment to the son, by reason of its being charged with his appointment to his children, was invalid; but the appointment to the daughter was held to be a valid exercise of the power. *Wallinger v. Wallinger*, L. R. 9 Eq. 301, 22 L. T. N. S. 259, 18 Week. Rep. 274.

While a bequest in the will of one possessing a power of appointment limited to the children of the donee of the power, to a son-in-law of such donee, is not a valid exercise of the power, other bequests in the same will to the children of the donee are a good exercise of the appointment. *Ratcliffe v. Hampson*, 1 Jur. N. S. 1104, 4 Week. Rep. 67.

Where a testatrix, who, by the will of her father, had been invested with the power to appoint a fund, by deed or will, amongst her brothers and sisters; and she by her will, after directing her debts and funeral and testamentary expenses to be paid out of her personal estate, gave legacies to persons not objects of the power, and a portion of the fund which was the subject of the power to persons who were objects of it; and then bequeathed the residue of her personal estate, after payment of her debts, funeral, and testamentary expenses and the legacies before mentioned, to two persons, who, also, were objects of the power,—this residuary clause was a valid appointment of the remainder of the fund which was the subject of the power. *Elliott v. Elliott*, 15 Sim. 321, 15 L. J. Ch. N. S. 393, 10 Jur. 730.

Where, in an attempted exercise of the power of appointment by will, it is obvious that, as to some of the objects, the appointment is in excess of the power, although others may be within it, if the court cannot possibly define the class which fall within the power and those which must be without it, the whole gift will fail. *Re Brown*, 1 Kay & J. 522, 3 Week. Rep. 542, L. R. 1 Eq. 74.

A married woman being possessed of savings of her separate estate to a considerable amount, and having the power of appointment in regard to a still larger amount, made her will directing the payment of her debts and funeral and testamentary expenses, and then gave, bequeathed, limited, and appointed, in pursuance of all powers and authorities in any wise enabling her in that behalf, all her clothes, and all her ready money, and money which might be due to her at her decease, and all other articles of personalty belonging to

her, but not including property she had no power to dispose of, to a servant. There was no express residuary gift, and no further reference to the power. Prior to the date of her will, and down to her death, she lived apart from her husband. Her executor paid her debts out of the sum which were the savings of her separate estate, and, in an action between the party entitled as her next of kin under the settlement in default of appointment and the executor of her will, it was held that the legatee was entitled to have her legacy without any deduction for debts; and that, as the debts had been paid out of the "ready money," the amount must be made good out of the settled fund; but that the remainder of that fund must then be divided according to the trust of the settlement as in default of appointment. *Laing v. Cowan*, 24 Beav. 112.

Where one having a power of appointment by will, by his will makes certain gifts which are valid, and others which are invalid as offending the law against perpetuities, the will, as to the former, is a good exercise of the power of appointing, but not as to the latter. *Albert v. Albert*, 68 Md. 352, 12 Atl. 11; *Graham v. Whitridge* (Md.) 57 Atl. 609.

h. Exercise by deed of power limited to will.

Where the donor of a power of appointment directs that the same be exercised by a will, it cannot be executed by a deed, and conversely, where in its creation it is stipulated that the power is to be executed by deed, an attempt to exercise it by will will be ineffectual.

A conveyance to a person during his natural life, and, after his death, to such person as he, by any writing in hand of his last will and testament signed and sealed by him, and executed in the presence of three credible witnesses, might limit and appoint; and, in default of such appointment, to such child or children as he might leave to be divided equally among them, creates a power of appointment which can only be executed by will; and an attempt to execute it by deed will be ineffectual. *Bentham v. Smith*, Cheves, Eq. 33, 34 Am. Dec. 599.

Where a testator, by his will, gave, devised, and bequeathed to a daughter the residuum of his estate, both real and personal, during the term of her natural life, and, after her decease, to her children, with liberty to devise the same at her discretion, such a power of appointment is not and cannot be exercised by deed, as the power is given to devise, and not to sell and convey by deed, and must be executed in the mode prescribed by the instrument which confers it, and, if not so executed, it passes nothing. *Moore v. Dimond*, 5 B. I. 121.

A power which gives the donee at her decease the right to make a distribution and disposal of the remaining property among the children of the donor as may seem just and equitable, according to her discretion, can only be exercised by a will, and cannot be exercised in the lifetime of the donee of the power by deed. *Freeland v. Pearson*, L. R. 3 Eq. 658, 36 L. J. Ch. N. S. 374, 15 Week. Rep. 419.

Where a testator devised real property to trustees to hold in trust for his grandson to receive the rents and profits, with the power to dispose of it by will at his death; and the donee of the power, and the trustees, and the widow of the testator united in a deed to another; and thereafter the donee, by his will, 64 L. R. A.

disposed of the same land,—this was held to be an exercise of the power which no act other than the testamentary disposition of it by the donee could prevent; and that his testamentary disposition conveyed the real title, in despite of the before-mentioned deed. *Bolton v. DePeyster*, 25 Barb. 539; *Learned v. Tallmadge*, 26 Barb. 444.

Where a married woman is invested with a power of appointment by her will, if such conveyance is made during the life of her husband, an action cannot be maintained by her and her husband on a contract to convey such real property, against the other party to the contract, for the purchase money, for the reason that they cannot give a good title; as, during the life of her husband she could not exercise the power by a deed. And she could not exercise it by a will, and a covenant not to revoke the latter, as a will made in execution of a power, while not strictly a will, but simply a declaration of a use, yet so far retains the properties of a will as to be ambulatory until the death of the testator, and, consequently, revocable in the same manner as an ordinary testamentary instrument. *Reid v. Boushall*, 107 N. C. 345, 12 S. E. 324.

A power of appointment to be exercised by a last will cannot be executed by an instrument which is to take effect during the lifetime of the donee of the power, as the intention of the donor is that the donee shall have his whole lifetime to determine in what manner the power shall be exercised. *Taliaferro v. Young Men's Christian Asso.* 10 Ohio Dec. Reprint, 1.

A testator, by his will, devised the use and benefits and bequeathed all of his real estate to his wife for life, and all his personal property absolutely, "having full confidence that she will leave the surplus to be divided, at her decease, justly among my children." The word "leave" being inapplicable to a deed, the power must be executed by will, and cannot be executed by an act to take effect in the donee's lifetime. *McKonkey's Appeal*, 13 Pa. 259.

The will of a testator, after devising and bequeathing to his infant daughter all of his property to be her sole and separate estate, and free from the contracts and obligations of any person with whom she might intermarry, during her coverture, as though she had remained sole, provided, further, that, in the event of the death of his daughter without lawful issue, the property so devised and bequeathed should go as she might, by any instrument in the nature of a last will under hand and seal, direct; and, the power to dispose of the same in the event of her death without issue, either before or after the age of twenty-one years, and either while single or covert, was thereby given her, to be exercised and executed in the manner just described, and in no other way. The daughter married, and thereafter she and her husband entered into a contract with another for the sale of a large tract of real estate devised by the will of her father. Upon a bill filed for the specific performance of the contract, it was held that the bill must be dismissed as the complainants could not give good title to the property, which, under the will of the father of the wife, could only be disposed of by will under the power therein contained, *i. e.*, by her will; and she could not dispose of the property by deed, gift, or sale. *Starnes v. Allison*, 2 Head, 221.

Where a testator, in his will, devised to his wife his estate during her widowhood, with

the power to dispose of the same by her last will and testament, she could not, in her lifetime, convey any portion of such estate by deed; and, where she assumed to do so, and thereafter devised the whole of the lands by will, it was held that the parties taking under the will could successfully maintain ejectment against one claiming under a deed made by her in her lifetime. *Gaskins v. Finks*, 90 Va. 384, 19 S. E. 166.

A testator, by his will, gave to his wife all his property, both real and personal, during her life. His will then contained this further provision: "I further will and request that at her death she makes such disposition of it as she may think best." She afterwards intermarried with another, who, after making his will, died leaving her surviving. After the death of her second husband, she, by an instrument under seal, in which she referred to the power of appointment in the will of her first husband, conveyed to certain parties all the land and negroes and property of every kind, of which her first husband became possessed by virtue of his marriage with her, and which she claimed the power to dispose of by virtue of his will before mentioned. Afterwards she executed her last will, by which she devised and bequeathed the same property to her executors in trust for her grandson, and shortly thereafter died. It was held that the will of her first husband created a power in her to dispose of all his property; that the execution of the instrument mentioned, in her lifetime, was not a good execution of the power, as, if it was a deed, it was not good as an execution of the power, which could be executed by will alone, and that, if it was a will, it was subject to be superseded by the subsequent repugnant will. This action was an action of trover, brought by the executor of her will to recover certain slaves; and it was further held that the plaintiff was entitled to recover. *Porter v. Thomas*, 23 Ga. 467.

On the other hand, where a deed of trust provides that the same shall be held by the trustees for such estates and in such manner as one named therein shall appoint by deed, and, in default of appointment by deed, to the settler's three children, the power of appointment must be executed by deed, and cannot be executed by the will of the donee of the power. *Shore v. Shore*, 21 Ont. Rep. 54.

Where a power is created with the condition that it be executed by deed, it cannot be executed by will. *Darlington v. Pulteney*, 1 Cowp. 260.

But in *Sneed v. Sneed*, 1 Ambl. 64, it was held that where a power to charge lands provided that it should be by deed or deeds duly executed, a will making the charge is a valid exercise of the power.

See also *Tollet v. Tollet*, 2 P. Wms. 489, *infra*, III.

1. Gift of less estate than provided in power.

Where an appointment is to be made of a particular estate, or in a certain manner, and in no other way, the negative words must control, and the donee is not permitted to appoint a different estate, or in any other manner; but where the party has the power to appoint a fee, if there are no words of positive restriction, a less estate may be appointed. The appointment of a less estate than the donee might have created under the power is not 64 L. R. A.

hereby rendered void; and so, where the husband had conveyed the property in trust for the use and benefit of his wife during her natural life, and upon her death the trustee was to convey the real estate, or so much thereof as should remain undisposed of, to such person or persons as she by her last will and testament should have directed and appointed, the court held that it was expressly declared that, upon the decease of the donee of the power, the real estate should belong, in fee absolute, to such person or persons as she should have appointed by her will. By her will she gave and bequeathed to another the property involved in the action, with the use, possession, rents, and profits during her natural life, "the reversion and fee thereof to the heirs of her body at and after her decease." It was held that, although the power of appointment extended to a disposition of the whole property in fee absolute, yet the will, by the use of the terms "during her natural life" and "heirs of her body," conveyed to the appointee only a life estate, and the fee reverted to the creator of the power. *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589.

1. Delegation of exercise of power.

A power of appointment, where trust and confidence are reposed in the donee, is personal to the donee, and cannot be delegated. *Hood v. Haden*, 82 Va. 588.

In *Crooke v. Kings County*, 97 N. Y. 421, it was held, by a divided court, that an absolute testamentary power of disposition, given to a wife, could be delegated by her to her husband, and an exercise thereof by him would be upheld. Earl, J., in delivering one of the prevailing opinions, said, after discussing various English decisions holding to the same effect: "I therefore reach the conclusion that there are abundant authority and reason for holding that the execution of the absolute testamentary power of disposition, given to Mrs. Crooke, could be delegated to her husband; and I am confident that there is not a *dictum*, or even a hint, to be found in any textbook or judicial opinion, to the contrary, and to me it is inconceivable how there could be any."

But all of the opinions admitted the correctness of the principle laid down in *Hood v. Haden*.

k. Exercise for consideration.

The donee of a power of appointment cannot exercise the same for a consideration passing to him, or in any way for his own benefit. *Taliaferro v. Young Men's Christian Asso.* 10 Ohio Dec. Reprint, 1.

Where a wife, by virtue of a provision in the will of her husband, was clothed with the power of appointment among their children at her death, and she, in order to relieve herself from a liability to a son which he was about to enforce by suit, agreed so to exercise the power as to give him a double share, and, in pursuance of that agreement, by her will did give him a double share, such an attempted exercise of the power of appointment will not be sustained. If a parent has a power of appointment to such of her children as she may choose, she cannot appoint it to one of the children upon a bargain beforehand for her own benefit. *Holt v. Hogan*, 58 N. C. (5 Jones, Eq.) 82.

Where, by a settlement, certain bank annuities and stock, the property of the husband.

were vested in trustees upon trust, after the death of the survivor, as to one equal moiety thereof for all and every the children or child of the marriage as the husband and wife should, during their joint lives, appoint, or, in default of such appointment, as the survivor of them should by deed or will appoint; and the husband survived, and by his will devised and bequeathed all other real and personal estate and effects, whatsoever and wheresoever, of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition,"—it was held that the words "property over which I may have any beneficial power of disposition" excluded the property comprised in the settlement, and he could not, under the power of disposition given to him by the settlement, derive any benefit; and that the word "beneficially," as used by the testator, described a power from the exercise of which he or his estate could derive a benefit; and that it was only by so reading the word that the whole will could be made consistent with itself. *Ames v. Cadogan*, L. R. 12 Ch. Div. 868, 48 L. J. Ch. N. S. 762, 41 L. T. N. S. 211, 27 Week. Rep. 905.

A testator, by his will, gave to his son a life interest in a share of his residuary estate, with power, by deed or will, to be executed in the presence of one or more witness or witnesses, to appoint such share to his son or daughter, or sons or daughters, in such shares and proportions as he saw fit. By the issue of his first marriage the son had two children, a son, the petitioner herein, and a daughter, the respondent. Their mother having died, he afterwards remarried, but there was no issue of the second marriage. Thereafter he made his will in the French language, but executed it according to English law, by which, after reciting the power of appointment given him by his father's will he, by virtue of, and in exercise of, that power, appointed that the share in which he took a life interest under that will should, after his death, go to his daughter absolutely, and, in case she should die in his lifetime, to his son absolutely. Thereafter the daughter married, and a settlement was made by a French instrument, not under seal, to which she, her intended husband, and her father were all parties, in which he assumed, by virtue of his right to appoint under his father's will, to settle 60,000 francs on his daughter, the intended wife, reserving to himself the faculty of disposing of the securities and claims, in favor of his second wife, of the reversion of 10,000 francs during her life. Thereafter, being a resident of France, he made a codicil to his will, entirely in his own handwriting, but unattested, in which he stated that the reservation in favor of his second wife, in the settlement before mentioned, had been consented to by the daughter and her husband, and he did not doubt they would execute their engagement; but that, in case they should not respect it, he gave one half of the whole sum or share of his father's estate to his son, but, if they did so respect it, then the daughter and her husband should have the whole sum of his share according to the original will. This codicil was, together with his will, admitted to probate under the act 24 & 25 Vict. chap. 114, which provides that wills of personal estate, made out of the United Kingdom, by British subjects, shall be held to be well executed for the purpose of being

admitted to probate, if made according to the forms required by the place where the same are made. It was held, first, that the codicil was a void appointment in equity, supposing it to be otherwise a good appointment, as equity would not allow it to stand because it proceeded upon a bargain which was contrary to the nature of the power; second, that the same may be said of the appointment made by the settlement of the daughter's marriage. *Re Kirwan*, L. R. 25 Ch. Div. 373, 52 L. J. Ch. N. S. 952, 49 L. T. N. S. 202, 32 Week. Rep. 581.

1. Exercise for charitable use.

Where a power of appointment is, by its terms, to be executed by any writing under the hand and seal of the donee, etc., in the nature of a last will and testament; and the donee assumes to execute it in all respects conforming to the requirements, except that it is not under seal,—the execution of the power, though for ordinary purposes void, yet if for a charitable use, will be sustained as a good appointment, *Pepper's Will*, 1 Pars. Sel. Eq. Cas. 436.

In *Atty. Gen. v. Sawtell*, 2 Atk. 497, the question was whether copyhold lands surrendered by a testator to the use of his will, and devised by him in charity, would pass, as the testator had not signed the last sheet, nor were there any witnesses to it; and the chancellor held that though the will was not signed on the last sheet, and was without witnesses, it was a good appointment of the copyhold estate for the charity, according to the statute of 43 Eliz. chap. 4.

III. Relief in equity against defective exercise of power.

A married woman, entitled under the will of her father to an undivided moiety of certain freehold and leasehold properties, with her husband conveyed the freehold to another in fee, and assigned to him her moiety of the leasehold by way of mortgage for securing the sum advanced by him to her husband, reserving to herself, subject to such mortgage, the power of the appointment of the equity of redemption; and, her husband having died, she thereafter wrote and signed an unattested paper, by which, after referring to the property in terms sufficient to identify it, she said that, if she died suddenly, she wished her eldest son to have it, and that her intention was to make it over to him legally if her life was spared. Shortly thereafter she was taken ill, and died without making any other disposition of her property by will or otherwise. It was held that, although this was a defective execution of the power of appointment, yet it was such a case that equity would relieve against it in favor of her eldest son. *Kennard v. Kennard*, L. R. 8 Ch. 227, 42 L. J. Ch. N. S. 280, 28 L. T. N. S. 83, 21 Week. Rep. 206.

Where a settlement creating a power of appointment provides that it shall be executed by a will duly executed, and the donee assumes to execute the same by a will in the presence of only two witnesses, the law requiring three, it is a defective execution of the power; but it is one that may be supplied, as, where a will is to operate by way of appointment, it takes no effect from the statute, though the rules prescribed by the statute may, as in this case, be arbitrarily inserted by the party; and the appointee cannot claim under the will, but by the deed of settlement directing the execution

of the power, which, together with the instrument executing the power, makes in effect but one thing, doing the thing for the purpose of which the power was created. *Wilkes v. Holmes*, 9 Mod. 485.

Where a husband, having the power, by virtue of a settlement, to make a jointure on his wife by deed, made his will whereby he devised part of his lands within his power to his wife for life, it was objected that the conveyance, being by will, was not warranted by the power, which directed that it should be by deed, and that a will is a voluntary conveyance, and not to be aided in a court of equity. It appeared that the husband had made no provision for his wife other than that contained in his will, and the master of the rolls said that this was a provision for a wife who had none before, and, within the same reason, was a provision for a child not before provided for; and, as a court of equity would, had this been the case of a copyhold devise, have supplied the want of a surrender, so, where there is a defective execution of the power by it, either for payment of debts, or provision for a wife or children unprovided for, he would equally supply any defect of this nature. A defective execution of a power will always be aided in equity under such circumstances, it being the duty of every man to pay his debts, and of a husband or father to provide for his wife or child. *Tollet v. Tollet*, 2 P. Wms. 489.

But a court of equity will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute it or not; for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself. *Ibid.*

In *Taylor v. Rains*, 7 Mod. 148, a woman, before her marriage, had articles of settlement with her intended husband, to the effect that such person should have the profits of a term under a lease held by her as she should by her last will appoint, and, the day before her marriage, made a will devising the trust of the term to another, and then married. After her death the executor appointed in the will attempted to prove it in the spiritual court, and, on a motion by the husband in the King's bench for a prohibition, it was held that the court below had no jurisdiction of the same as a will, but that it amounted to an appointment in equity, who should have the trust according to the articles; and that the appointee was entitled to administration.

A testatrix, by her holographic will, bequeathed one third of her estate, real and personal, to her son for life, at his death a sum certain to his first daughter, naming her, "the balance of his portion of my estate at his own entire disposal." The estate consisted wholly of personal property, which had always been, and was, at the donor's domicile. The daughter of the son who was the legatee under her grandmother's will, died before the latter. The son, being domiciled in another state, executed his holographic will, which, by reason of its being such, was valid, and was admitted to probate in the state in which he was domiciled, in which he stated that, in the exercise of the power of appointment, conferred upon him by the last will and testament of his late mother, over that portion of her estate devised and bequeathed to him for life, he appointed and gave to his wife, for her absolute use, the whole of the property, both real and personal, given 64 L. R. A.

him by the will of his mother for life with the power of appointment as stated. It was held that, even if the will of the son was not effective as a will in the execution of a power, because not executed in the presence of witnesses, according to the laws of the state of the domicile of the donor of the power, and in which the property was, equity ought to intervene with its remedial powers to carry out the son's purpose and intention to give his wife his portion of the estate; and it was held to be a valid appointment. *Ward v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906.

Where a wife had a general power of appointment by her last will and testament in writing, or appointment in nature of a will, to be by her signed and published in the presence of, and attested by, two or more credible witnesses; and her will, claiming to exercise the power, was signed by her and attested thus: "Witness," followed by the names of two witnesses,—the case, upon the question as to whether, when a power is given to be executed by such a will as was named in the settlement, a will like this is a good execution of the power, was sent to the court of common pleas for decision, but the other question in the case, i. e., whether a husband is entitled to have a defective execution of a power in his favor, by his wife, supplied, was decided by the vice chancellor in the negative. *Moodie v. Reid*, 2 Madd. 156, 16 Revised Rep. 257.

By a marriage settlement of husband and wife certain funds were vested in trustees, for their benefit for their lives, and afterwards, in trust for the children, grandchildren, or other issue of the marriage, to be born before any appointment, as the husband and wife, or the survivor, should appoint, and, for want of such appointment, upon trust for all the children of the marriage equally. The settlement contained a clause by which "no child" taking any part under an appointment should share in the unappointed part, unless he should bring the sum appointed to him into hotchpot "with the other children" of the marriage. This hotchpot clause was, therefore, applicable only as between the children. There were two children of the marriage,—sons. The wife died, and thereafter one of the sons died leaving a son. The husband thereafter, in his lifetime, appointed part of the fund to his surviving son, and thereafter died having made his will, by which he gave to the same son some policies and all other property which he might have at his death. He then proceeded as follows: "He will have to bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, and then, as I make no further appointment under the power for that purpose, the whole settled fund will be equally divided between him and my little grandson,"—meaning the plaintiff in the action. The husband possessing the power of appointment, the master of the rolls, after referring to the circumstance that he had appointed a portion of the sum to his surviving son, referred to that circumstance, and said: "I make no further appointment;" and that it could not be contended that this was an appointment. That although it might be said that, if he had understood what the effect would be, he would have made an appointment, yet that admits that there was no appointment. And he held that the remaining fund must, therefore, go as in

default of the appointment. *Langslow v. Langslow*, 21 Beav. 552, 25 L. J. Ch. N. S. 610, 2 Jur. N. S. 1057.

IV. When power in effect absolute gift.

Where a testator, by his will, gave to his wife, if she survived him, power to appoint a leasehold estate in the same manner as she should direct with respect to the disposition of her residuary personal estate; and she, by her will, gave the same to one for life, and thereafter, by a residuary clause, disposed of all the residuum of her personal estate, subject to the payment of some legacies,—this was held to be a valid exercise of the power. The master of the rolls said that it was the same as if the testator had said: "On the death of my wife, I give it to the particular persons who shall select and appoint;" but that he had or as if he had said: "I give it to such of the residuary legatees named in her will as she shall select and appoint;" but that he had done no such thing; he had not mentioned any person at all, nor even designated a class of persons; he had done nothing more than to say that the estate would go "to the same uses, upon the same trusts, and to and for the same intents and purposes as my wife may have declared, or shall hereafter declare, with respect to the disposition of her residuary personal estate;"—that is to say, he did not point out any person at all; it is nothing more than this,—*"It shall form part of my wife's residuary personal estate."* That his intention was, and the object and purpose of the will were, to do nothing more than to make this estate pass as part of the residuary personal estate, and, being so, it passed by her will. *Bristow v. Skirrow*, 5 Jur. N. S. 1379, 1 L. T. N. S. 180.

Where a testator gave to his wife the residue of his personal property to and for her own use and benefit, and to be at her own absolute disposal, and, if not disposed of, it should go to two nephews and a niece; and the widow made her will, in which there was no reference or allusion to her husband's will; and she thereby disposed of all her personal estate to other persons than the two nephews and niece named in her husband's will; and a sum of stock, which was part of the husband's property, given to the wife, remained in his name at the widow's death.—It was held that the widow took an absolute interest in the whole of the testator's residuary estate, and that the stock in question passed by the will. *Bourn v. Gibbs*, 1 Russ. & M. 614, *Tamlyn*, 414, 8 L. J. Ch. 151.

Where a partnership deed provided that the interest of one of the partners in the concern should, after his death and during the term of the partnership, go to such person as he should, by will, name and appoint, and he made a will, not alluding to the power, but by which he gave all his estate and effects to one of his children, his interest in the partnership passed by the will; but in this case it was really held that the expression "name and appoint," in the partnership deed, was but saying that the agreement was that the partnership should be continued during its term, to whoever became lawfully possessed of his interest therein after his death, which was the reason why it passed under the description in his will of "all other his estate and effects, of whatsoever name and

description." *Ponton v. Dunn*, 1 Russ. & M. 402.

A provision in a will giving stock to a married woman for her separate use, and, whenever she should die, to be absolutely in her own power to dispose of by will, or writing purporting to be a will, to any person or persons, purpose or purposes, as she should think proper; but in case of her failure of any such disposition or appointment, to go over,—is not a power, but an absolute gift, qualified only as to her situation as a married woman, and to prevent the husband from taking as administrator in case of her death; and the stock passed by general words in her will. *Hales v. Margerum*, 3 Ves. Jr. 290. In this case the master of the rolls said: "If the interests of married women are criticized, as this has been, I do not know how property could be given to a married woman; it would be all power. When this administratrix gives all her stock and all her real estate, she does mean to include this sum. It must be included under the word 'my,' being an absolute interest in her. I do not now want the authority of *Standen v. Standen* [2 Ves. Jr. 589, *supra*, I. d. 1]; though I do not quarrel with it."

V. Miscellaneous cases.

Where a power of appointment, claimed to exist upon a settlement, does so by implication merely, a will particularly executing express powers will not be deemed a valid exercise of the power thus implied. *Atty. Gen. v. Vigor*, 8 Ves. Jr. 256.

Where a person having a power of appointment by will disposed by will, of certain shares of the sum of which she has the power to dispose, to two children, who died during her lifetime, and she made no change in her will, the shares thus appointed lapse, and as to such portions the power is not to be considered as having been exercised. *Marlborough v. Godolphin*, 2 Ves. Sr. 61.

Where a husband, upon a treaty of marriage, covenanted with the wife's relation, in consideration of a certain sum, to execute his power, and settle a sum per year upon the wife for her jointure; and afterwards, in pursuance of such covenant, by deed reciting his power and the covenant and declaring that he was minded to execute his power, limited several farms, at the rents at which they were then let, to the value of about the sum per year settled upon the wife, and in the deed the rental of each particular farm was expressed, and, after the marriage took effect, it was found that when the leases of the farms expired the lands would not let again for the same rent, but sank in their rental value; and the husband thereafter made a will, and, by a codicil thereto, desired and earnestly requested his son, inasmuch as the lands settled on his mother were greatly fallen in value, to make up his mother's jointure to the amount originally covenanted by the testator,—it was held that the request in the codicil was a completion of the imperfect execution of the power as to the jointure. *Vernon v. Vernon*, 1 Amb. 3.

Where a deed of settlement was executed in contemplation of an intended marriage; and contained a recital that the intended wife was entitled to a share in certain profits from coal mines during the continuance of a license under certain leases; and also a provision that the

same should be held by the trustees to such trusts and purposes as she should at any time after the expiration of six years, or such early period as certain mortgages of the leasehold houses should have been discharged, by deed duly executed, or by will from time to time, or at any time, appoint,—the provision “after the expiration of six years” does not apply to the will; and the will of the wife, made immediately after her marriage, was a proper and complete exercise of the power contained in the settlement; and the property therein mentioned would go according to the dispositions of the will. *Re Hernando*, L. R. 27 Ch. Div. 284, 53 L. J. Ch. N. S. 865, 51 L. T. N. S. 117, 33 Week. Rep. 252.

The will of a woman having the power of appointment of a sum certain to any of her kin, and, for want of appointment, to go according to the statute, which appointed the same to her nephew upon the condition that he pay his mother an annuity, and then bequeathed to another of her kin all the rest and residue of that of which she had power to dispose, is a valid exercise of the power; and, the nephew, to whom the conditional appointment was made, having died before the donee of the power, the appointment was, as to him, void, but was a valid exercise of the power so far as the annuitant was concerned; and the remainder will pass under the residuary bequest. *Oke v. Heath*, 1 Ves. Sr. 135.

By a marriage settlement, a term of years was created to raise and pay to younger children such sums as the father should think fit, and as he by deed or will should appoint, and subject to, and chargeable with, the same upon trust to attend the inheritance. The father, who was tenant for life, and the eldest son of the man who was tenant in tail, suffered a recovery to the use of the father in fee, but the recovery did not destroy the term. The father and son made a mortgage in fee, and the father covenanted not to make any appointment of portions to overreach the mortgage. By his will he devised the estates to trustees, to sell and pay the encumbrances and his debts, and out of the remainder of the money to pay his second son a certain sum, and his two daughters each a certain sum. The lord chancellor held that this was not an execution of the power. *Tempest v. Sabine*, Sugden, Powers, Appx. No. 10.

A power to appoint by will is well executed by direction in the will to sell the property subject to the power, and divide the proceeds. *Ratcliffe v. Hampson*, 1 Jur. N. S. 1104, 4 Week. Rep. 67.

Where a person seised of lands conveyed part to the use of himself for life, with remainder, and power to charge the land so conveyed with a sum of money by a deed or will in writing under his hand and seal, which conveyance was voluntary and without valuable consideration; and afterwards he, by his last will in writing, not sealed, devised the same to his younger children,—in a bill exhibited against the grantee and heir for the same, the lord keeper decreed the land, though the will was not under seal, and the power not legally pursued. One of the reasons given for the judgment was that the son sought to be charged claimed under the same conveyance by which the power was limited. *Smith v. Ashton*, 1 Ch. Cas. 264, Finch, 273, Freem. Ch. 308, 8 Keble, 551, 3 Saik. 277, 64 L. R. A.

In *Attv. Gen. v. Brackenbury*, 1 Hurst. & C. 782, 32 L. J. Exch. N. S. 108, 9 Jur. N. S. 267, 8 L. T. N. S. 822, 11 Week. Rep. 380, the persons who took under the general residuary clause of the will of a person having a power of appointment by the will of her father were the same as those who would take by appointment if such residuary clause were a sufficient exercise of the appointment. The question in the case was as to whether the residuum left by the will of the person having the power of appointment there, was an execution of the power or not; if it was, then a legacy duty was payable in respect to so much of the residuary estate as came to him by the will of her father, and as was appointed by her will in favor of the two legatees. And it was held that the residuary clause was an exercise of the power, and the executors were bound to pay the legacy duty.

Where, in the creation of a power, it is stated that the same is to be exercised by an instrument in writing, it is so exercised by a will. *Smith v. Adkins*, L. R. 14 Eq. 402, 41 L. J. Ch. N. S. 628, 27 L. T. N. S. 90, 20 Week. Rep. 717.

When the mode in which a power is to be executed is not defined in its creation, an execution of the same by will is valid. *Graeff v. De Turk*, 44 Pa. 527.

A husband who, by virtue of his marriage settlement, had a power of appointment over lands demised to trustees, to appoint a certain sum to be raised upon the land by the trustees to the children of the marriage, made his will, and directed the land to be sold, and bequeathed portions to his children, but did not exercise the power of appointment given by his marriage settlement; and thereafter made a codicil reciting that he had directed and provided in his will that no part of the produce of the lands should be paid to his sons until the sum mentioned in his will to be paid to each daughter should have been paid to her, in addition to the equal distributive share of the sum mentioned in the marriage settlement to which each was entitled. This was held not to be an execution of the power. *Pennefather v. Pennefather*, Ir. Rep. 7 Eq. 300.

An instrument in the nature of a will, which is the execution of a power of appointment, is to be judged by a different rule in regard to a legatee being a witness thereto from a will proper; and so, where a testatrix had, by the will of her first husband, power of appointment over certain real estate, and she married again, and on her second marriage a settlement of personality was made for her separate use for life, together with a power to appoint the same by will or otherwise; and she had made a will appointing the real estate under the will of her first husband, and disposing of the personality settled on her second marriage; and thereafter she, by a codicil, revoked the appointment in her will, and after appointing the real estate in a different manner, bequeathed part of the personality, settled on her by her marriage settlement, to her daughter, who was an attesting witness to the codicil,—the gift to the daughter was valid as an exercise of the power. *Wilkins v. Charretton*, 22 Week. Rep. 598.

Where a married woman, who, by her marriage settlement, had reserved to herself a power of appointment, made her will, and, after disposing of considerable property, proceed-

ed thus: "And as to all the rest, residue, and remainder of my said real and personal estate after answering the several purposes aforesaid, I give and bequeath the same unto the persons hereinafter appointed my executors, to be divided among them in equal shares, for their absolute benefit;" and one of the three persons named as executors died previous to the testatrix, and another was a witness to the will, and thereby became disqualified from taking under it,—it was held that the bequest was one to the executors personally, and not to them as a class, and that therefore the undivided two thirds of the property sent by the bequest was unappointed. *Hoare v. Osborne*, 33 L. J. Ch. N. S. 586, 10 Jur. N. S. 694, 10 L. T. N. S. 258, 12 Week. Rep. 661.

In *Wilkinson v. Schneider*, L. R. 9 Eq. 423, 39 L. J. Ch. N. S. 410, a married woman having the power of appointment had made her will, and by it and four codicils variously appointed the property which was the subject of the power to two of her nieces. In deciding the case, the vice chancellor said: "I do not think it is really a question of intention at all. It is a question of resulting trust, if anything. There is an absolute severance of the property. . . . I think a resulting trust must be a resulting trust always for the creator of the settlement,—the conveyer and disposer of the property. The resulting trust here must be for the persons who would be entitled if this were the appointer's property. She appointed two of the settlement trustees executors and trustees of her will; and, as far as she could, made the property, over which she had the power of appointment under the settlement, her own property."

Where, by a settlement, real estate was conveyed to trustees for the use of the husband and wife during the life of the wife, and after her death to such uses as the husband should by deed or writing appoint, with a power to the trustees to sell the property with the consent of the husband and wife during their joint lives, and lay out the money in the purchase of other lands, and, until doing so, invest it in the public funds; and thereafter the husband made his will, in which he bequeathed all money and moneys that he should die possessed of, whether in the public funds or elsewhere, and he had no money of his own in the funds, and no power of appointment other than that contained in the settlement,—it was held that the will did not operate as an exercise of the power of appointment, because the wife had a right to require the trustees to invest the stock, in which the purchase money of the real estate was held, in land; and, therefore, the stock must be considered as land at the time of the husband's death, and pass to his heir at law. *Re Greaves*, L. R. 23 Ch. Div. 313, 52 L. J. Ch. N. S. 753, 48 L. T. N. S. 414, 31 Week. Rep. 807.

A testator, by his will, devised his land to trustees upon trust, out of the rents, issues, and profits, in case his wife survived him, to pay unto such person or persons as she should by will appoint, a sum certain. The wife, having survived her husband, made her will, in which she directed her executors to call in, receive, and raise the moneys that she might die possessed of, and apply the same in payment of her debts and funeral expenses; and secondly, in payment of the legacies left by her. The will then provided that, in case there should be a sufficient surplus, the executors

should pay to some persons, naming them, a certain sum each; and whatever money might be over and above the payment of those legacies, she requested that her executors might apply as she should direct them by letter. There was no residuary bequest, and no letter such as referred to was ever found. The property was sufficient to pay the legacies in addition to debts and funeral expenses. It was held that the will of the wife amounted to an exercise of the power given by the will of the husband, and the next of kin of the wife were entitled to the sum mentioned in the will of the husband. *Re Keown*, Ir. Rep. 1 Eq. 372.

In *Re Ickerlingill*, L. R. 17 Ch. Div. 151, 50 L. J. Ch. N. S. 384, 29 Week. Rep. 500, the question was whether the donee of the power meant, by the exercise of it, to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed. In this case the disposition included the real estate of the testatrix, while the will in *Re Davies*, L. R. 13 Eq. 163, 41 L. J. Ch. N. S. 97, 25 L. T. N. S. 785, 20 Week. Rep. 165, *supra*, I. d. 3, only disposed of personal estate and contained a previous direction to pay debts and certain legacies.

In the present case the testatrix, after appointing her executrix, charged her property and effects with the payment of her debts and funeral and testamentary expenses. The court held that the appointees—whether as devisees or legatees—were to take the property subject to that charge, and further, that it was as though the testatrix, in substance, had said: "I am making my will. I am disposing of all the property I can dispose of, and am dealing with it as being my own." And therefore, so making her will, and so disposing of and treating the property, the result was that that part which, by reason of the death of one sister before the testatrix, lapsed, must go in the same way as the testatrix's own property would go,—to those claiming under her, and not to those claiming under the will of the donor of the power. As will be seen, in *Re Davies* the real question was not whether the power had been exercised, but what was the effect of its exercise.

Previous to the marriage of a woman articles of agreement were executed between her and her intended husband and a third person, by which the intended husband covenanted that the real estate belonging to his intended wife should be to their joint use during the marriage, but that she should have full power to dispose of it by deed or will during coverture. They had no issue, and she subsequently, during the coverture, made a will in the usual form, appointing executors, and giving them full power to sell her real estate, the moneys arising from which were bequeathed. It was held that this was a valid exercise of the power of appointment reserved to her under the marriage agreement, and this although she could not devise real estate, and although the power of appointment came from her instead of from another; and, in an action by her heir against her executors, it was held that, by the appointment, the estate passed in equity; and judgment was given for the defendants. *Barnes v. Irwin*, 2 Dall. 199, 1 L. ed. 348.

Where the will of a testator gave to his wife his property during her life, and also the

power to dispose of one half thereof at her death, according to her own will and pleasure. It would be a fanciful misconstruction to hold that such power had to be exercised literally at death,—in the moment of dissolution; and a will executed eight years before her death, giving the half of the testator's property to her second husband, would take effect at her death, as an exercise of the power. *New v. Potts*, 55 Ga. 420.

A married woman, who was also an infant, executed a will purporting to have been made under the power, given her by the will of her father, to dispose of certain property in case of her decease without issue, "by her last will and testament, or writing in nature thereof, executed under her hand and seal, in the presence of one or more competent witnesses, notwithstanding her coverture." After becoming of full age, she executed another will, in which she stated that she revoked "all former will or wills" by her made. It was held that as, by the former will, she, being an infant, but being of sufficient age as such to make a will of personality, could only exercise the power as to that part of the estate of her father which was personality; and that, as the real estate covered by the power only passed by the latter will, which revoked the former, it was inconceivable that the testatrix should have intended the personality, constituting part of the mixed fund over which the power extended, to be governed by the former will. That it could not have been the design of the testatrix, the very moment she declared all former wills revoked, to have, by a rule of construction, an unascertained and undefined part of the fund go one way under one will, and another part go another way under another instrument; and it was held that, therefore, the power given her by her father's will was exercised by the latter will only. *Van Wert v. Benedict*, 1 Bradf. 114.

It is not competent, in order to show that a testator intended to execute a power of appointment, to prove his declaration or statement that he intended so to do. *White v. Hicks*, 33 N. Y. 383.

Where, by a will creating a power of appointment the donee thereof is clothed with the power to appoint to his children and their issue, and, for want of appointment, among said children and issue; and he has only one child,—such child, being the sole representative of his class, will take in any event, as no appointment could vary his interest, and it would be a vain act. *Wickersham v. Savage*, 58 Pa. 365.

The reason that the rule that an instrument purporting to be a conveyance, but incapable of taking effect as such, may operate to revoke a previous devise, is that the subsequent conveyance was inconsistent with the devise, and disclosed an intent to revoke it; but, where an instrument passes the same estate to the same person as the previous will, it can in no sense be said that what was intended to make sure is a contradiction of terms. *Aubert's Appeal*, 109 Pa. 447, 1 Atl. 336.

In *Croft v. Slee*, 4 Ves. Jr. 60, it was conceded that the power of appointment was not executed by a general disposition by will.

VI. Conclusion.

The result of an examination of the cases in the note would appear to be that, whether a power of appointment by will has been duly 64 L. R. A.

executed by the donee thereof depends entirely upon the question whether the donee of the power intended to so exercise it; and the cases given in the first division are all to that question.

Wherever the will of the donee contains a plain allusion to the power, indicating its presence in his mind at the time of making the will, the latter will always exercise the power.

And, even if there is no such allusion to the power, a reference in the donee's will to the subject of the power will show that he intended to dispose of it, and thereby execute the power.

The effect of a general provision in the will of the donee of a power of appointment has probably given rise to more discussion as to whether the power in a particular case was exercised, than any other. Ordinarily it will not suffice to execute the power under the rule of the common law. But even under that rule, it was held that, in case the will would be inoperative except as an execution of the power, there the general provision in the will would be deemed such. This was most generally decided by discovering whether the donee of the power possessed any interest aside from that over which he had the right of appointment. If he did, it was usually held that the general provision of the will was satisfied by that interest, and that the power was not executed; and conversely, that if he had no other interest than that over which he had the power of appointment, it was a good execution of the power, as otherwise the general provision of the will would be inoperative.

The question whether other circumstances than the one last stated, which might surround the donee of the power of appointment at the time of the execution of the will whereby the power was claimed to have been exercised, could be taken into consideration in ascertaining whether the donee intended to exercise the power, has given rise to some difference of opinion; but it may be said that the weight of authority is in favor of the affirmative of the proposition, and that the donee's condition, and the condition of his property, and any other fact that legitimately goes to show whether or not he intended to exercise the power, may be given in evidence, and should be considered upon the decision of that question.

But, although what has been said as to the effect of a general provision in the will of a donee of a power of appointment to execute the same is correct as to English and American law generally previous to the adoption of the statutes hereinafter mentioned, it never was the rule in Massachusetts and New Hampshire, where it was at all times held that a general provision in the will of a donee of a power of appointment would, under all circumstances, execute the power, unless a contrary intention was expressly stated or necessarily implied.

The rules at common law, as above stated (with the exception mentioned), appear to have been continued in force until the adoption of the Revised Statutes in New York in 1829. In which it was provided that "lands embraced in a power to dispose shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power shall appear, expressly or by implication:" since which, as has been seen (*supra*, L. d. 3),

the general provisions in a will will execute the power, not only as to lands, but also as to personal property.

Thereafter, in 1837, the British Parliament, by the statute ordinarily known as the "wills act" being 7 Wm. IV. & 1 & 2 Vict., passed a similar statute (in effect identical) to that of New York, only in that statute it was separately provided that a general devise and a general bequest in the will of one invested with a power of appointment would respectively execute the power as to real and personal property. Since then other states than New York have passed similar statutes, and in such as have, of course the stern rule of the common law has been largely abrogated.

It must be remembered, however, that these statutes can only relate to a case where the power of appointment is general and unlimited; and that wherever the creator or donor of the power has restricted or limited the execution of the same to a class, either as to person or property, the statutes have no application, and the rules as decided by the weight of authority, both before and since the statutes, must determine whether or not the power has been well executed.

By § 24 of the wills act, it is enacted that "every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Similar statutes have been enacted by nearly all, if not all, of the states. Previous to the adoption of these statutes the rule was that a will containing a devise of realty took effect at the time of its execution, but that a will during the life of the testator was ambulatory in its character; and, as a testator's personal property was liable to change during his lifetime after the execution of his will, a bequest of the personality was said to speak or take effect as of the time of the death of the testator; and so in cases arising previous to the adoption of the before-mentioned statutes, a will purporting to exercise a power of appointment in regard to real estate took effect as of the date of its execution, and so, in regard to that property, the will, if executed before the creation of the power, would not execute it; but, as to the disposition of personal property under the power, the weight of authority was that, as the will as to that took effect at the death of the testator, a will made before the creation of the power was a good execution of it, although, as has been seen, there was some dissent even from this last proposition. Since the adoption of the statutes, however, the will of a person who, after its execution, is clothed with a power of appointment, is a good execution of it, the reason being that it must be presumed that, if he had not so intended, he would have revoked the provision which will operate to exercise the power.

In the investigation to ascertain the intent of the donee of a power of appointment by will, courts are frequently held to a consideration of the question as to what law governs, and the cases invariably hold that whether the power has been exercised by the will of the donee exhibiting an intention to execute it must always be decided by the law of the domicile of the donor.

The fact of the intention of the donee of a power of appointment to execute the same be-
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ing found or conceded, the question frequently arises as to whether his attempt to do so is valid. The first question that naturally arises is as to whether, in the attempt to exercise the power, the donee thereof has made a valid will, and, as a general rule, it may be stated that, in order to execute the power, the will must be such as will be held a valid will for any and every purpose, and as such be entitled to probate.

And right here another question arises, and that is as to what law governs in deciding whether a will has been duly executed and is valid as such. While there seems to be some difference of opinion as to the law which shall govern in deciding whether there was a valid execution of the will of a donee of a power of appointment, which has been accentuated somewhat by the courts in some of the cases, it is believed that with one or two exceptions there is no real difference. It would seem from all the decisions in the note that it has been affirmed that such a will, formally executed in all respects as required by the law of the domicile of the donee of the power, will be sufficient (having all the other requirements) to execute it. But it has also been held in one case, and the proposition seems to have been affirmed by the privy council, that where the will was a good execution of the power according to the law of the domicile of the donor and the situs of the property, it was a valid exercise of the appointment, even though not according to the testamentary law of the foreign country which was the domicile of the donee of the power at the time of the execution of the will.

The question as to the essential validity of the will of the donee of a power of appointment would seem to be governed by the law of the domicile of the donor.

Where, by the instrument creating the power, the execution of the same is limited to a class, the effect of the exclusion of a member of the class has led to some discussion, and the authorities agree that it will invalidate the appointment.

A still more interesting question is, What is the effect of the provisions of the will of a donee of a power of appointment which attempts to execute a power of appointment limited to a class, including one not a member of the class? The authorities are agreed that it certainly has the effect to render the appointment invalid as to the person not an object of the same; but, as to whether such a provision in the will of the donee will operate to render the whole appointment invalid, there seems to be some difference, with the weight of authority in favor of the proposition that it only operates as far as stated, and that, so far as the provision relates to those who are proper objects of the power, it is a good execution.

Under the earlier English decisions, it was held that, where the power of appointment in its creation was limited to a class, there must be, not only no exclusion of a member of the class, but that each person therein must receive something more than a nominal gift, or the appointment will be held invalid as being illusory. The later authorities, however, all go to the effect that, so long as the appointing power is left in the discretion of the donee thereof, any gift to each member of the limited class will be sufficient, no matter how disproportionate to other gifts to other members.

Whether the creation by the will of the donee of a power of appointment of a trust is a valid execution of the power, as has been seen, depends upon the particular circumstances of each case; as does also the question as to when the power has been exhausted, or when there remains a right to revoke a former appointment and make a new one.

This is also true as to the question as to whether, when a power of appointment is given to the survivor of two or more persons, it may be duly executed by the will of the donee of the one of them who happens to be the survivor, although made in the lifetime of one of the others. A power of appointment may be exercised at different times and by different acts. Where the exercise of a power of appointment is limited to a will, it can never be exercised by a deed in the lifetime of the donee of the power; and so, also, where it is prescribed in the instrument creating the power that it shall be exercised by deed, it cannot be exercised by the will of the donee.

A gift in the will of the donee of a power of appointment of a less estate than provided by the instrument of its creation is a valid execution of the power.

Where trust and confidence are reposed in the donee of a power of appointment the power

cannot be delegated; but it would seem that where the power is general in every sense, and not in any manner limited, it may be.

Where a power of appointment by will is attempted to be exercised by the donee thereof for a consideration or benefit, it will be invalid as an execution of the power. The exercise of a power of appointment in favor of a charity is always looked upon by the courts with liberality; and, wherever it is possible to hold that there is an intention to exercise it, it will be done in such case.

It is hardly necessary to say that, when an apparent power in an instrument is, in effect, an absolute gift, the will of the apparent donee will dispose of it. Sometimes in the attempt to exercise the power, where there seems to be no question but that the donee thereof intended to execute it by the will, yet for some reason the court has felt compelled to hold that the execution was defective; and in such case equity will generally relieve against such defective exercise. But it must be a defect in the exercise of the power, and not the actual supply of the intention, which is so essential to the execution, as, in no event, will a court of equity do for the donee of a power what is solely within his discretion to do or leave undone.

P. H. V.

CALIFORNIA SUPREME COURT.

BANK OF CALIFORNIA, *Appt.*,
v.
CITY AND COUNTY OF SAN FRANCISCO, *Respt.*

(142 Cal. 276.)

1. The right to exist as a corporation is a franchise which may be assessed for taxation to the corporation, instead of the members or stockholders.
2. The right to exist as a corporation may be taxed as property, and the tax need not be in the form of an excise tax.
3. A constitutional declaration that "property," for the purpose of taxation, shall include franchises, authorizes taxation of the right to exist as a corporation.
4. The value of the shares of corporate stock may be taken into consideration in assessing the corporate franchises for taxation.
5. The courts will not revise the honest judgment of the officials to whom is committed the assessment for taxation of the franchises of a corporation in fixing the taxable value of such franchises.
6. That a corporation is engaged in a business which an individual might carry on without payment of any tax or license fee does not render the imposition of a tax upon

its franchises an unlawful discrimination prohibited by U. S. Const., Amend. 14.

(*Beatty, Ch. J., and McFarland, J., dissent.*)

(February 18, 1904.)

A PPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in a suit to annul a tax assessment, and to recover back money paid under protest because of it. *Affirmed.*

The facts are stated in the opinion.

Mr. John Garber, with Mr. James M. Allen, for appellant.

Messrs. Franklin K. Lane and W. I. Brobeck for respondent.

Angellotti, J., delivered the opinion of the court:

This action was brought by plaintiff corporation to have an assessment of its franchise for the fiscal year ending June 30, 1901, declared illegal and void, and to recover from defendant \$12,187.76 paid by it, under protest, as taxes thereon. Defendant had judgment in the court below, and plaintiff appeals therefrom, on the judgment roll.

The claim of the plaintiff is that it has never owned or possessed any franchise whatever, and that the only franchise in any way connected with it is the corporate franchise, or the franchise of being a corporation, which it is claimed is the property of

NOTE.—As to taxation of corporate franchises in the United States, see also, in this series, *Louisville Tobacco Warehouse Co. v. Com.* 57 L. R. A. 33, and *note*, and *People ex rel. Metropolitan Street R. Co. v. State Board*, 63 L. R. A. 884.
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its stockholders, and is not assessable or taxable to said corporation. The assessor of defendant, in addition to assessing the assessable, tangible property of the plaintiff, situate in said city and county, consisting of land, improvements, furniture, library, typewriter, and money, at \$2,311,774, assessed its "franchise" at \$750,000, and the board of equalization of the city and county refused to lower said assessment, or "give plaintiff any relief whatever." The tax on said \$750,000 so assessed on the franchise amounted to \$12,187.76, which was paid under protest.

It appears from the findings of the trial court that the plaintiff was incorporated in the year 1864, under the provisions of the act providing for the formation of corporations for certain purposes, approved April 14, 1853, and all acts amendatory thereof and supplementary thereto, for the purpose of carrying on the business of banking, and has ever since conducted such business under its articles of incorporation, and that it has never owned, possessed, claimed, or controlled any other rights, powers, privileges, or franchises than such as were acquired or conferred upon it by said articles of incorporation. It further appears that the assessor found that the aggregate value of the tangible property of plaintiff, including nonassessable bonds, and property not assessable in San Francisco, and all property assessable therein, was \$5,158,903.08; that the aggregate market value of all the shares of capital stock issued by plaintiff was \$8,100,000; and that the difference between the aggregate market value of said stock and the value of all tangible property of the corporation, to wit, \$2,943,096.92, was by him ascertained and determined to be the value of the so-called franchise of plaintiff, which he thereupon assessed and valued, for purposes of assessment and taxation, at the sum of \$750,000.

The only franchise acquired under the articles of incorporation—and the findings in this case establish the fact that the corporation has no other franchise—was the right to be and exist as a corporation, with all the powers given by law to corporations, and the right to enjoy the privilege and immunities of a corporation in the conduct of the business of banking. Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens; and no grant from the sovereign is essential to its existence. Any individual, or any number of individuals may, under such regulations as the state, in the exercise of its police powers, may legally make, engage therein, without any

grant from the state. While, however, the right to engage in the business of banking is a common right, available to all citizens, such right can be exercised through the agency of a corporation only by express permission of the state. Corporations, being purely creatures of the law, may be formed only when the state so authorizes, and then only for such purposes as may be authorized by the state. It is universally recognized that the power of creating corporations is one appertaining to sovereignty, and can only be exercised by that branch of the government in which it is legally vested, and that, whatever method may be adopted for their formation, and with whatever liberality the privilege of forming them may be conferred, every corporation is dependent for its existence upon the permission of the state in which it is created. While our law provides that private corporations may be formed by any five or more persons, a majority of whom are residents of the state, for any purpose for which individuals may lawfully associate themselves, each corporation so created derives its right to exist as a corporation, with all the incidents thereof, for the purpose of doing the business specified in its articles of incorporation, directly from the sovereign power, precisely the same as the corporation that formerly existed in England under special grant from the King, and later under special act of Parliament, or the corporation that in this country exists under special act of the legislative department of any of our states. Whenever a corporation is legally formed, the right to be and exist as such, and, as a corporation, to do the business specified in its articles, whether it be a banking business, grocery business, or the operation of a railroad, or any other business in which individuals may engage without grant from the state, is a grant by the sovereign power,—a valuable right, which is generally known as the "corporate franchise." 2 Morawetz, Priv. Corp. § 922; *Spring Valley Water-Works v. Schottler*, 52 Cal. 69, 106; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564, 566; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663.

In the case of *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, the Supreme Court of the

United States, speaking of this kind of franchise, said: "Its [the corporation's] creation . . . is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members, without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states, this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation." This corporate franchise, *viz.*, the franchise to be and exist as a corporation for the purposes specified in the articles of incorporation, appertains to every corporation, for whatever purpose it may be formed; and there is no distinction in this regard between the banking or grocery corporation and the railroad, water, or gas corporation. The right to engage in every such business is open to all citizens, independent of any grant from the sovereign; but it is available to no one to conduct any such business through the agency of a corporation without such grant. Certain occupations are, however, of such a nature that various privileges conferrable only by the sovereign power are convenient and in most cases absolutely essential to the successful maintenance of the business to be carried on, whether it be carried on by a corporation or by an individual,—such, for instance, as the right to use public highways. Such rights and privileges are also known as franchises, but they constitute a class entirely distinct from and independent of the corporate franchise. Such rights and privileges are, of course, the property of the corporation or individual by whom they have been acquired, and are taxable as such.

As already shown, the corporate franchise is considered as property separate and distinct from the so-called franchises which the corporation may acquire subsequent to its incorporation. The plaintiff claims that, because it has acquired and is exercising no such rights, it has no franchise. The basis of this claim is the contention that this corporate franchise is not a franchise of the corporation, but vests in and belongs to the members of the corporation. In a certain sense, it is true that such a franchise is the property of the members of the corporation. It has been often said that a corporation is itself a franchise belonging to the members of the corporation, and a corporation may hold other franchises as rights or franchises of the corporation. Expressions of this character have been used for the purpose of dis-

tinguishing the rights and privileges which the corporation, as a legal being, subsequently acquires and controls, and which, when transferable, may be transferred by the corporation itself, from the franchise of being and existing as a corporation, which is incapable of assignment, and which survives "in the mere fact of corporate existence" after all property capable of assignment has been transferred to others by the corporation. The corporation is, however, nothing other than its stockholders or members, transformed into and existing as one legal being by permission of the state. The incorporators and their associates and successors are the "body politic or corporate by the name stated in the certificate" (Civil Code, § 296), and, as such body politic or corporate, they hold the right to exist and transact the business specified in the articles. They hold the right in their collective capacity as a corporation, and not severally as persons. They have no rights in regard to the corporate franchise that they can exercise, except through the corporation. It is the corporation, the "body politic or corporate," the legal creature comprised of the incorporators, their associates and successors, that is invested by the state with life and the power to do. It was said by the Supreme Court of the United States in *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. ed. 897, 902: "Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchises; and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises."

If this corporate franchise is assessable as property, then, that it must be assessed to the corporation, instead of the members or stockholders, is clearly settled in this state by the decision in *People ex rel. Burke v. Badlam*, 57 Cal. 594, where it was held that a stockholder could not be assessed upon his certificate of stock, inasmuch as his shares were simply an interest in the very property held by the corporation, and the assessment of all the property of the corporation covered everything represented by the certificate. See also § 3608, Pol. Code.

It is not claimed that a corporate franchise may not be taxed by a state, but it is urged that such tax has always been an excise tax, and not a tax on property. An examination of the authorities will disclose the fact that in many cases it has been directly taxed as property. The manner and method, however, are entirely within the control of the state, which is supreme in

such matters, so long as no constitutional right is impaired. As already shown, such a franchise is property. Mr. Justice Field, speaking for the Supreme Court of the United States in *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, after saying that such a franchise is property, and is subject to separate taxation, said: "The right of the states to thus tax it has been recognized by this court and the state courts in instances without number, . . . 'and the manner in which its value shall be assessed and the rate . . . are mere matters of legislative discretion,' except . . . as controlled by the organic law of the state." The same court said in *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 638, 18 L. ed. 904, 906, that "corporate franchises . . . are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter; and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereignty of the state." See also *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. ed. 897, 902. In *Central P. R. Co. v. California*, 162 U. S. 91, 125, 40 L. ed. 903, 914, 16 Sup. Ct. Rep. 766, the Supreme Court of the United States, speaking of a tax on the state franchise of a railroad corporation, said that if the corporation procured any rights or privileges, otherwise called "franchises," from the state, they were taxable, and the extent of their value was to be determined by the board of equalization. The court, after saying that, under the laws of California, the plaintiff obtained from the state the right and privilege of corporate capacity and other rights, said that it is not to be denied that such rights and privileges have value, and constitute taxable property. In *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 580, 63 N. W. 746, the supreme court of Wisconsin, after saying that the franchises of the Milwaukee Street Railway Company, whether of existence or for the operation of its track, are, beyond dispute, the property of the corporation and assessable as such, said—the method of taxation in that state being upon the valuation of property taxed, and the state not providing for a certain, specific tax on franchises like an excise rate—that they should be regarded as personal estate for purposes of taxation in the district in which the corporation has its principal place of business, and that the proper officers should fix the 64 L. R. A.

value. See cases cited in opinion in that case. Mr. Cooley says in his work on Taxation (p. 686, 3d ed.): "In some states all taxation, as far as possible, is brought to an ad valorem standard. Franchises are property, and in such states may be taxed by a valuation, being estimated for the purpose either separately, or as a part of the aggregate corporate property."

The Ohio, Indiana, and Kentucky methods of taxation, upheld by the court (see *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 980, 17 Sup. Ct. Rep. 527; *Adams Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991), while contemplating the assessment of all the property of certain kinds of corporations, tangible and intangible, as an entirety, necessarily involved therein the inclusion of the corporate franchise as a part of the property of the corporation. See also *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556. The case of *Louisville Tobacco Warehouse Co. v. Com.* 106 Ky. 165, 57 L. R. A. 33, 49 S. W. 1069, relied on by plaintiff, was decided by a bare majority of the supreme court of Kentucky, upon a statute specifically naming many kinds of corporations, including banking corporations, as liable to a property tax on the corporate franchise, and declaring "every other like corporation" liable to the same tax, and also every corporation, company, or association having or exercising any special or exclusive privilege or franchise; and it was simply held that a mere private business corporation, of a kind not specifically named and having no special or exclusive privilege or franchise, not allowed by law to natural persons, was not intended to be included by the statute. In several cases where it was said that the tax upon a corporate franchise could be sustained only upon the ground that it was an excise tax, the tax would have been invalid as a property tax solely for the reason that it was, in effect, levied on property exempt from state taxation under the laws of the United States. See *Home Ins. Co. v. New York*, 134 U. S. 594, 597, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593. The power of a state to impose a tax on the franchise of a corporation in the nature of an excise or duty does not, however, exclude the taxation, in a proper case, by a valuation made by the assessor. *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 112. Under the authorities, there can be no question that a state may provide for the taxa-

tion of a corporate franchise as property of the corporation.

It is further contended that a corporate franchise is not a franchise, within the meaning of the provisions of our state Constitution relating to taxation, and that this state has made no provision authorizing an assessment thereof. The question thus presented can hardly be said to be a debatable one, in view of certain decisions of this court rendered shortly after our present state Constitution went into effect, determining the effect of the provisions of such Constitution in the matter of the taxation of property of corporations. The Constitution adopted in 1879, after providing that all property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, declares that the word "property," as used in this connection, includes "moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Const. art. 13, § 1. The legislature thereupon repealed § 3640 of the Political Code, providing for the assessment of shares of stock to the owners thereof, the assessable value thereof to be determined by deducting from the market value of the entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares, and added a new section to that Code (§ 3608), in which they declared that shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they represent; that the assessment and taxation of such shares, and also of the corporate property, would be double taxation; that all property belonging to corporations shall be assessed and taxed, but that no assessment shall be made of shares of stock. Amendments to Codes (1881) pp. 56, 59, chap. 53. Immediately after the enactment of this legislation, the question of the liability of shares of stock in corporations to assessment to the holders thereof came before this court. It was held that the language of the Constitution clearly forbade double taxation; that the legislature had the right thereunder to say that all the property of the corporation should be assessed to the corporation, and the same property should not again be assessed for the same tax; that the "property" of the corporation included its franchise, and everything else evidenced by the certificates of stock; that, while the share of each stockholder was undoubtedly property, it was an interest in the very property held by the corporation, and nothing more; and that when all the property of the corporation, including its franchise, was assessed, which it was to be presumed would

be done by the assessor in obedience to the requirements of the law, any further assessment of the shares to the individual stockholders would be double taxation. *People ex rel. Burke v. Badlam*, 57 Cal. 594. This case necessarily involved the question as to the constitutionality of § 3608, Pol. Code, prohibiting the assessment of shares of stock to the holders thereof. Such shares being undoubtedly property, unless they were otherwise assessed the section was clearly unconstitutional, in view of the provision of the Constitution requiring all property to be taxed. According to the decision of the court, they were, under the law, to be otherwise assessed; i. e., everything represented by the certificates was to be assessed to the corporation. See also *San Francisco v. Mackey*, 21 Fed. 539.

In the later case of *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 117, this court, speaking of the repeal of § 3640, Pol. Code, and the enactment of § 3608, Pol. Code, already noticed, after stating that under the scheme provided by § 3640 the whole property of the corporation, including franchise, would have been taxed, by the taxation of the shares to the owner in the manner indicated therein, said that by the repeal of such section, and the enactment of § 3608, it was, without doubt, the intention of the legislature that everything entering into and giving value to the shares should be taxed as property of the corporation. This case involved the question as to the validity of the action of the board of supervisors of San Francisco, sitting as a board of equalization, raising the assessment of the franchise of the plaintiff from \$5,000 to \$5,000,000. It appeared from the record in the case that the supervisors held the difference between the value of the tangible property of the corporation and the aggregate market value of the shares of stock in the company to be the value of the franchise. Practically every objection made to the assessment here involved was made in that case by eminent attorneys representing various corporations, including this plaintiff. The opinion of the court, signed by all of the six justices who participated in the case, overruling each of the objections, has been, so far as the records of this court show, accepted up to this time as a correct exposition of the law of California relative to the taxation of franchises of corporations. While the plaintiff in that case possessed the right to lay down pipes in the streets, alleys, and ways of a city, and to collect rates for water furnished, which were said to be franchises, it was, in terms, declared by the court that its existence and right to employ its corporate powers is a franchise; and the court said in regard thereto: "We have no

doubt that it was the intention of those who framed and ratified the Constitution to place such franchises in the category of property to be taxed. . . . To hold that a private corporation does not own its franchise right, power, and privileges, would be both novel and untenable. . . . The franchise of a corporation is, and can be well defined to be, the right of the corporation to exist and exercise the powers and privileges vested in it by its charter. . . . From the foregoing cases, it would seem that there can be no doubt of the power of a state to tax the franchise at its assessed value." Commenting on the decision in *People ex rel. Burke v. Badlam*, 57 Cal. 594, the court said that in that case it was held that the franchise of a corporation of the character of those named in the petition therein, which included a banking company, a gaslight company, a smelting and lead company, and a water company, is taxable property of the corporation. It was further declared that the tax must be according to the valuation made by the officer appointed for that purpose, subject to equalization by the board of equalization. The method of determining the value of the franchises there employed was declared by the court to have been held to be within the powers of the assessor in *San José Gas Co. v. January*, 57 Cal. 614, and impliedly approved as a correct mode in *Pepple ex rel. Burke v. Badlam*, 57 Cal. 594. See also *Spring Valley Waterworks v. Barber*, 99 Cal. 36, 21 L. R. A. 416, 33 Pac. 735; *San José Gas Co. v. January*, 57 Cal. 614; *London & S. F. Bank v. Block*, 117 Fed. 900.

It is sought to distinguish the case at bar from those of *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Spring Valley Waterworks v. Barber*, 99 Cal. 36, 21 L. R. A. 416, 33 Pac. 735, and *San José Gas Co. v. January*, 57 Cal. 614, upon the ground that, in each of the cases cited, other franchises were possessed by the corporations; the waterworks having and exercising the right to lay pipes in the streets, ways, and alleys of the city, and to collect rates for water furnished, and the gas company having and exercising the right to use the streets and lay pipes therein for supplying a city with gas. The distinction is in no way material to the controversy here. As already shown, it was definitely determined in *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, that, whatever other franchises the water corporation possessed, its existence and right to employ its corporate powers was a franchise, constituting taxable property. Aside from this, however, the other rights possessed by the waterworks and gas company were rights granted by express provisions of the Constitution to every individual in the state, 64 L. R. A.

and to every company incorporated under the laws of the state for the purpose of supplying any municipality and its inhabitants with water or artificial light. Const. art. 11, § 19, and article 14. While the generality of the grant does not deprive such rights of the character of franchises, they have value only so far as the exercise thereof contributes to the value of the capital of the corporation, and are precisely the same in this respect as the exercise of the corporate franchise. As was aptly said of such other rights or franchises by counsel in *Spring Valley Waterworks v. Schottler*, no one can sell them, for everybody has them, and no person can gain by the accession of such rights of others.

It is urged that the assessment on the corporate franchise is, in this case, grossly unjust as to amount; that the assessor's method of arriving at such valuation is improper and unjust; and that it includes such elements as dividends or profits, earning power, and good will. The assessed value of the franchise, it will be observed, is a fraction over 25 per cent of the total value of the intangible property of the corporation, ascertained by a deduction of the value of the tangible property from the market value of the shares of stock.

The value of the franchises of a corporation is not limited by the cost of obtaining them. If it were so limited, such franchises as the right to use the public streets for water pipes or gas pipes for the purpose of supplying a municipality and its inhabitants with water or gas would be valueless and unassessable, for everybody possesses such rights under the terms of our Constitution. It is the exercise of the right that gives the value that our laws require to be taxed. As was said in *San José Gas Co. v. January*, 57 Cal. 614, 616: "In a pecuniary sense, the value of franchises may be as various as the objects for which they exist, and the methods by which they are employed, and may change with every moment of time; but that franchises are property, and are to be taxed in some method in proportion to value, is a part of the paramount law of this state." In the same case it was said by the court, speaking of the method employed by the assessor in arriving at the valuation of certain mains: "The duty of making the valuation was cast upon the assessor. The method of arriving at the valuation, the process by which his mind reached the conclusion (in case where, as here, it is not pretended that he acted fraudulently or dishonestly) is matter committed to his determination. . . . If he erred in his judgment, the remedy was by application to the board of equalization, and the courts will not revise the judgments of these officers

upon such questions." This appears to be determinative of the contention here made. While the complaint herein alleged fraudulent motives on the part of the assessor, the allegation was denied, and no finding was made therein, and no point is made as to the failure of the court to make such finding. Whether or not the whole difference between the aggregate market value of the shares of stock and the value of the tangible property, viz., \$2,943,096.92, was the value of the franchise, the assessor certainly had the right to take the value of the shares into consideration in determining the value of the franchise; and, were we at liberty to review the judgment of the assessor and of the board of equalization upon those matters, we could not say that an assessment of \$750,000 thereon is unjust, or that it includes such elements as dividend or profit earning power, or good will, which, it is claimed, should not be taken into consideration in determining the value of the property of the corporation. In this connection, it will be observed that these elements, so far as they may enter into the value of shares of stock, would be included in an assessment of such shares to the stockholders,—a method of assessment which the state is at liberty to adopt (in fact, bound to adopt), unless such shares are otherwise covered by the assessment of the property of the corporation. It is clear that, if the laws of this state properly express the intention that everything that gives value to the shares of a corporation shall be assessed as property of the corporation, the true value of those shares is a most important element in determining the value of such property.

Finally, it is urged that the assessment is in violation of the 14th Amendment of the Constitution of the United States, in that a corporation is thereby compelled to pay a tax of \$12,187.76 for carrying on a "common business—banking—that everyone has a right to carry on," while any person or partnership may carry on the same business without paying any tax. If this contention be well founded, it, of course, follows that no tax whatever can be imposed by any state on the corporate franchise of any corporation which is engaged in a business open to all who choose to engage therein. In view of the many decisions of the United States Supreme Court already cited, upholding the taxation by states of corporate franchises, it would appear unnecessary to further discuss this claim. As was said by the learned circuit judge in *London & S. F. Bank v. Block*, 117 Fed. 900, in upholding an assessment on such a corporate franchise, "The assessment is not . . . upon the business or occupation of a banker, but upon the

property of the complainant embraced in the unity of the franchise of the corporation to have perpetual succession, to have a common seal, and to act in all its business transactions of a general banking business with those special advantages which are incident to corporate existence." A person or partnership engaged in the same business has no such property.

The judgment of the Superior Court is affirmed.

We concur: **Shaw, J.; Van Dyke, J.; Lorigan, J.**

McFarland, J., dissenting:

I dissent, and at some future time, if other duties permit, will express my views on the question here involved more fully. At present I will say only this:

1. The only assessment actually made was of appellant's "franchise." This attempted assessment was, under any view, void for want of description. If there be any particular property embraced under the general category "franchise" which is assessable, such particular property must be described in some manner sufficient to identify it. The mere word "franchise" is no more descriptive of any particular property than would be the words "an easement," or "a piece of land."

2. It appears, however, that the only franchise of appellant intended to be assessed was its mere franchise to be a corporation. But such a franchise, assuming it to belong to the corporation, and not to the stockholders, is not assessable, because it has no ascertainable value, under the rule prescribed by the state Constitution and the statute for determining assessable value. Const. art. 13, § 1; Pol. Code, § 3617. It cannot be transferred by the owner, nor seized and sold under execution or other process of law, and is not in any way vendible. In this respect it cannot be distinguished from a seat in a stock board, which was held in *Lowenberg v. Greenebaum*, 99 Cal. 162, 21 L. R. A. 309, 37 Am. St. Rep. 42, 33 Pac. 794, not to be property in the sense that it could be seized and sold.

3. The assessor reached the conclusion that this franchise was of the value of \$750,000, at which amount he assessed it, by the process of deducting the total value at which all the tangible property of the appellant had been assessed from the value of all the shares of its capital stock, as shown by sales thereof in the market. This was not fixing the value of the only franchise attempted to be assessed, to wit, the right to be a corporation. It was merely an attempt to assess the good will of the appellant as a business concern, and was an unlawful discrim-

ination against the appellant, and in favor of partnerships, individuals, and all other "persons" whose tangible property alone is assessed, and not the good will of their established business. The value of the franchise to be a corporation is not affected by the fact that the corporation afterwards does a successful or unsuccessful business.

Beatty, Ch. J., dissenting:

I agree with Justice McFarland that the mere franchise to be a banking corporation is not susceptible of valuation according to the criterion of value established by the statute. Pol. Code, § 3617, subd. 5. It is not transferable or vendible, any more than a broker's seat in the stock and exchange board; and, unless we are prepared to overrule the decision in *San Francisco v. Anderson*, 103 Cal. 70, 42 Am. St. Rep. 98, 36 Pac. 1034, and at the same time to pronounce the Code definition of "value" unconstitutional, I cannot see how the judgment in this case can be affirmed. The invalidity of the assessment of appellant's franchise is to my mind much clearer than that of the broker's seat, for it was made to appear in the case cited that the privileges attaching to a seat in the stock board were of considerable pecuniary value to the member, whereas there is nothing to show that the right to conduct the banking business is of

any greater value to a corporation than to a copartnership, and in case of a partnership it is not regarded as having any value whatever. The truth is that when, as in this case, a valuation of a franchise of a banking or trading corporation is made by taking the whole or a part of the difference between the market value of its shares and the value of its tangible assets, such valuation necessarily includes, and is mainly, if not wholly, composed of, the value of the good will of the business, and the franchise has little or nothing to do with it. Whether the good will of a business is subject to taxation, or not, is a question never decided by this court; but, conceding it to be property liable to taxation, I am clear that it should be assessed *eo nomine*, and assessed equally to all persons, natural and artificial. If it be true, as contended by appellant, that good will is never assessed to natural persons, it is an unjust discrimination to assess it to corporations merely because the market price of their shares affords a means of estimating its value. Upon the grounds thus briefly indicated, I dissent from the judgment.

Petition for rehearing overruled March 19, 1904, **Beatty, Ch. J., and McFarland and Henshaw, JJ., dissenting.**

COLORADO SUPREME COURT.

JEFFERSON MINING COMPANY, *Appt.*,
v.
ANCHORIA-LELAND MINING & MILL-
ING COMPANY.

(.....Colo.....)

1. The determination by the government officials after notice to adverse claimants of the priority of a mining location and the issuance of a patent therefor is conclusive upon the question of seniority of location.
2. When one attacking a patent to a mining location is permitted, against the objection of his adversary, to go behind the patent and introduce evidence as to the priority of location, he cannot complain if his adversary is permitted to introduce evidence showing that his own location is the prior one.
3. A new trial cannot be granted for surprise in the case made by the evidence which the court permitted to be

introduced, where there is nothing to show that the complaining party would be able to fortify or strengthen the case which he has made.

4. The right to follow a vein on its dip does not apply in favor of a patentee of a lode mining claim the exterior boundaries of which include a portion of a claim already patented to another, which includes a portion of the apex of the vein, so as to enable the second patentee to follow the dip of the portion of the apex within the limits of his patent into the territory already patented to the prior claimant.

(February 1, 1904.)

A PPEAL by defendant from a judgment of the District Court for Teller County in plaintiff's favor in an action brought to enjoin interference with mineral ore alleged to belong to complainant, and to recover damages for ore already taken. *Affirmed.*

Statement by **Campbell, J.:**

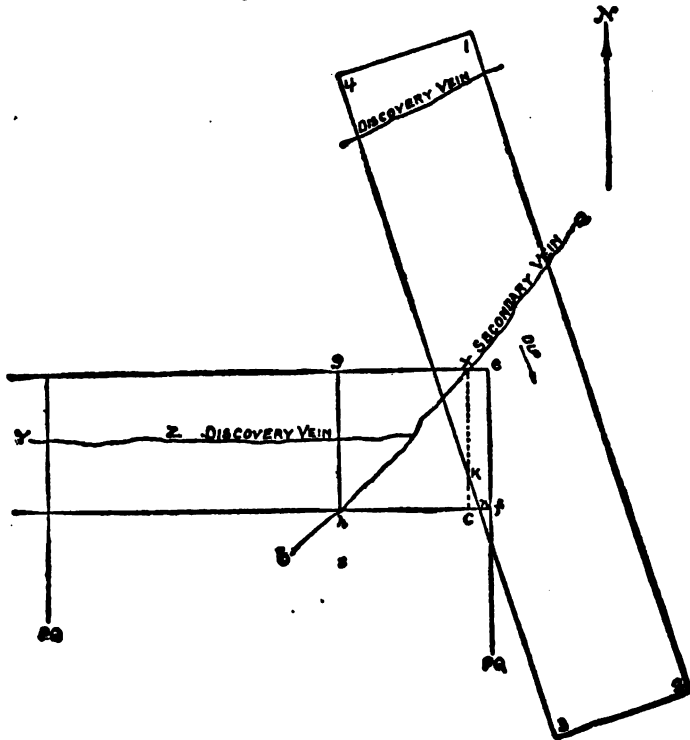
The Anchor and the Mattie L. are both patented lode mining claims, and, as originally located, overlapped on the surface, as shown by the accompanying diagram. The appellee, plaintiff below, the Anchoria-Le-

NOTE.—As to right to follow vein or lode on its dip beyond surface lines of location, see also, in this series, *Parrot Silver & Copper Co. v. Heinze*, 53 L. R. A. 491, and *note*; *Ajax Gold Min. Co. v. Hilkey*, 62 L. R. A. 555; and *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 64 L. R. A. 207.
64 L. R. A.

land Mining & Milling Company, is the owner of the Anchor, and the Jefferson Mining Company, appellant and defendant below, owns the Mattie L. claim. The Anchor went first to patent October 5, 1894, without adverse or protest by the owners of the Mattie L., and the patent includes the entire surface in conflict. A patent was issued for the Mattie L. November 3, 1896, in which the conflicting surface ground is expressly excepted from the grant. The Mattie L. as actually located is across, instead of along, the course of the discovery vein, as subsequent developments of the claim show, so that what its locators believed to be, and so designated as, its end lines are in law its side lines, and its side lines are its end lines, so far as concerns extralateral rights. The Anchor location was along the course of its discovery vein, so that its located end lines are the legal end lines for all veins that have their apex within its boundaries. The relative positions of the two locations, and the patented area of each, and the segment of the vein in controversy, are shown with sufficient accuracy by the following diagram:

mentary evidence and oral testimony produced by both parties. From the agreed statement, in addition to the facts already recited, it appears that what is called in the record a secondary vein, as distinguished from the discovery vein, and delineated on the diagram as a-b, enters the exterior boundaries of the Mattie L. across the easterly boundary line thereof about 510 feet southerly from corner No. 1 of that location, and thence continues, substantially parallel with the discovery vein (which is near the northern boundary), on a southwesterly course across its patented surface, and thence across the Anchor claim, entering it at the north, and departing from it at the south, side line. This vein has a dip to the southeast, and the ore in controversy is situated in that segment of the vein, a-b, under the surface of the Anchor claim, and within vertical planes drawn downwards through its side and end lines.

This vein, a-b, has a portion of its apex within the patented surface of each, and the outcrop appears throughout its entire course across both of the locations. In following this vein on its dip the owners of the Mat-



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controversy, and began to extract and remove ore from such segment of the vein; whereupon this action was brought by the Anchoria Company, as the owner of the Anchor claim, to restrain the Jefferson Company, the owner of the Mattie L., from continuing such work. Further reference is made in the opinion to the evidence introduced by both parties supplementing the agreed statement of facts.

The court made findings of fact in favor of the plaintiff company, establishing the seniority of the Anchor claim, and permanently enjoined defendant from removing any ore lying beneath the surface of the Anchor claim and within vertical planes drawn downwards through its side lines and end lines.

Messrs. D. P. Howard and Morrison & De Soto, for appellant:

Where the patentee has the apexes of several lodes within his survey lines, he can have only one set of end lines, which determine the planes within which he can follow his veins, which dip, perhaps, at different angles and in different directions.

Walrath v. Champion Min. Co. 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909, 63 Fed. 557; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 42 C. C. A. 415, 102 Fed. 434.

When the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though junior in date, gives to its owner the right to follow the vein on its dip underneath the senior claim.

Colorado Cent. Consol. Min. Co. v. Turck, 4 C. C. A. 313, 12 U. S. App. 85, 54 Fed. 263.

Where a patentee follows his lode on the dip, he can so follow it only in the same direction and between the same planes as he is allowed to follow his discovery vein. He can follow any vein in any direction within his side lines and end lines vertically extended; but if, in so following a vein, he reaches a point where the apex of such vein is held by a patent, the owner of such patent has the right to follow the vein.

Where there are surface outcroppings from the same vein within the boundaries of two claims, the one first located necessarily carries the right to work the vein.

Argentine Min. Co. v. Terrible Min. Co. 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356.

The patentee has the right to everything found within his lines, unless another has located or patented the apex of the vein within his ground, in which case such other party can follow on the dip so as to cover the contested vein.

Tyler Min. Co. v. Sweeney, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284; *Last Chance* 64 L. R. A.

Min. Co. v. Tyler Min. Co. 9 C. C. A. 613, 15 U. S. App. 458, 61 Fed. 557, 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Tyler Min. Co. v. Sweeney*, 24 C. C. A. 578, 48 U. S. App. 203, 79 Fed. 279.

From every patent are excepted the veins, or parts of veins, which apex exterior to its lines.

Duggan v. Davey, 4 Dak. 110, 26 N. W. 891.

Messrs. Gunnell, Chinn, & Miller and Wolcott, Valle, & Waterman, for appellee:

The rights of a patentee relate back to the date of the location of the claims patented.

Calhoun Gold Min. Co. v. Ajaw Gold Min. Co. 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885.

The failure of the Mattie L. to adverse the application of the Anchor for patent, and the issuance of a patent to the Anchor for the conflict territory, became, as to this territory at least, a definite adjudication of seniority in the Anchor claim.

Bunker Hill & S. Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co. 48 C. C. A. 665, 109 Fed. 538.

The Mattie L. has no extralateral right southerly on the dip of the vein.

The Federal statute, § 2320 (U. S. Comp. Stat. 1901, p. 1424), in express terms limits the width of a mining claim in these words: "No claim shall extend more than 300 feet on each side of the middle of the vein at the surface."

United States v. Iron Silver Min. Co. 128 U. S. 673; 32 L. ed. 571, 9 Sup. Ct. Rep. 195; *Lindley, Mines*, §§ 171, 575.

The appellee, as the owner of the Anchor claim, is entitled to all the ore in the vein in controversy, found beneath the surface of the Anchor claim.

Colorado Cent. Consol. Min. Co. v. Turck, 2 C. C. A. 67, 4 U. S. App. 290, 50 Fed. 889, 4 C. C. A. 313, 12 U. S. App. 85, 54 Fed. 263; *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *Calhoun Gold Min. Co. v. Ajaw Gold Min. Co.* 182 U. S. 508, 45 L. ed. 1206, 21 Sup. Ct. Rep. 885; *Wilhelm v. Silvester*, 101 Cal. 358, 35 Pac. 997; *Walrath v. Champion Min. Co.* 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

Campbell, J., delivered the opinion of the court:

The positions taken by the parties may thus be stated: Appellant's contentions are, first, that, in law and in fact, the Mattie L. is senior to the Anchor, and therefore entitled to the ore in controversy because of its priority under the doctrine governing its intraliminal rights; second, that, regardless of

the question of seniority, as to the secondary vein, a-b, the Mattie L. has extralateral rights southerly on the dip of that vein between what its locators considered its parallel side lines, but which in law are parallel end lines, and this covers the segment in dispute; third, that the Anchor claim, although it has within its exterior boundaries a portion of the apex of this particular vein, is not entitled to the ore in controversy within the parallelogram, c. x, e, f, but the same belongs to the Jefferson Mining Company, the owner of the apex of the vein, a-b, northeasterly from x. Each of these propositions is controverted by appellee, and we shall discuss them, but not in the order pursued by counsel in their briefs.

It is to be observed again that a-b is not the discovery vein of either location, but the parties seem to agree that, under the facts of this case, their respective rights thereto, whether intraliminal or extralateral, are not different from what they would be were both locations based upon it as such.

1. In one branch of the argument of appellant's learned counsel they say that the question as to which is the senior location is the vital one in the case. This is so because there are surface outcroppings of the same vein within the boundaries of two lode mining claims which conflict on the surface. In such circumstances appellant asserts, and appellee concedes, that the claim first located necessarily carries the right to work the vein, and they both cite and rely upon: *Argentine Min. Co. v. Terrible Min. Co.* 122 U. S. 478, 30 L. ed. 1140, 7 Sup. Ct. Rep. 1356; *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 7 U. S. App. 463, 54 Fed. 284; *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 613, 15 U. S. App. 456, 61 Fed. 557, 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Tyler Min. Co. v. Sweeney*, 24 C. C. A. 578, 48 U. S. App. 203, 79 Fed. 277, 279.

In the last case it was said that the ore body in dispute is on the dip of the lode or vein within the extended vertical planes of the end lines of the Tyler claim, and also within the side lines of the Last Chance claim, and on the dip of the vein as it passed through that claim, and it was there said that "the question as to which claim was first located necessarily determines the rights of the respective parties." Applying this principle to the present case concretely, it may be said that the ore in controversy here is on the dip of the lode, a-b, between the extended vertical planes of the legal end lines of the Mattie L. claim. It is also within the side lines of the Anchor claim, and on the dip of the vein as it passes through that claim. If the reasoning and conclusion in the *Tyler-Sweeney Case*, 24 C. C. A. 578, 48 U. S. App. 203, 79 Fed. 277, 64 L. R. A.

are right,—and both parties here agree that they are,—then it seems logically to follow that the senior location is entitled to the ore in controversy. It may be that the facts of this case differentiate it from those cited, and that the principle therein established does not apply here. And while it may not be necessary for us to rest our decision solely upon the question as to the seniority of the respective locations, yet, as both parties deem it vital, we first inquire which is the older location?

These claims overlap on the surface. The Anchor applied for, and first received, its patent, and no protest or adverse was made thereto by the owners of the Mattie L. The United States statute governing such applications provides for ample notice, which is equivalent to a summons in a judicial proceeding, and he who fails to heed it has no right to complain that his rights are concluded by it, and if, in such a case, a patent is issued in pursuance of an application regularly made, all persons are concluded. Had the owners of the Mattie L. protested the application for patent of the Anchor, and brought their suit in support of such adverse claim, and the judgment of the court in which the suit was pending had been in favor of the Anchor, this would have been a conclusive determination that the latter is the senior location. Such a judgment of the court would be no more conclusive than the determination by the officers of the land department, in the absence of such protest, that the Anchor was entitled to a patent for all of the territory within its surface boundaries, including the strip covered by both locations. *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Bunker Hill & S. Min. Concentrating Co. v. Empire State-Idaho Min. & Developing Co.* 48 C. C. A. 665, 109 Fed. 538. It may be true, as appellant contends, that, to protect the apex rights of such subsequent locator, no protest is necessary where the junior location is made on the apex of a vein on the dip of which the senior patented location is based, and there is no surface conflict; but in this case the Anchor senior location has a portion of the apex of the same vein, and there was a conflict in the surface between the two locations, and the rule invoked by both parties is applicable to the present case.

Upon the trial, however, appellant, over the objection of appellee, was permitted to go behind the patents to introduce evidence upon the question of the date of the location of the respective claims, since the patents on their face do not disclose the dates of such location, and to rebut this testimony appellee introduced oral testimony. Appellant, therefore, cannot complain if from this

showing, as well as from the adjudication of the officers of the land department in granting a patent to the Anchor claim, which we hold conclusive, it appears that the Anchor is the senior location. It was a perfected mining location not later than the 10th of September, 1891, and the Mattie L. does not relate back farther than the 14th of October of the same year, because it did not have a valid discovery until that time, and until after the location of the Anchor was made. It is true that the trial court disregarded all the evidence, documentary and oral, produced at the trial, with respect to the date of location of these claims, except that pertaining to the patents themselves, apparently basing its decision solely upon the effect of the patent proceedings; but if the other evidence admitted, but not considered, is competent or material to the issue of priority, it quite conclusively shows the seniority of the Anchor location. The complaint of appellant that the trial court improperly refused to grant it a new trial on the ground of surprise in the attack made by appellee upon the discovery of the Mattie L., if at all important here, is wholly untenable for the reason that the proof as to the alleged surprise is altogether insufficient under our practice; and, even if appellant were surprised, there is no showing that, in case of a second trial, it would be able to fortify or strengthen its case as made upon the first.

2. The second contention of appellant is that, if the seniority of the Anchor claim be admitted, nevertheless the ore body in dispute belongs to the Mattie L. This is the argument: The discovery vein of the Anchor crosses both end lines of that location. Its dip right thereon is to follow the vein at right angles to the side lines, and its owner may not follow any vein, either discovery or secondary, on the dip at any other angle. Referring again to the diagram, counsel say that the owner of the Anchor may follow the discovery vein, y-z, wherever found within the exterior lines of the survey, and upon its dip between the planes, PQ, being the planes of the end lines, and may follow the secondary vein, a-b, between vertical planes drawn parallel to the planes of the end lines, at the points x and h, where the vein a-b departs from the side lines of the location, and within such planes, represented by the parallelogram, x, c, h, g, may follow the vein, a-b, to its south side line, either on its strike or dip, at any point west of x, but may not follow it east of x, because the apex of the vein, a-b, between x and a, belongs to the owner of the Mattie L. claim, which by its patent has the right to follow such vein on its dip between vertical planes drawn parallel to and coincident with the legal end lines (that is, the located side lines) of the 64 L. R. A.

Mattie L. location, and this includes the vein under the surface of the Anchor within the parallelogram, c, x, e, f.

It is now settled law that the legal end lines of the original or discovery vein are the end lines of all veins within the surface boundaries with respect to extralateral rights. While appellant expressly disclaims that the present case involves the doctrine of extralateral rights, nevertheless in argument its counsel virtually asks to have the principle of that rule applied to the facts. That doctrine does not fit the facts of the case, for the legal question is one strictly of intraliminal rights. Neither can we, by analogy, apply to the facts the principles of that doctrine, as we proceed to show.

The ore bodies in dispute within the parallelogram, c, x, e, f, except the triangle, k, c, n, to which appellant can make no claim, are within the surface lines of the Mattie L., and the entire parallelogram is wholly within the surface lines of the Anchor. The doctrine of extralateral rights refers to that part of a vein which, on the dip, lies outside of the side lines of the location within whose surface lines the apex of the vein appears. and not to any part of such vein, either the outcrop or segments on the dip thereof, which lie wholly within planes drawn downwards coincident with its surface boundaries. In other words, the extralateral rights of a locator of a lode mining claim do not attach until after, in pursuit of his vein on its dip, he crosses the side lines of his location. Here, as we have said, in pursuing the vein, a-b, from its apex, which is within the surface lines of the Mattie L., thence downward on its dip, its owner has encountered a segment thereof inside the side lines, and also the end lines, of the Mattie L., which is also within the surface lines of the senior Anchor location. This segment, too, has a part of the apex of the same vein within the surface boundaries of the Anchor. It will not do to say that such segment is outside of the side lines of the Mattie L., because it is also within the boundaries of the senior Anchor, and, though the Mattie L. does not own the conflicting ground, still this very ground is actually physically within its surface boundaries. The fact that it belongs to another person, and is within the surface boundaries of another location, does not change its position on the ground with reference to legal boundary lines of the respective locations.

To make the point, if possible, still clearer, suppose that the Mattie L. patent had included all the ground which its original survey encompassed. This would embrace the strip in dispute patented by the Anchor. In other words, suppose the Anchor was out of the case entirely, and we were required to

ascertain the nature and extent of the rights of the Mattie L. to all the veins found within its surface lines. On the assumption that it has the apex of the vein, a-b, then the rights of the locator are defined by § 2322, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 1425). The property rights conferred by a lode location thereunder are twofold (1 Lindley on Mines, 2d ed. § 549), intraliminal, and extraliminal or extralateral. The first embraces all within its boundaries down to the center of the earth; the second, while depending for its existence upon something within such boundaries, may nevertheless be exercised, under certain conditions, beyond those boundaries. Now, the segment of the vein in dispute here is wholly within the surface lines of the Mattie L. as they were run upon the ground. The property rights of the owner thereto are therefore strictly intraliminal, and in no sense referable to the law governing property rights of the second class. There would seem to be no doubt of this conclusion in the hypothetical case. Instead of the supposed case, however, we have one where two locations cover the same ground, and where the strip common to both is expressly excepted from the Mattie L. patent because it had been previously segregated from the public domain and conveyed by the United States to the owner of the older Anchor location. Neither this exclusion from the Mattie L. patent of the disputed strip, nor the projection of the Anchor into its territory, nor both combined, operate to change the boundary lines of the Mattie L. location. They are still to be traced on the ground as they were first run, and the ground in controversy is just as much within the existing surface lines, both side lines and end lines, of the Mattie L. as when such lines were first laid. Manifestly, therefore, now, as always, whatever property rights, if any, which the owner of the Mattie L. has in the veins found in this particular area, are derived, and must spring, from § 2322 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1425), and that section confers no right whatever if such ground has been previously patented to another.

It is not logical to hold that the extralateral rights with respect to this disputed strip are to be defined as though it was territory beyond the Mattie L. side lines, and within the planes of its end lines, when it so clearly appears that it is wholly within the surface lines of that claim, though covered by a senior conflicting location. The law does not require that the bounding lines of a location be laid wholly upon its own territory, and so as to include only the surface ground actually belonging to it, but they may be laid along or across other and

senior locations belonging to another, though, of course, the prior rights of the latter may not thereby be injuriously affected. The courts cannot make a location or change the boundaries as made by the locator himself. But if the Mattie L. was permitted to draw in its boundaries so as to include therein only the ground actually belonging to that location, and so as to exclude all that belonging to the Anchor, the position of the appellant would not be strengthened. On the contrary, it would be left without the vestige of an extralateral right. For then the westerly legal end line (the located westerly side line) of the Mattie L. would be coincident with the northerly side line, the easterly end line, and the southerly side line of the Anchor claim for a certain distance, and thus would be not a straight, but a broken, line, and the westerly end line of the location, as thus laid, would not be parallel with its easterly legal end line, and from a claim thus irregularly located extralateral rights are withheld. The law is that it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones. *Walrath v. Champion Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

To hold that the disputed strip is, legally speaking, outside the side lines of the Mattie L. location, would be, not only contrary to the physical fact, but would be putting a premium on an unlawful act. It is clear that, if the locators of the Mattie L. had observed the statute, and not attempted to include within their location previously located ground, and had so drawn its westerly legal end line as to take in only public domain, it would have acquired, by such compliance with the law, no right whatever to the ore bodies now claimed. And while, if the Anchor owner made no objection, the boundary lines of the Mattie L. might be laid on the surface of the Anchor, still the latter's superior right might not thereby be jeopardized. In neither of these cases could extralateral rights be asserted. Can it be said that, because the Mattie L. has so run its surface lines as to include therein property already located by another, it thereby has enlarged its rights beyond what it would have secured had it obeyed the provisions of the statute under which its rights are obtained, and by which they are defined? In other words, may a locator of a mining claim acquire greater rights by disobeying, than by observing, the statutes of the United States, from which all his rights are derived? Until a higher authority so commands, we shall not so decide.

Extralateral rights, as to the ore bodies in dispute, might be exercised if they are out-

side the side lines of the Mattie L. But this situation can exist only if its westerly legal end line be drawn in to exclude the conflicting territory. In that event, appellant may not go westerly beyond that boundary, for it could not, in pursuing its vein on the dip, pass beyond the planes drawn vertically through the end lines of its location. Such planes would constitute a barrier beyond which the owner of the Mattie L. could not go, and would exclude from the exercise of its extralateral right the easterly portion of the Anchor claim which is here in controversy.

The doctrine of extralateral rights, therefore, does not apply; neither does it by analogy fit this case. The intraliminal rights of the respective parties govern, and since those rights of the junior Mattie L. claim conflict with, and are interrupted by, the senior intraliminal rights of the Anchor, the latter prevails, as we have hereinabove said in discussing another contention of appellant.

Counsel rely chiefly upon *Colorado Cent. Consol. Min. Co. v. Turok*, 4 C. C. A. 313, 12 U. S. App. 85, 54 Fed. 262, wherein it was said that, where the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though junior in date, gives to its owner the right to follow the vein on its dip underneath the senior location. That is the case most nearly in point, but it does not, in our judgment, apply to the facts of this case. Here in the case at bar the segment of the vein claimed by appellant has not on its dip passed out of the side line of the Mattie L. claim, but is wholly within its surface boundaries. In the *Turok Case* the circuit court of appeals did not deny to a senior location so much of the vein underground as it had the apex of. That decision, as we understand it, so far as it is analogous to this case, was that one who locates upon the apex of a lode may, within planes drawn through the end lines of the location, follow the vein outside of its side lines, and underneath the boundary lines of an adjoining proprietor, when the latter has no part of the apex, though he holds under a senior patent. But here, as we have said, the vein has not on its dip passed beyond the side lines of the junior Mattie L. location, but the ore body in question is wholly within the surface lines of the junior Mattie L., and also inside the surface lines of the senior Anchor, location. Necessarily, therefore, it seems to us that the senior claim has the right to it.

A fundamental error of appellant consists in the attempt to apply the doctrine of extralateral rights to a case which is governed by the law of intraliminal rights; in seeking to apply the limitations which are 64 L. R. A.

applicable to outside parts of veins—that is, veins outside the side lines—to the parts of veins wholly within such lines. This we believe is contrary to § 2322, and opposed to the authorities hereinabove cited. Appellee is not here asserting extralateral rights to the secondary vein, but bases its claims thereto solely on the ground that it is the owner of the senior location, and for that reason owns the ore found within its surface boundaries.

But if the doctrine of extralateral rights does govern, then by the decision in *Walrath v. Champion Min. Co.*, 19 C. C. A. 323, 44 U. S. App. 291, 72 Fed. 978, the end lines, and no other lines, of the Anchor location bound its extralateral rights in the vein, a-b; hence the owner of the Anchor would be entitled to all ores of such vein found within planes drawn downward through its end liens, PQ, and would not be limited, as is attempted to be done here by appellant, by planes drawn parallel to the end lines at the points x and h. This case was affirmed by the Supreme Court of the United States under the same title (171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909), and as to this point was referred to with approval in *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 42 C. C. A. 415, 102 Fed. 430. We are aware that considerable criticism has been made of this decision. In *Ajao Gold Min. Co. v. Hilkey*, 31 Colo. 131, 62 L. R. A. 555, 72 Pac. 447, we decided that planes drawn parallel with the end lines, and at points where the vein passed through the side lines of a location, bounded the extralateral rights. We so limited the rule because that was the extent of the claim made by the owner of the extralateral rights. But the Supreme Court of the United States has gone further, and said that these bounding planes must be coincident with the planes of the end lines, and if this case demanded the application of that rule it would be our duty to follow it if we believed the facts of this case are such as to bring it within the principle there announced, notwithstanding the adverse criticism of the decision by the learned author of *Lindley on Mines*, 2d ed. §§ 593 *et seq.* Its application would give the ore bodies in dispute here to the Anchor claim as the owner of the senior extralateral right.

Our conclusion is that where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict, as here, with respect to the dip rights within the surface lines of the two locations, the senior location must prevail.

To avoid, if possible, misunderstanding, we further observe that in this case a portion of the secondary vein, a-b, is within the surface boundaries of the senior Anchor

lode, as the stipulated facts show. The owner of that claim, to say the least, certainly owns all the mineral of such vein within planes extended vertically downwards coincident with its end lines and side lines to the extent at least, of the length of the apex found within its surface boundaries. The case has not been argued, certainly not exclusively, upon the proposition that each of these parties owns a definite portion of the ore found within the parallelogram, c, f, e, x, to each belonging such part of the vein as it has the apex of, but, if it had been, there are not sufficient data in the record to show what portion, or how much, each party is entitled to, even if we should hold that the Mattie L. owns such portion of the ores within that parallelogram as it has the apex of easterly of x. The case has been submitted rather upon the proposition that each party owns all the ores found within this parallelogram.

In thus disposing of this action, we have not overlooked, though we do not pass upon, the contention of appellee that the Mattie L. can, in no circumstances, have any right,

intraliminal or extralateral, to the secondary vein, a-b, because it is substantially parallel with the discovery vein, and more than 300 feet distant therefrom, and under § 2320 (U. S. Comp. Stat. 1901, p. 1424) such other vein is, therefore, excluded from the operation of the patent, though it may be within the surface lines of the claim as surveyed and located on the ground. There are other contentions by appellee which, in the view we have taken of the case, are not discussed.

In addition to the authorities already cited, we refer to the following, among others, which in principle uphold the conclusions here reached: *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.* 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 43 L. ed. 72, 18 Sup. Ct. Rep. 895.

The judgment of the District Court being in accordance with our conclusion, it is affirmed.

Rehearing denied March 7, 1904.

GEORGIA SUPREME COURT.

Park WOODWARD

v.

MILLER *et al.*

(.....Ga.)

*1. The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employees, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale for injuries caused by such defect; and this is so notwithstanding there was no privity of contract between the plaintiff and the defendant in the sale of the buggy.

2. The amendments which were allowed merely amplified the original petition, and were not open to the objection that they set out a new cause of action.

(March 3, 1904.)

CROSS-WRITS of error to the City Court of Atlanta to review a judgment sus-

*Headnotes by CANDLER, J.

NOTE.—As to liability of manufacturer or seller of dangerous article to person injured thereby where there is no privity of contract between them, see also, in this series, *Schubert v. J. R. Clark Co.* 15 L. R. A. 818, and note, *Heizer v. Kingsland & D. Mfg. Co.* 15 L. R. A. 64 L. R. A.

taining a demurrer to the petition in an action brought to recover damages for personal injuries alleged to have been caused by the use of a buggy sold by defendants; the plaintiff assigning error in the sustaining of the demurrer; and the defendants assigning error in the allowance of an amendment to the petition. *Reversed on plaintiff's assignment.*

The facts are stated in the opinion.

Mr. Reuben R. Arnold, for plaintiff:

The warranty being an undertaking or contract on the part of the vendor, the vendee is entitled to recover such damages as are sustained by him as a direct consequence of the breach of such contract. In this respect the warranty may be regarded as an undertaking separate and distinct from the contract of sale.

28 Am. & Eng. Enc. Law, p. 822.

A contract of sale creates a relation which carries with it certain duties and obligations which are wholly separate and distinct from the pure sale.

A seller bears such a relation to the persons who, it is contemplated, shall go into possession of the property which he sells,

821; *State use of Hartlove v. M. Fox & Son*, 24 L. R. A. 679; *Lewis v. Terry*, 31 L. R. A. 220; *Ives v. Welden*, 54 L. R. A. 854; *McCaffrey v. Mossberg & G. Mfg. Co.* 55 L. R. A. 822; *Husert v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 303.

that the law imposes a duty upon him to exercise ordinary prudence to avoid injuring them in reference to that property.

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 819, 32 Am. St. Rep. 559, 51 N. W. 1103; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 303, 57 C. C. A. 237, 120 Fed. 866.

When a sale is made to a corporation, necessarily it is within the purview of the parties that that corporation will use the property sold by its agents alone.

For negligence in the sale of, or furnishing a defective article, even though it is not imminently dangerous to life, the seller is liable, not only to the purchaser, but to those who, it must have been in contemplation by the seller, would use it under and with the authority of the purchaser.

The Rheola, 22 Blatchf. 124, 19 Fed. 926; *Bright v. Barnett & R. Co.* 88 Wis. 299, 26 L. R. A. 524, 60 N. W. 418; *Mulchoy v. Methodist Religious Soc.* 125 Mass. 487; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Cook v. New York Floating Dry Dock Co.* 1 Hilt. 437.

A person selling an article which he represents to be sound, but which in reality is defective and known to be so by him, has committed such a tort, such a fraud, such a wrong, upon the public that any person who is injured by using the article upon the assumption that it is not dangerous has a right of action against the seller.

Bragdon v. Perkins-Campbell Co. 30 C. C. A. 567, 58 U. S. App. 91, 87 Fed. 110; *Langridge v. Levy*, 2 Mees. & W. 519, 6 L. J. Exch. N. S. 137; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Lewis v. Terry*, 111 Cal. 39, 41 L. R. A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821, 19 S. W. 630; 16 Am. & Eng. Enc. Law, pp. 392, 434; *Peters v. Johnson*, 50 W. Va. 644, 57 L. R. A. 431, 88 Am. St. Rep. 909, 41 S. E. 190.

A vital defect in the axle of a buggy renders it inherently dangerous in the hands of whoever may use it.

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L. R. A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640; *Norton v. Sewall*, 106 Mass. 144, 8 Am. Rep. 298; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Barney v.* 64 L. R. A.

Burnstenbinder, 64 Barb. 213; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 303, 57 C. C. A. 237, 120 Fed. 866; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154; *Peters v. Johnson*, 50 W. Va. 644, 57 L. R. A. 431, 88 Am. St. Rep. 909, 41 S. E. 190; *Parry v. Smith*, L. R. 4 C. P. Div. 325, 48 L. J. C. P. N. S. 731, 41 L. T. N. S. 93, 27 Week. Rep. 801; *Woodley v. Coker* (Ga.) 46 S. E. 89.

Mr. Howell C. Erwin also for plaintiff.

Mr. W. H. Terrell, for defendants:

There is no privity between plaintiff and defendants.

Ga. Code, §§ 3555, 4939, 4940; 28 Am. & Eng. Enc. Law, p. 824; *Cobb v. C. Everett Clark Co.* 118 Ga. 483, 45 S. E. 305.

The measure of damages is the value of the property.

Ga. Code, § 3556; 28 Am. & Eng. Enc. Law, pp. 822-836.

The damages are too remote.

28 Am. & Eng. Enc. Law, pp. 846, 847; *Pollock, Torts*, p. 328.

The proximate cause of the injury was the runaway.

Macon v. Dykes, 103 Ga. 847, 31 S. E. 443.

Candler, J., delivered the opinion of the court:

The main bill of exceptions assigns error upon the sustaining of a general demurrer to the plaintiff's petition. The defendants filed a cross bill complaining of the allowance of an amendment to the petition. The case made by the declaration was, in substance, as follows: The plaintiff is superintendent of the waterworks department of the city of Atlanta, and in the performance of his duties has occasion to ride between different points in the city. The defendants are manufacturers and sellers of buggies, carriages, and other vehicles. On July 30, 1901, the plaintiff, in behalf of the city of Atlanta, bought of the defendants a buggy for his use, the defendants at the time representing to him that the buggy was in good condition, extra strong, and fitted for the service for which it was intended. After purchasing the buggy, the plaintiff began to use it, and on or about November 12, 1901, while riding in it on the streets of Atlanta, "the spindle extending from the right front axle broke, the buggy was wrecked and turned over, causing the horse to run away, and plaintiff was thrown about and around and on the Belgian block pavement, and greatly and permanently injured." The defendants were lacking in ordinary care in the manufacture, inspection, sale, and handling of the buggy. An ordinary test would

have led to the discovery of the defect which caused the spindle to break. "There was a large crack in said axle, but the defendants had caused and directed the same to be covered with grease, and the crack filled in. This crack extended through the larger part of the spindle, and so weakened the same that the weight of the buggy caused the same to break. The crack was visible to the defendants, in the exercise of ordinary care, before they placed the grease upon the spindle, and, had the defendants exercised ordinary care in sounding and testing the buggy in any way, they would have discovered the break or crack." On account of the crack being filled and covered with grease, the plaintiff could not, in the exercise of ordinary care, discover its existence, and was unaware of it. The defendants falsely represented to the plaintiff that the buggy was in good condition, knowing at the time that the representation was false. The plaintiff's injuries were described, and were alleged to be permanent. Two amendments to the petition were offered, and were allowed over the defendants' objection. The first alleged that the spindle which broke was made of "defective, cheap, imperfect, and improperly welded iron and steel, . . . and flaws and incipient cracks were present in it." The second set up that at the time of his injuries the plaintiff was in the discharge of his duties as superintendent of the waterworks system of Atlanta; that the defendants, who reside in Atlanta, knew at and prior to the time the buggy was sold that it was to be used by the plaintiff in the discharge of his duties, and sold the buggy expressly for such use; and that the plaintiff was injured by being thrown out into the street by the giving way and breaking of the axle, which caused the buggy to drop to the ground. "He was not hurt by the horse running away. The horse ran away after the buggy fell, and after plaintiff was injured."

1. We do not hesitate to hold that the petition set out a cause of action. Independently of the question of liability to the plaintiff on the alleged warranty of the buggy, we are clear that under the allegations the defendants were guilty of a tort for which the plaintiff could hold them liable. The gist of the action is the alleged false representation, knowingly made, as to the quality and condition of the buggy. In this it is very similar to an action of deceit. It makes no difference that there was no privity of contract between the parties. It appears that the plaintiff's injuries were sustained while the buggy was being put to a use expressly contemplated by the parties when the sale was made. "A particular transaction may sometimes be looked upon 64 L. R. A.

as affording the right to bring an action either for the breach of contract or in tort. Take, for instance, the too familiar case of a railway disaster caused by the company's negligence. The company is liable to the passenger in contract because it gave him a ticket, and in tort because it was not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendant. But, generally speaking, privity is not necessary to support an action in tort. . . . If a railway company contract with a master to carry his servant, and in doing so is guilty of negligence, which causes bodily hurt to the servant and consequent damage by loss of service to the master, the company may be sued in contract by the master and in tort by the servant." Note to *Landridge v. Levy*, 4 Mees. & W. 337; *Shirley*, L. C. 346. In that case, which is closely in point in the present discussion, a father bought from a gunsmith a gun, which was warranted, telling the gunsmith at the time of the purchase that he wanted the gun for the use of himself and his sons. The gun, while being used by one of the sons, exploded, injuring him, and suit was brought by him against the seller of the gun for the tort. The defendant contended that the right of action, if any, was in the father, to whom the sale had been made; but it was held that the suit in tort could be maintained by the son. In the able and exhaustive brief of counsel for the plaintiff a large number of cases of similar import are cited, but for the purposes of the present discussion we deem it necessary to refer to only a few of those most closely in point. In *Lewis v. Terry*, 111 Cal. 39, 31 L. R. A. 220, 52 Am. St. Rep. 146, 43 Pac. 398, it was held that "one who sells a folding bed, representing it to be safe for use, when he knows it to be dangerous, is liable for injuries caused by the defects in the bed to any person who uses it, although there may be no privity of contract between them." That decision was based on the principle that the defendant was guilty of a wrong independently of his contract, viz., his false representation as to the safety of the bed, and that thereby the case was brought within the operation of the law of torts. In *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103, the plaintiff was a painter in the employment of a contractor. The contractor ordered of a retail merchant a stepladder for the use of the plaintiff. The merchant, not having such a ladder in his stock, ordered the defendant, a manufacturer, to deliver one to the place designated by the contractor. The ladder so delivered was made of defective and inferior

material, and was dangerous, but its defects were hidden from view by paint, varnish, and oil. By reason of its weakness the plaintiff fell from it and was injured. The court held the defendant "liable for injuries caused by such negligence to one into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer." We have been able to find in our own Reports only one case at all in point in the present discussion. In *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L. R. A. 612, 20 Am. St. Rep. 324, 10 S. E. 118, this court held: "Where one prepares a proprietary or patent medicine, and puts it upon the market, and recommends it to the world as useful for the cure of certain diseases, the bottle containing it having therewith a prescription, made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and the medicine with this prescription is sold by the proprietor to a druggist for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person, who uses it in the quantity thus prescribed, and the same contains an ingredient such as iodide of potash in such quantities as proves harmful to the person thus using it, the proprietor is liable." We recognize that there is some distinction between the case cited and the case now under consideration, but it seems clear that the same principle of law is applicable in both. Many courts have laid down a different rule governing the sale of articles which are inherently dangerous, such as a deadly poison or a powerful explosive, from that which is applied to the sale of ordinary articles of commerce; holding that the negligent sale, shipment, or handling of such inherently dangerous articles will render the negligent person liable to anyone who may be injured by reason of his negligence, regardless of the

question of privity between them, while as to articles not inherently dangerous there must be some privity between the parties to give a right of action. This rule, however, can have no application to the present case in view of the fact that the petition distinctly alleges that the plaintiff's use of the buggy was contemplated by the defendants when the sale was made, that they knew of the defects in the spindle, and that they concealed this defect from him by the use of paint and grease, and represented to him that the buggy was in perfect condition. The case of *Cobb v. O. Everett Clark Co.* 118 Ga. 493, 45 S. E. 305, cited in the brief of counsel for the defendants, has no bearing upon the case now under discussion. There the plaintiff entered into a written contract with a building company, which was erecting a building adjoining his premises, concerning the building of a party wall between the two buildings. The defendant, a contractor for the building company, was not a party to this contract. The suit was brought against it for alleged negligence in the erection of the wall for the building company. This court held, necessarily, that whatever duty was owed to the plaintiff in the construction of the wall was by the building company, with which he had a written contract on the subject; that the defendant owed the plaintiff no duty, and was not liable to him in damages.

2. There was no error in allowing the amendments to the petition. These amendments merely amplified the original petition, and set out more in detail the nature of the alleged defects in the buggy and the circumstances of the plaintiff's injury. By no construction can they be held to introduce a new cause of action.

Judgment reversed.

All the Justices concur except *Simmons*, Ch. J., absent on account of sickness.

INDIANA SUPREME COURT.

AMERICAN MUTUAL LIFE INSURANCE COMPANY of Elkhart

v.

Mary BERTRAM.

(.....Ind.....)

1. One who, without knowledge of the facts, takes an assignment of a policy

of life insurance which, under the statute, is void because taken, without his consent, upon the life of one in whom the applicant has no insurable interest, and pays the premiums thereon in reliance upon the assurance by the agent of the company, confirmed by its vice president, that the policy is valid and the assignment good, may recover back the premiums paid.

2. The statute of limitations does not

NOTE.—As to validity generally of assignment of life insurance policy to one having no insurable interest, see, in this series, *Rittler v. Smith*, 2 L. R. A. 844; *Roller v. Beam*, 6 L. R. A. 136; *Johnson v. Alexander*, 9 L. R. A. 660, and *note*; *Hewlett v. Home for Incurables*, 64 L. R. A.

17 L. R. A. 447; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761; *Steinback v. Diepenbrock*, 44 L. R. A. 417; *Clement v. New York L. Ins. Co.* 42 L. R. A. 247; and *Chamberlain v. Butler*, 54 L. R. A. 338.

begin to run against a right to recover back premiums paid by an assignee of a void life insurance policy until the invalidity of the contract is discovered, and further obligation thereon disavowed, and demand made for a return of the premiums paid.

3. Interest does not begin to run upon premiums paid by an assignee of a void insurance policy until demand is made for their repayment.

(March 9, 1904.)

CROSS-APPEALS from a judgment of the Circuit Court for Elkhart County in favor of plaintiff in an action brought to recover back premiums paid upon a void policy of life insurance; the defendant appealing from so much of the decree as permitted a recovery, and plaintiff appealing from so much as applied the statute of limitations to a portion of the demand. *Reversed on plaintiff's appeal.*

The facts are stated in the opinion.

Messrs. Van Fleet & Van Fleet for plaintiff.

Messrs. Miller, Drake, & Hubbell, with *Messrs. Crumphaek & Moran*, for defendant:

Stiles had no insurable interest in the life of Mary Ellsworth, and so, on the ground of public policy, the policy of insurance issued to him was void from the beginning.

Prudential Ins. Co. v. Jenkins, 15 Ind. App. 297, 57 Am. St. Rep. 228, 43 N. E. 1056; *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 130, 44 N. E. 809; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; *Burton v. Connecticut Mut. L. Ins. Co.* 119 Ind. 207, 12 Am. St. Rep. 405, 21 N. E. 746; *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383; *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798; *Smith v. Wabash R. Co.* 141 Ind. 92, 40 N. E. 270; *Cleveland, C. C. & I. R. Co. v. Closser*, 126 Ind. 348, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 22 Am. St. Rep. 593, 26 N. E. 159.

Appellant cannot now assert that the policy is valid, having elected to declare it void because of lack of insurable interest in Stiles.

Aetna Ins. Co. v. Shryer, 85 Ind. 362; *Metropolitan L. Ins. Co. Bowser*, 20 Ind. App. 557, 50 N. E. 86.

The person paying premiums may elect to treat the policy as rescinded, even though the insurance company was estopped from making such defense, and may recover premiums paid.

16 Am. & Eng. Enc. Law, 2d ed. p. 954; *Hogben v. Metropolitan L. Ins. Co.* 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214. 64 L. R. A.

Appellee purchased the policy in good faith for its actual value, and the policy was not a wagering contract, nor the assignment a cover for such contract; hence, appellee could have recovered on the contract itself but for the fact that the policy was void and of no effect in the hands of her assignor.

Nye v. Grand Lodge, A. O. U. W. 9 Ind. App. 131, 36 N. E. 429; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; 3 Am. & Eng. Enc. Law, 2d ed. p. 1025.

An assignee without an insurable interest in the life of the insured may recover back premiums paid out to keep such policy alive, if the assignment is taken in good faith, and not for a wager.

Supreme Lodge, K. of H. v. Metcalf, 15 Ind. App. 135, 43 N. E. 893; *Tepper v. Supreme Council of R. A.* 59 N. J. Eq. 321, 45 Atl. 111; *Fulton v. Metropolitan L. Ins. Co.* 47 N. Y. S. R. 111, 19 N. Y. Supp. 660; *Waller v. Northern Assur. Co.* 64 Iowa, 101, 19 N. W. 865; *Mount v. Waite*, 7 Johns. 434.

Appellant, by falsely representing to appellee that the policy which Stiles sought to assign to her was valid, and by making its policy payable to Stiles or his assigns, perpetrated a fraud on appellee which induced her to part with her money; and so, in equity and good conscience, it must be returned to her.

DeSouchoi v. Dutcher, 113 Ind. 249, 15 N. E. 459; *Worley v. Moore*, 77 Ind. 567; *Hess v. Young*, 59 Ind. 379; *Lemans v. Wiley*, 92 Ind. 437; *Ashton v. Shepherd*, 120 Ind. 69, 22 N. E. 98.

The rule that courts refuse to enforce contracts, or to grant relief to parties to contracts, against public policy, does not apply, for the court does not recognize the contract, but totally disregards it.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442.

Appellee is neither *particeps criminis* nor *in pari delicto*, and, to decide that appellee cannot recover would be to save to appellant the fruits of its illegal transactions, and aid, rather than destroy, the wrong to the public.

Dural v. Wellman, 124 N. Y. 156, 26 N. E. 343; *Mount v. Waite*, 7 Johns. 434.

Appellee's cause being based on fraud concealed by its nature and the acts of appellant, the statute did not begin to run until she discovered the fraud or the fact that the policy was void.

Morrill v. Palmer, 68 Vt. 1, 33 L. R. A. 412, 33 Atl. 829; *Metropolitan L. Ins. Co. v. Trende*, 21 Ky. L. Rep. 909, 53 S. W. 412; *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 553, 47 Am. St. Rep. 290, 38 N. E. 208;

Jackson v. Jackson, 149 Ind. 245, 47 N. E. 963; *Day v. Dages*, 17 Ind. App. 228, 46 N. E. 589; *Runyon v. Snell*, 116 Ind. 165, 18 N. E. 522; *Dodge v. Essex Ins. Co.* 12 Gray, 65.

Premiums paid for insurance are not apportionable or separable; and so, unless the statute of limitations has run against the last assessment paid, it has run against none.

New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; *Supreme Lodge, K. of H. v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893; *New Holland Turnp. Co. v. Farmers' Mut. Ins. Co.* 144 Pa. 541, 22 Atl. 923; *Overton v. Tracey*, 14 Serg. & R. 311; *Rosborough v. Shasta River Canal Co.* 22 Cal. 557; *Chamness v. Coe*, 131 Ind. 118, 30 N. E. 901.

Dowling, J., delivered the opinion of the court:

This action was brought by the appellee to recover from the appellant premiums paid for insurance upon a policy alleged to have been void from the time of its execution. At the request of the parties the court made a special finding of facts, and stated its conclusions of law thereon. Exceptions were saved by both parties, and judgment was rendered for the appellee for so much of the premiums as was paid by her within six years before the commencement of the action. Errors are assigned by the appellant upon each conclusion of law. The appellee assigns a cross-error upon the second conclusion.

Briefly stated, the facts were as follows: The appellant was a mutual life insurance company organized under the laws of this state, doing business on the assessment plan. On February 24, 1887, at the city of Elkhart, with full knowledge of the facts, it issued its policy of insurance to one Leander Stiles upon the life of one Mary Ellsworth, a resident of New York, without her knowledge. Stiles was not a creditor of Mrs. Ellsworth, nor was she under any kind of obligation, legal or moral, to him. She was related to him only as an aunt by marriage, and he was in no way dependent upon her. The consideration of the policy was the payment by Stiles of a membership fee of \$25, and his agreement to make monthly payments of \$6.80. The sum to be paid to Stiles, his heirs, administrators, or assigns, within thirty days after the death of Mrs. Ellsworth, and proof thereof, was his *pro rata* share of 80 per cent of an assessment on all members of the insurance company,—not exceeding, however, \$4,000. Stiles paid the membership fee and the assessments for February and March, 1887. On March 2, 1887, in consideration of the agreement of the appellee to pay all sub-

sequent premiums and assessments on the policy, he assigned to her a two-thirds interest in it. After such assignment the assessments were increased by appellant to \$12 per month. The appellee paid all such premiums and assessments until October, 1890, when the appellant refused to receive any further payments, for the reason, as it alleged, that the policy had lapsed in consequence of the failure of the appellee to pay the October, 1890, assessment on the day it became due. Mrs. Ellsworth died in May, 1900, and, when payment of the amount named in the policy was demanded by the appellee, the appellant at first refused to pay it because the policy had lapsed on the nonpayment of the October, 1890, assessment; but afterwards, on June 13, 1900, it denied its liability on the ground that neither Stiles, who took out the policy, nor the appellee, to whom it was assigned, had an insurable interest in the life of Mrs. Ellsworth. The application for the policy was made by Stiles through one Gusten, an agent of the appellant. Gusten knew that the application was made without the knowledge or consent of Mrs. Ellsworth; that Stiles was not a creditor of Mrs. Ellsworth; that she was not obligated to him in any manner; that Stiles was not dependent upon her in any way; that she was an aunt of the said Stiles by marriage only, and not otherwise related to him. The application was written by Gusten himself, and Stiles signed Mrs. Ellsworth's name to it in the presence of Gusten. The latter forwarded the application to the appellant, at Elkhart, Indiana, and on February 24, 1887, the appellant, on this application, issued to Stiles the policy on the life of Mrs. Ellsworth. At the time of the assignment of the policy to the appellee and prior thereto, Gusten, who was acting as the agent for the appellant, and who knew all the facts before stated, for the purpose of inducing the appellee to take an assignment of the policy, falsely and fraudulently represented to her that the policy was valid and all right; that she had a right to take an assignment thereof; that she would be entitled to receive payment thereunder in case of loss; that it was a good investment for her, and one by which she might save her money. The appellee was ignorant of all the facts of the case, and of the law in respect to them. She believed and relied on the representations of Gusten, the agent of the company, and was induced by them to take an assignment of the policy, and to pay to Stiles therefor all he had paid out thereon, including the membership fee and the said monthly assessments. She continued to pay the assessments thereafter, under the belief that the policy was valid. Some two months after

the policy was assigned to her, Barney, the vice president and treasurer of the appellant, visited the appellee at her home, in Valparaiso, and she repeated to him all that Gusten had said to her in regard to the assignment of the policy. Barney thereupon, with full knowledge of all that had taken place, represented to her that everything was perfectly right, and advised her to keep her dues paid. The appellee thereafter, relying on these false representations and statements of Barney and Gusten, as agents of the appellant, continued to pay the monthly assessments on the policy until October, 1897. A few days after it became due, she tendered the October assessment, and from month to month thereafter she offered to pay each subsequent assessment, but her tenders and offers were refused. The total amount paid by the appellee on account of premiums and assessments was \$1,574, which, with the interest thereon, amounted to \$2,586.35. Before the commencement of the suit, the appellee demanded repayment to her of the amount so paid on account of the policy, but the appellant refused to repay the same, or any part of it. The action was commenced November 10, 1900.

The court's conclusions of law were, "(1) that the said policy was void from the beginning; (2) that plaintiff is entitled to recover all moneys paid by her, with interest, within six years before the commencement of this action, being the sum of \$1,007.35."

A reversal of the judgment is insisted upon by the appellant on the grounds, (1) that the finding fails to show that the policy was issued without the knowledge or consent of Mary Ellsworth; (2) that it does not appear that the policy was invalid under § 6 of the act of March 9, 1883 (Acts 1883, chap. 136, p. 204), either in the hands of Stiles or the appellee; (3) that public policy forbids a recovery by the appellee; (4) that the appellee can found no right upon a misrepresentation of the law; and (5) that the appellee has no superior equity against the other members of the appellant, as a mutual life insurance company.

Section 6 of the act of March 9, 1883 (Acts 1883, chap. 136, p. 204), under which the appellant company was organized, declared that when payments of assessments on a policy were made by any person other than the insured, and without his written consent, the beneficiary must have an insurable interest in the life assured. Section 9 of the act made it a felony for any person to knowingly secure a policy on the life of another without his knowledge or consent. Stiles had no insurable interest in the life of Mrs. Ellsworth. All assessments were to be paid by him, and the policy was issued to

him without her knowledge or consent. The contract of insurance, therefore, was void, both as against public policy, and by force of the statute. *Continental L. Ins. Co. v. Volger*, 89 Ind. 572, 575, 46 Am. Rep. 185; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; *Russ v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; May, Ins. 4th ed. § 74; Beach, Ins. § 850.

The question, then, is, Had the appellee, as the assignee of the policy, under the circumstances hereinbefore stated, the right to recover the premiums and assessments paid by her on account of the supposed insurance? The general rule is that an action will not lie to recover premiums paid upon an insurance which is illegal by reason of the policy being illegal by statute, or by reason of the illegality of the adventure insured. *Lowry v. Bourdieu*, 2 Dougl. K. B. 468, 14 English Ruling Cases, 533; *Van Dyck v. Hewitt*, 1 East, 96, 5 Revised Rep. 516; *Russell v. De Grand*, 15 Mass. 35; *Welsh v. Cutler*, 44 N. H. 561; *Feise v. Parkinson*, 4 Taunt. 640, 13 Revised Rep. 710; *Anderson v. Thornton*, 8 Exch. 425; *Waller v. Northern Assur. Co.* 64 Iowa, 101, 19 N. W. 865; *Richards v. Marine Ins. Co.* 3 Johns. 307; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837. But it is held that this rule does not apply where there has been no fraud on the part of the plaintiff, where the policy is void because of innocent misrepresentations, where the plaintiff has been induced to take out the policy by the fraud of the insurer, and is himself innocent, or where it is clear that the policy was not a wagering contract, but was taken out under a mistake in regard to the rights of the party insured. In this case it is to be borne in mind that the appellee herself did not take out the policy, but that, with the knowledge and consent of the appellant, and at its solicitation, she took an assignment of it. Upon the authority of *Continental Ins. Co. v. Munns*, 120 Ind. 30, 5 L. R. A. 430, 22 N. E. 78, the assignment is to be treated as a new contract, to which the assignee and the insurer are the parties. In *Lowry v. Bourdieu*, 2 Dougl. K. B. 472, the right to recover the premium paid upon a gaming policy issued in violation of an act of Parliament was denied; but Lord Mansfield said "he desired it might not be understood that the court held that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back; that in cases of oppression—when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon a usurious contract—it may be recovered, for in such cases the parties are not *in pari delicto*." In *Fulton v.*

Metropolitan L. Ins. Co. 47 N. Y. S. R. 111, 19 N. Y. Supp. 660, the plaintiff, being solicited for life insurance by defendant's agent, took out policies on the life of her sister and brother, payable to herself; having signed their names to the application with the knowledge of the agent. After several years, she ascertained that the policies were void on that account, and brought an action to recover the premiums paid. It was held that the company was chargeable with the agent's knowledge of the invalidity of the policies and that the plaintiff was entitled to recover, though the facts were never communicated to the company. In *Waller v. Northern Assur. Co.* 64 Iowa, 101, 19 N. W. 865, two policies of fire insurance were issued to the plaintiff as the absolute owner of the property insured, when he really held but a mortgage interest in it. No actual fraud was found in the representations concerning the title. The policies contained the condition that, "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, . . . it must be so represented to these companies, and so expressed in the written part of this policy, otherwise, the policy shall be void." The court said: "Under this condition, each of the policies was absolutely void, and incapable of binding or being enforced against defendants. . . . Each presents the case of a payment of money by plaintiff, and a failure to receive any consideration therefor, without any fraud or deception practised by him. It is the simple case of money paid in good faith, and nothing in return received. No element of fraud exists which defeats plaintiff's rights. Nor is it a case of voluntary payment, for it was made with the expectation of receiving a consideration in return which has wholly failed, for the reason that the policy did not bind defendants. Under familiar rules of the law, plaintiff is entitled to recover the amount of premiums paid, as money had and received to his use. This doctrine has been often recognized by the authorities as applicable in actions for the recovery of money paid as premiums upon policies when the risk did not attach, or the contract was void *ab initio*." The facts in *Fisher v. Metropolitan L. Ins. Co.* 160 Mass. 386, 39 Am. St. Rep. 495, 35 N. E. 849, were these: An agent of the defendant solicited the plaintiff's husband to effect an insurance on his life for the wife's benefit, which the husband refused to do. Afterwards the agent, without the knowledge of the husband, urged the wife to effect such insurance, and procured a physician to visit and converse with the husband, and thereafter to sign the requisite examination. The

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husband was not aware of the purpose of the physician in visiting him, nor did he know that any application had been made for insurance on his life. The wife signed her name and that of her husband to the application for insurance, and also to the examination form on the back of the application. The agent afterwards delivered to the wife a policy of insurance upon the life of her husband, payable to her in the event of his death, and the wife paid the premiums then and thereafter falling due for such insurance. The agent also delivered to the wife a book upon which receipts of money paid by her were, from time to time, acknowledged, and the book contained extracts from the rules and regulations of the company to which the policy was subject. Among others was a rule stating that under no circumstances could an application be written upon the life of a husband for the benefit of his wife without his consent, nor without an examination by the physician of the company, nor unless the applicant personally signed the examination form on the back of the application after the answers to the application had been made, and that any policy issued in violation of these rules should be void. In July, 1892, the wife claimed that she was first advised of the invalidity of the policy for want of the consent of her husband. She informed the president of the company by letter of that date that she had discovered that the policy had been issued against the rules of the company, and was not enforceable, and that the agent had told her at the time it was issued it was all right. She therefore stated that she wished her money back. The company did not make any direct reply to the letter, but afterwards one of its agents urged the wife to continue her payments, which she refused to do, and again demanded repayment of the money paid by her as premiums, which demand being refused, she brought her action. In ruling upon an exception to an instruction given to the jury, the court said: "If the plaintiff, in collusion with Bannigan, the defendant's agent, intended to cheat the company or practise a fraud upon it, then the money she has paid the company was paid in pursuance of this fraudulent intention, and she cannot recover it back; but, if she was innocent of any fraudulent intent, and was deceived by Bannigan, and induced by his fraudulent representations to make the application, then she could rescind the contract of insurance when she discovered the fraud, and recover back the amount of the premiums which she had paid. *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25." In *Bales v. Hunt*, 77 Ind. 355, this court held that while, ordinarily, relief against mistakes of law will not be afforded, yet, where

the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, and the plaintiff, through misapprehension or mistake of law, assumes obligations or gives up a private right of property upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired. See also Kerr, *Fraud & Mistake*, pp. 398, 400; *Hollingsworth v. Stone*, 90 Ind. 244; *Kinney v. Dodge*, 101 Ind. 573; *Parish v. Camplin*, 139 Ind. 14, 37 N. E. 607; *Metropolitan L. Ins. Co. v. Bowser*, 20 Ind. App. 557, 50 N. E. 86; *Supreme Lodge, K. of H. v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893.

If the contract of insurance be illegal in its inception, the insured cannot recover the premiums paid, if the parties are *in pari delicto*. The controlling inquiry, then, in the present case, is, Were the parties to the transaction equally in fault? It was said by Lord Mansfield in *Browning v. Morris*, 2 Cowp. 790, 793, that "the rule is, *In pari delicto potior est conditio defendentis*, and there are several other maxims of the same kind. Where the contract is executed and the money paid *in pari delicto*, this rule, as Mr. Dunning contended, certainly holds, and the party who has paid it cannot recover it back. For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action, because both plaintiff and defendant are equally criminal. But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other,—there the parties are not *in pari delicto*; and, in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." The rule is thus stated in 20 Am. & Eng. Enc. Law, 2d ed. p. 816: "It is one of the fundamental maxims of the common law that ignorance of law excuses no one. It is a maxim founded, not only on expediency and policy, but on necessity. . . . It is therefore applied most rigidly at law, and is only relaxed in equity where the mistake is mixed with misrepresentation or fraud, or where the ignorance of the complainant has conferred upon the defendant a benefit which he cannot in good conscience retain." The language used by the court in *Jestons v. Brooke* 2 Cowp. 793, 795, is directly applicable to 64 L. R. A.

the case under consideration: "This is an action for money had and received, and therefore it is analogous to a bill in equity. The ground of the action is to recover half of the net profits arising by the resale of certain goods purchased by the defendant, as stated in the report. The general question is 'whether the plaintiff ought to recover in an action for money had and received?' that is, 'whether it is against conscience that the defendant should retain the whole profits of the goods in question to himself.'"

The present suit is not brought to enforce the illegal contract of insurance, or any right arising out of it. The appellee seeks only to recover from the appellant moneys paid by her to it without any consideration whatever. For, as the policy on the life of Mrs. Ellsworth was void from its inception, the appellant never incurred any risk, and the appellee never could have derived any benefit from it. At the time of the assignment of the policy, and immediately previous thereto, Gusten, acting as the agent of the appellant, and knowing all the facts which rendered the policy void, for the purpose of inducing the appellee to take an assignment of the policy, falsely and fraudulently represented to her that the policy was valid, that she would be entitled to recover payment thereunder in case of loss, and that the assignment would be a good investment for her. The appellee, who was a woman, believed these representations, and was induced by them to take an assignment of the policy from Stiles, and to reimburse him for his entire outlay up to that time. She also agreed to pay all future premiums and assessments. Within two months after the assignment was made, and when she had paid a comparatively small amount on the policy, Barney, the vice president and treasurer of the appellant, acting for it, visited the appellee at her home, and, when told by her what Gusten had said to her, with a full knowledge of the facts, also falsely represented to the appellee that the policy was perfectly right, and advised her to go on and keep her dues paid up. Relying on these false statements, the appellee paid to the appellant premiums and assessments on the void policy to the amount of \$1,574. It cannot be said that the parties to this transaction were *in pari delicto*, or that the appellant ought, in good conscience, to retain the moneys paid to it by the appellee. The representations made to the appellee by the officers and agents of the company—one of them being its vice president and treasurer—were calculated to impose upon and mislead anyone contemplating the purchase of a policy previously issued by the company.

The parties did not stand upon an equal footing, and the officers and agents making the false representations to the appellee had every advantage over her which their special knowledge of the facts of the case, and of the law of insurance applicable to their company, could give. We think, too, that these representations that the policy was valid and would be paid were equivalent to a statement that it had been issued with the knowledge and consent of Mrs. Ellsworth, and that Stiles had such an interest in her life, as creditor or otherwise, as authorized him to take it out, so that the mistake of the appellee, occasioned by the fraudulent representations of the appellant's officers and agents, may be fairly regarded a mistake of fact as well as of law. The direct result of this mistake was that the appellee assumed obligations to pay the premiums and assessments on the policy, and that she parted with her money in discharging them.

In this connection, the fact is not to be overlooked that § 9 of the act of 1883 makes it a criminal offense for any person to secure a policy on the life of another without his knowledge or consent only when such act is done knowingly. The court expressly found that, in taking the assignment of the policy, the appellee was ignorant of the facts which rendered it void.

Our conclusion upon this branch of the case is that the appellant cannot, in good conscience, be permitted to retain the premiums and assessments paid to it by the appellee, and that she has the right to recover the same in this action.

A distinction between a mistake of law, affecting mere private rights, and such a mistake when the transaction is illegal by statute or is against public policy, may exist, as contended for by counsel for appellant; but, giving to this distinction its fullest effect, it could not, under the circumstances of this case, as shown by the special finding, defeat the appellee's right to recover the premiums and assessments paid by her. She did not take out the policy. She violated no statute. She knowingly did no act prohibited by law or by public policy. She has not attempted to enforce the illegal contract, or make any claim under it. She admits that she has no claim against the appellant upon the policy. While she must give up the insurance upon the life of Mrs. Ellsworth, because the contract was void, it is equally necessary that the appellant should surrender the money it has received from her without right, without consideration, and solely through the fraudulent misrepresentations of its officers.

The point that the appellee has no equity

which is superior to that of the members of the appellant association is without merit, and requires no consideration. The corporation received the money, and should repay it.

The trial court found that \$1,574 had been paid by the appellee on account of premiums and assessments, and that the interest thereon amounted to \$1,012.35, making a total of \$2,586.35, but that the appellee was entitled to recover only the moneys paid by her within six years before the commencement of the action, with interest thereon. The cross-error assigned by the appellee calls in question the correctness of the conclusion limiting the appellee's right of recovery to the sums paid by her within six years before the commencement of the action, and we are asked to grant her affirmative relief, by requiring a restatement of this conclusion of law. It is well settled that this court has the right to grant such relief to the appellee, even where the judgment is not reversed. In discussing the subject of the assignment of cross-errors by the appellee, this court said in *Feder v. Field*, 117 Ind. 386, 388, 20 N. E. 129: "The rule [allowing the assignment of cross-errors] which has so long prevailed, and which we here sanction and carry to its just and logical result, does no injustice to any party. It prevents a multiplicity of appeals, and yet presents for adjudication the rights of all the parties properly brought before the court. It enables the court to finally adjudicate upon the whole controversy. It prevents one party from taking an advantage of the other by appealing, and, after the assignment of cross-errors, dismissing the appeal and carrying the entire case out of court. It brings the practice on appeal into harmony with the practice in the trial courts, and gives uniformity and consistency to our system of procedure. It simplifies the practice, and yet preserves all rights. In deciding that cross-errors may be assigned, we do not by any means decide that it is necessary to consider them in every instance. Nor do we decide that they are always, or even generally, of controlling effect. If, for instance, all that the appellee asks is an affirmance of the judgment, then all that it is necessary to do, in cases where an affirmance can be reached by disposing of the errors assigned by the appellant, is simply to consider and decide the questions presented by the appellant's assignment. It is not every case where cross-errors will entitle the appellee to affirmative relief, for in many cases they can do no more than prevent a reversal or settle a question of costs. Where, however, the entire record and all

the parties are properly before the court on appeal, and it is manifest from the record before the court that the appellee has not received the relief to which he was entitled, this court may direct that it be awarded him. . . . With such a record before us, all questions should be decided, for otherwise the assignment of cross-errors would be an idle ceremony." *Patoka Twp. v. Hopkins*, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; *Johnson v. Outcser*, 116 Ind. 278, 19 N. E. 129; *Thomas v. Simmons*, 103 Ind. 538, 547, 2 N. E. 203, 3 N. E. 381; 2 Enc. Pl. & Pr. p. 970. The money received by the appellant from the appellee on account of premiums and assessments on the policy was so received, with the knowledge and consent of the appellee, to be applied in discharge of supposed obligations arising out of the transaction between the parties. Until the discovery by the appellee that the policy was void, and her rescission of it, the moneys so paid were held by the appellant, with her apparent consent as its own. Under the particular circumstances of this case, we think a demand was necessary before bringing the action. The statute of limitations did not begin to run until such demand was made, or until the disavowal of the contract by the appellant. Then, too, the contract on the part of the appellant was wholly executory, and on the part of the appellee it was a continuous one. *Taggart v. Tevanny*, 1 Ind. App. 339, 357, 27 N. E. 511; *Littler v. Smiley*, 9 Ind. 116; *Purviance v. Purviance*, 14 Ind. App. 269, 272, 42 N. E. 364. Until June 13, 1900, both the appellant and the appellee treated the contract of insurance as a valid one, and acted under it. We think it clear that the statute did not begin to run against the claim of the appellee until June 13, 1900.

The trial court allowed interest upon the claim of the appellee from the date of the payment of the several premiums. We find no authority for this action of the court, and we have been referred to none. The provision of the statute on this subject is that interest shall be allowed on money had and received for the use of another, and retained without his consent. Burns's Rev. Stat. 1901, § 7045. According to our view of the case, interest should be calculated on the sum of the premiums and assessments paid by the appellee to the appellant only from the date of the demand made by her for their repayment. *Stanley v. Penoe*, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441.

Judgment reversed on cross-error, and the Elkhart Circuit Court is directed to restate its second conclusion of law in conformity to this opinion, and to render judgment in favor of the appellee and against the appellant for the amount due.

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William POTTER, Appt.,
v.

STATE of Indiana.

(.....Ind.....)

The death of one of the participants in a friendly scuffle through the accidental discharge of a pistol carried in the pocket of the other contrary to the provisions of the statute cannot be said to be caused by the performance of a wrongful act, so as to render the one carrying the pistol guilty of manslaughter, under the provisions of a statute that whoever unlawfully kills a human being involuntarily, but in the commission of some unlawful act, is guilty of that crime.

(February 23, 1904.)

APPEAL by defendant from a judgment of the Criminal Court for Marion County convicting him of manslaughter. *Reversed*.

The facts are stated in the opinion.

Messrs. W. E. Henderson and M. L. Clawson, for appellant:

The mere fact of carrying a concealed weapon, coupled with the death from its discharge, does not constitute involuntary manslaughter. There must be some overt act in connection with the weapon.

Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Rea v. Franklin*, 15 Cox, C. C. 163.

It is not true that, if one is killed by another who is engaged in the commission of an unlawful act, and the killing is accidental, he is liable for manslaughter, when there was no act of his showing any disregard for the rights of the decedent.

Robertson v. State, 2 Lea, 239, 31 Am. Rep. 602; *Rea v. Waters*, 6 Car. & P. 328; *Barrett v. Midland R. Co.* 1 Fost. & F. 361; 1 East, P. C. 260; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118.

Messrs. William C. Geake, Cassius C. Hadley, and Leopold G. Rothschild, with *Mr. Charles W. Miller*, Attorney General, for the State:

A death resulting inadvertently from the commission of any misdemeanor will ordinarily constitute manslaughter. Some of the authorities have imposed the qualification that the unlawful act causing death must be *malum in se*, and not merely *malum prohibitum*; but this is not a distinction of much practical importance, for an act not wrong in itself will seldom, if ever, be the efficient cause of death.

21 Am. & Eng. Enc. Law, p. 190; *Surber*

NOTE.—As to homicide in commission of unlawful act, see also, this series, *People v. Sullivan*, 63 L. R. A. 353, and *note*.

As to negligent homicide, see *Johnson v. State*, 61 L. R. A. 277, and *note*.

v. State, 99 Ind. 71; *State v. Johnson*, 102 Ind. 247, 1 N. E. 377; *Thompson v. State*, 131 Ala. 18, 31 So. 725; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Reg. v. Skeet*, 4 Post. & F. 931; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118; 1 East, P. C. 260.

It is not necessary that death should be the proximate result of a felonious act.

Harvey v. State, 40 Ind. 516; *Kelley v. State*, 53 Ind. 311.

Jordan, J., delivered the opinion of the court:

Appellant was tried before a jury in the lower court, and a verdict was returned finding him "guilty of manslaughter, as charged in the indictment." Over his motion for a new trial, the court rendered judgment on the verdict, assessing his punishment at imprisonment in the Indiana reformatory for not less than two nor more than twenty-one years, and that he be fined and disfranchised. From this judgment he appeals, and assigns, among others, that the court erred in overruling his motion for a new trial.

The indictment upon which he was tried and convicted charged that William Potter on the 10th day of April, 1903, at the county of Marion, state of Indiana, "did then and there unlawfully, feloniously, and involuntarily, without malice, express or implied, kill one Hurva Garnett, by then and there, in a rude, insolent, and angry manner, unlawfully and feloniously shooting at and against and into the body of the said Hurva Garnett with a certain revolver, a dangerous weapon, which he, the said William Potter, then and there unlawfully had, loaded with gunpowder and leaden balls, concealed upon his person, he, the said William Potter, not then and there being a traveler, thereby mortally wounding the said Hurva Garnett, from which mortal wound he, the said Hurva Garnett, then and there died, contrary to the form of the statute," etc. The undisputed facts established by the evidence are substantially as follows: Appellant, a young colored man, about twenty-four years old, residing in the city of Indianapolis, was on the day of the homicide, which is shown to have been on some Sunday in the month of April, 1903, going to his home, in said city. As he was passing along the street near the corner of Rhode Island and Locke streets, the deceased, a boy about eighteen years old, together with some two other boys, was standing at the corner of said streets. Appellant and the deceased, as it appears, were friends, and well acquainted with each other, and at times past had been in the habit of engaging in "friendly scuffles." As appellant approached the corner of the streets in ques-

tion, he was engaged in tossing up a small ball; and, when he came up to the point where the deceased was standing, some friendly conversation or bantering occurred between them, in regard as to whether appellant could hit him with the ball which he had been tossing. The talk or bantering between the parties in question appears to have led up to a friendly play or "scuffle," during which a loaded revolver that appellant at the time was carrying concealed in his pocket, or somewhere about his person, was accidentally discharged; the ball therefrom passing through the clothing of appellant into the body of the deceased, from the effects of which the latter died.

Counsel for appellant contend that the verdict of the jury is contrary both to law and the evidence, and that the conviction of the accused cannot, thereunder, be sustained. Counsel for the state say in their brief: "This record presents a case which is somewhat novel in the annals of criminal jurisprudence in this state, if not in this country. The manner in which the deceased met his death, as shown by the record, was peculiar, to say the least; and whether appellant must suffer for the crime of involuntary manslaughter for circumstances created unintentionally, nevertheless unlawful, on his part, is the question presented for this court's consideration and solution."

Neither the facts as alleged in the indictment, nor as established by the evidence, constitute the crime of voluntary manslaughter. The pleader, in drafting the indictment, however, appears to have at least attempted to charge appellant with the offense of involuntary manslaughter. As the indictment is not assailed in this court, we need not determine its sufficiency as to the charge of involuntary manslaughter, but simply treat it, for the purpose of this appeal, as presenting such a charge. The crime of voluntary and involuntary manslaughter, as defined by the statutes of this state, is as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and upon conviction thereof shall be imprisoned in the state prison," etc. Burns's Rev. Stat. 1901, § 1981 (Horner's Rev. Stat. § 1908). The statute prohibiting the carrying of concealed weapons is as follows: "Every person, not being a traveler, who shall wear or carry any dirk, pistol, bowie knife, dagger, sword in cane, or any other dangerous or deadly weapon, concealed . . . upon conviction thereof, shall be fined in any sum not exceeding \$500." Section 2069, Burns's Rev. Stat. 1901 (§ 1985, Horner's Rev. Stat.).

It is conceded, and properly so, that, at the time of the homicide, appellant was carrying the pistol in question in violation of the above statute. The question arises, then, Did carrying the weapon unlawfully at the time of the homicide, in view of the other facts in the case, render the accused guilty of the crime of involuntary manslaughter, as charged in the indictment? The question, under the circumstances, as counsel for the state assert, is certainly a novel one, within the "annals of criminal jurisprudence," and we believe that a search for authorities to sustain the judgment below, under the facts, will be futile. The theory of the state in the lower court, as the case appears to have been placed before the jury under the evidence and instructions of the court, was that the carrying of the revolver concealed by appellant, in violation of the statute, was the commission of an unlawful act, from which the homicide resulted. It is undoubtedly true, as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act. But before this principle of law can have any application under the facts in the case at bar, it must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute. Burns's Rev. Stat. 1901, § 2215, prohibits, under penalty, any person from hunting birds or other species of game with firearms on Sunday. If appellant, instead of carrying the pistol in question concealed, had been hunting with the weapon on Sunday in violation of the above statute, and when so hunting he had accidentally discharged it and killed Garnett, who happened to be standing near by, could it, in reason, be asserted that his death was due to appellant's unlawful act of hunting on Sunday? Certainly not. If, while engaged in hunting in violation of the statute, the pistol, through or by reason of the culpable negligence of appellant, had been discharged, and killed the deceased, the law, under such circumstances, would not have attributed his death to the unlawful act of hunting, but would have imputed it to such negligence. In fact, under such circumstances, the unlawful act of hunting would not be a factor in, or add anything to, the case. It would constitute nothing more than a separate and distinct offense. An eminent author on Criminal Law says: "It is *malum prohibitum*, and not *malum in se*, for an unauthorized person to kill game in England contrary to the statutes; and if, in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him

than if he were authorized." 1 Bishop, New Crim. Law, § 332. See also 1 East, P. C. p. 280; 2 Roscoe, Crim. Ev. p. 800. With equal reason and force it may be asserted that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act did not, during the scuffle between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful. Of course, the law exacts of all persons the duty of being exceedingly cautious and careful in the use of or the handling of fire arms or other dangerous agencies. *Surber v. State*, 99 Ind. 71. In fact, as a general rule, the law has such a high regard for human life that it considers as unlawful all acts which are dangerous to the person against whom they are directed, no matter how innocently they may be performed. A person will not be permitted to do an act which jeopardizes the life and safety of another, and then, upon plea of accident, escape liability for a homicide involuntarily resulting from his reckless or careless act or conduct. *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777; Gillett, Crim. Law, 2d ed. § 502; 21 Am. & Eng. Enc. Law, 2d ed. p. 191, and cases cited. It is not charged in the indictment in this case that the homicide resulted from the reckless, careless, or negligent manner in which appellant was using or handling the pistol at the time it was discharged. Consequently, under the pleading, even though the facts could be said to justify or sustain such a charge, the case is not brought within the rule of culpable negligence, as affirmed and enforced in *State v. Dorsey*, *supra*, wherein the defendant was charged in the indictment with having carelessly and negligently run a locomotive engine into a passenger car, thereby killing a person who was a passenger thereon. It will be readily seen that, under the charge made by the indictment, the case at bar does not fall within that class of cases where the homicide is the result of culpable carelessness or negligence of the accused party in using or handling a dangerous weapon. 21 Am. & Eng. Enc. Law, 2d ed. pp. 191 to 195, inclusive, and cases cited in footnotes.

Without further comment upon the question involved, we conclude that the conviction of appellant was wrong. *The judgment of the lower court is therefore reversed, and the cause remanded, with directions to the court to grant appellant a new trial. The clerk will issue the proper order for the return of the prisoner.*

KANSAS SUPREME COURT.

H. K. GOODRICH

v.

Porter MITCHELL.

(.....Kan.....)

*Section 1, chap. 186, p. 359, of the Laws of 1901, which provides that those who have served in the Army and Navy of the United States in the War of the Rebellion, and have been honorably discharged therefrom, shall be preferred for appointment to office in every public department, and upon all public works of the state, and of the cities and towns thereof, is constitutional.

(March 12, 1904.)

APPPLICATION for a writ of quo warranto to determine the validity of defendant's claim to exercise the office of superintendent of the electric-light plant of Topeka. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. David Overmyer, for plaintiff:

Quo warranto is the proper remedy to recover possession of an office, its emoluments, etc.

Kan. Const. art. 3, § 3; Civil Code, § 652; *Bartlett v. State*, 13 Kan. 99; *Neeland v. State*, 39 Kan. 154, 18 Pac. 165; *Hussey v. Hamilton*, 5 Kan. 462; *Hunt v. Pleasant Hill Cemetery Asso.* 27 Kan. 737; *Western Home Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265; *State ex rel. Vance v. Wilson*, 30 Kan. 661, 2 Pac. 828.

In the action of quo warranto to recover an office, this court will inquire into and decide every question necessary to determine who ought to have the office, and will install into the office the person entitled thereto.

State ex rel. Borders v. Hamilton County, 39 Kan. 85, 19 Pac. 2; *Brown v. Jeffries*, 42 Kan. 605, 22 Pac. 578; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *Parker v. Hughes*, 64 Kan. 216, 56 L. R. A. 275, 91 Am. St. Rep. 216, 67 Pac. 637.

An ordinance of the city of Topeka provided that all officers of said city should hold their offices until their successors should be elected and qualified.

Such provision renders the qualification as well as the choice of a successor necessary to divest the incumbent of the office.

Throop, Pub. Off. §§ 328, 331; *People ex*

rel. Williamson v. McKinney, 52 N. Y. 374; *People ex rel. Illinois Midland R. Co. v. Barnett Twp.* 100 Ill. 332; *People ex rel. Battle v. McIver*, 68 N. C. 467; *People ex rel. Wetherbee v. Casneau*, 20 Cal. 504.

Defendant was neither elected nor qualified, because, while the forms were complied with, the proceedings of the mayor and council, being in open and flagrant violation of the law, were void, and the pretended qualification of the defendant by taking the oath of office was also void.

Throop, Pub. Off. § 328; *State ex rel. Baumbach v. Dubuc*, 9 La. Ann. 237; *Watkins v. Watkins*, 2 Md. 341; *People ex rel. Woods v. Crissey*, 91 N. Y. 616; *Clark v. Protection Ins. Co.* 1 Story, 109, Fed. Cas. No. 2,832; *Lewis v. Welch*, 14 N. H. 294; *Parker v. Hughes*, 64 Kan. 216, 56 L. R. A. 275, 91 Am. St. Rep. 216, 67 Pac. 637.

The veterans' preference act is constitutional.

Of all forms of government, the Republic is in greatest need of stimulating patriotism among the people.

1 Montesquieu, Spirit of Laws, p. 38.

The rewards of patriotism are not only consistent with, but indispensable to, the public welfare, under every form of government which recognizes honor and virtue as motives of human action; and especially are such rewards indispensable to the welfare, the dignity, and the very life of a republic. Such acts of legislation as are designed to recognize and reward patriotism and patriotic sacrifice are not obnoxious to the rule of "equal rights for all, and special privileges for none."

Public office is a public trust, and not a right.

19 Am. & Eng. Enc. Law, pp. 380-382, 399; *State ex rel. Savannah v. Deus*, R. M. Charl. (Ga.) 397; *Ex parte Lambert*, 52 Ala. 79; *Beebe v. Robinson*, 52 Ala. 67; *Wright v. Noell*, 16 Kan. 601; Throop, Pub. Off. § 17.

No man has any abstract right to any public office; and if, in the exercise of public powers for the public welfare, public authority prescribes qualifications and points of eligibility which he may not possess, but which others possess, he cannot claim that he is denied or deprived of any right.

Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 660, 3 Pac. 284.

Mr. M. T. Campbell, for defendant:

The veterans' act is unconstitutional and against public policy, however commendable the patriotic spirit that prompted its passage.

There must be some legal reason for grant-

*Headnote by JOHNSTON, Ch. J.
 as to validity of preference of veterans over other persons in making appointments to public office under civil service laws, see, in this series, *Brown v. Russell*, 32 L. R. A. 253; *Opinion of the Justices*, 34 L. R. A. 58; and *Re Keymer*, 35 L. R. A. 447.
 64 L. R. A.

ing the special privilege to a certain class of citizens; as, for instance, when it calls for the exercise of the police power of the state.

The veterans' act makes the question of the public good and the general welfare of secondary consequence. Its sole purpose is to favor and benefit the individual,—a granting of a special privilege, pure and simple,—regardless of the public weal.

Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 660, 3 Pac. 284.

Johnston, Ch. J., delivered the opinion of the court:

H. K. Goodrich and Porter Mitchell are each claiming the office of superintendent of the electric-light plant of Topeka. The term of this office is two years, and there is a provision that all officers of the city shall hold their offices until their successors are elected and qualified. Goodrich was duly chosen as superintendent, and continued to act in that capacity until April, 1903, which was the end of the term as fixed by ordinance. He then applied to the mayor and council of the city for appointment to the next regular term, and Mitchell made a like application. These were the only applicants for the place, and it is agreed that both are men of good reputations, are equally competent to perform the duties of the office, and equally eligible for appointment, unless Goodrich has a right to be preferred because of services and honorable discharge from the Army of the War of the Rebellion. Goodrich was a soldier in that war, and received an honorable discharge, while Mitchell never served in the Army or Navy at any time. With a knowledge of these facts, the mayor and council appointed Mitchell to this office, but the refusal to appoint Goodrich was not because he was lacking in qualifications, fitness, or eligibility, nor because Mitchell possessed any superior qualifications for the office. After Mitchell was appointed and had qualified he demanded the possession of the office, and when Goodrich declined to surrender it Mitchell took forcible possession and ousted Goodrich therefrom.

It is conceded that the result of this proceeding, and the right to the office in this contest, depends upon the constitutionality of an act spoken of as the "veterans' preference law." It provides: "That § 1 of chap. 160 [page 211] of the Laws of 1886 be and is hereby amended so as to read as follows: In grateful recognition of the service, sacrifices, and sufferings of persons who served in the Army and Navy of the United States in the War of the Rebellion and have been honorably discharged therefrom, they shall be preferred for appointment and employed

to positions in every public department and upon all public works of the state of Kansas, and of the cities and towns of this state, over other persons of equal qualifications, and the person thus preferred shall not be disqualified from holding any position in said service on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform the duties of the position applied for; and, when any such ex-soldier or sailor shall apply for appointment to any such position, place, or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, before appointing anyone to such position, make an investigation as to the qualifications of said ex-soldier or sailor for such employment, and if he is a man of good reputation, and can perform the duties of said position so applied for by him, said officer, board, or person shall appoint said ex-soldier or sailor to such position, place, or employment." Laws 1901, chap. 186, § 1, p. 359. Other provisions are that a like preference shall be given if it becomes necessary to reduce the force in any of the departments, cities, or towns of the state, and also declares penalties against those who wilfully refuse or neglect to obey the provisions of the act.

The fundamental infirmity in the act is not specifically pointed out. It is said to be unequal and arbitrary in its operations; that the preference given to veterans necessarily restricts the privileges of others; and that it is given as reward for past services, without regard to the public service or the general welfare of the people. It is not contended that the act conflicts with any express provision of either the state or Federal Constitutions, but, rather, that it is contrary to the implications and spirit of our Constitution. The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices shall be filled. There is no contract right or property interest in an office, and hence some of the constitutional principles invoked have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of the office for the public benefit, and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents, may determine for itself who can best accomplish its purpose, and whose appointment will best subserve the public good. When the Constitution prescribes a method, or imposes a limitation, the legislature is to that extent guided and controlled in choosing its offi-

cers, but no provision has been called to our attention which prohibits the giving of a preference to veterans of the Civil War. Constitutional limitations are prescribed with respect to eligibility and the holding of office, and among them are that a member of Congress, or officer of the state or of the United States, cannot hold the office of governor. Art. 1, § 10. Neither is a United States officer eligible to a seat in the legislature. Art. 2, § 5. Justices of the supreme court and judges of the district court cannot hold any other office during the terms for which they are elected. Art. 3, § 13. Persons who are under guardianship, have been convicted of a felony, who have defrauded the government, have given or received a bribe or offered to do so, have voluntarily borne arms against the government, with some exceptions, cannot hold office. Anyone who gives or accepts a challenge to fight a duel, or who carries a challenge to another, or who goes out of the state to fight a duel, is ineligible for office, and everyone who has given or offered a bribe to secure his own election is disqualified from holding office during the term for which he has been elected. Art. 5, §§ 2, 5, and 6. In the main, these are the provisions affecting the holding of office, and, aside from these restrictions, the whole matter is committed to the legislature by § 1 of article 15, wherein it is provided that "all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law."

It is conceded that the matter of holding office is a political privilege; but it is argued that it becomes a special privilege when a class of citizens are given a preference over all others. Our Constitution differs materially from those of many of the states with respect to the granting of privileges. The only provision we have touching the subject is found in § 2 of the Bill of Rights, which is: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked, or repealed by the same body; and this power shall be exercised by no other tribunal or agency." In most of the states the granting of special privileges or immunities is expressly prohibited; but, as will be observed, ours seemingly contemplates that such privileges may be granted, as it provides that none shall be granted that may not be altered, revoked, or repealed. The legislature may then exercise its judgment and discretion in the selection of officers, unhampered by restrictions, unless some are to be im-

plied from those expressed or from the theory of our government. As an office is a public trust, to be held and exercised for the public benefit, it is always implied, perhaps, that officers shall be chosen with a view to carrying out that purpose. So it is said that a law permitting the selection of persons unfit for the office and unable to perform its duties is defective. In *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005, it was in effect held that, in the absence of constitutional restrictions, the legislature had power to select officers at will, or to confer power of appointment on boards or officers; but that the appointment of a person or a class in preference to all others, without inquiry or determination whether the person appointed is actually qualified to perform the duties of the office, is inconsistent with the nature of our government. It was, therefore, held that a statute making the appointment of veterans compulsory when the appointing power should think the applicants were not qualified to perform the duties of the office sought was invalid. If that should be accepted as the correct view, our statute is not obnoxious to such a limitation, as it only gives a preference to ex-soldiers and sailors upon the theory of equality of qualifications. Nor is there any novelty in our legislation on the subject, as like preferences have been given by the legislatures of a great many states and by the Congress of the United States, and, except where the acts have been drawn so as to conflict with express constitutional provisions, they have been generally upheld. The supreme court of Massachusetts, in response to questions by the governor and council, held that the provisions of a civil service statute, giving a veteran the preference for appointments to offices that they were found competent to fill, were constitutional. And the same view was expressed with reference to a provision giving a preference in public employments. It was said: "We doubt whether a statute which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and town in preference to all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court." *Opinion of the Justices*, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. 625. See also *Opinion of*

the Justices, 145 Mass. 587, 13 N. E. 15; *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Re Sweeley*, 12 Misc. 174, 33 N. Y. Supp. 369; *Stutzbach v. Coler*, 168 N. Y. 416, 61 N. E. 697; *Re Wortman*, 22 Abb. N. C. 137, 2 N. Y. Supp. 324; *McGuire v. Byrnes*, 50 Hun, 203, 2 N. Y. Supp. 760; *State ex rel. Cowden v. Miller*, 66 Minn. 90, 68 N. W. 732; *State ex rel. Townsend v. Boughner*, 55 N. J. L. 381, 26 Atl. 808; Throop, Pub. Off. §§ 95-98; 6 Am. & Eng. Enc. Law, 2d ed. p. 93.

State v. Garbroski, 111 Iowa, 496, 56 L. R. A. 570, 82 Am. St. Rep. 524, 82 N. W. 959, is cited as an authority against the validity of a preference to veterans. That was a case where there was an attempted exemption of persons who had served in the Army and Navy from paying a license tax. That act, which affected liabilities and imposed burdens, gave rise to a very different question than is presented here. It was held to be a discrimination in violation of the 14th Amendment to the Federal Constitution, and a denial of the equal protection of the laws. Even in that case it was remarked that "possibly a veteran soldier or sailor would be preferred, everything else being equal, for civil office, because of superior fitness, resulting from discipline of service in the war; for 'it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state.' But the work of a peddler calls for no qualities such as a soldier or sailor acquires in the service." *State v. Shedrois*, 75 Vt. 277, 63 L. R. A. 179, 98 Am. St. Rep. 825, 54 Atl. 1081, involves the same question, and was decided in the same way.

Office-holding is a political privilege, and the matter of appointment to office is not affected by the 14th Amendment or other provision of the Federal Constitution, and, as has been said, the power of the legislature is supreme in respect to appointments, save as the Constitution has limited it. Already statutes have been enacted which limit the number from whom officers may be chosen, and necessarily puts others who might desire these offices at a disadvantage. There are boards upon which only physicians can be appointed; others to which only dentists are eligible; others where architects or skilled mechanics have the preference; others where a woman is arbitrarily appointed; and still others where political opinions enter into the qualifications of members,—that is, enactments that members of boards shall be taken in certain proportions from different political parties. These acts are generally held to be within the leg-

islative power, and the preferences and the exclusions so made to be reasonable and valid. Where the limitation from which officers shall be chosen is manifestly for the public good, and where the purposes sought and the ends attained in legislation in regard to the qualifications for office are the safety and welfare of the public, it cannot be said that the rights of any others are unduly affected or prejudiced. If we should lay aside the gratitude, mentioned in the first part of the section in question, for those who sacrificed and suffered in defense of the nation, there are reasonable and substantial considerations for making a preference in favor of the veterans. The love of country that induced them to fight for its existence and defend its institutions is some assurance, at least, of loyalty and fidelity in the civil service. In the nature of things the discipline of the Army and Navy tended to promote promptness, respect for authority, and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country receive like recognition and preference? As counsel for the plaintiff has well said: "A grateful recognition of the services, sufferings, and sacrifices of persons who have served the state in war has always been recognized by all nations as the exercise of the highest public policy, as the surest guaranty of the future safety, honor, and welfare of the state." In *Keim v. United States*, 177 U. S. 290, 44 L. ed. 774, 20 Sup. Ct. Rep. 574, the preference law enacted by Congress was considered and interpreted, but its constitutionality seems to have been conceded, as no attack was made upon its validity. Judge Brewer, in deciding it, remarked that "no thoughtful person questions the obligations which the nation is under to those who have done faithful service in its Army and Navy." That such service afforded reasonable grounds for preference in public offices and employments was recognized in *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 253, 55 Am. St. Rep. 357, 43 N. E. 1005, where it was remarked that "it may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often

will make a better civil officer than a person who never has been subjected to the discipline of service in war; and it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state, shown in the public service. These things we assume the legislature may take into account in providing for appointments to office, where the qualifications are not prescribed by the Constitution." The court, in *Opinion of the Justices*, 186 Mass. 595, 34 L. R. A. 58, 44 N. E. 627, in speaking of the belief that faithful service in, and honorable discharge from, the War of the Rebellion developed such qualifications of character in men that it was to the interest of the commonwealth to appoint them to office in preference to others, said: "The general court may have so thought on the ground, either that such a person would be likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the state which it concerns the commonwealth to foster. If such was the opinion of the general court, we cannot say that it was beyond its constitutional power to enact this section. Of the wisdom of such legislation we are not made the judges." Faithful service and devotion to duty in the past have always been

regarded as good considerations for preference or promotion in every department of life, public and private, and it belonged to the legislature to determine what qualifications and experience give the best assurance of faithful, honest, and efficient public service. The case is quite unlike the one supposed of a right to office by those affiliated with a particular church or a particular party, or because of some private achievement. The preference that is made here has its basis on services to the public and experience and fidelity in the public service, and we think it was within the constitutional power of the legislature to make such a preference.

It is conceded that the plaintiff possessed every qualification, and was entitled to re-appointment as against the defendant, who was the only other applicant for the position. The mayor and council were therefore required to give the plaintiff the preference, and, under the circumstances, had no power or authority to appoint the defendant. The plaintiff, being in the office, was entitled to continue until someone was legally appointed, and, therefore, had a right to bring a proceeding in quo warranto to obtain the possession of the office.

Judgment will therefore be given in favor of the plaintiff.

All the Justices concur.

Petition for rehearing denied.

MARYLAND COURT OF APPEALS.

A. B. BAXTER, *Appt.*,

v.

George E. DENEEN *et al.*

(.....Md.....)

1. Equity will not interfere to enjoin one with whom margins have been deposited in a stock-gambling transaction from violating his agreement to keep them upon deposit in a bank until the transaction is closed, and prevent his withdrawing them from the bank, although he intends to remove the funds from the state, and thereby defraud the complainant.

2. A bill to enjoin a broker from withdrawing from the bank margins which have been deposited with him on stock-gambling transactions will not be entertained as a suit for an accounting because other customers are made parties defendant, and an accounting is alleged to be necessary to settle the conflicting interests, where only two of such customers answer the bill, and they decline to state the nature of their transactions, one even admitting that he has abandoned his interest.

(McSherry, Ch. J., dissents.)

(December 4, 1903.)

NOTE.—As to validity of option deals and contracts for purchase of stock on margin generally, see notes to Preston v. Cincinnati, C. & H. Valley R. Co. 1 L. R. A. 141; Osgood v. Bauder, 1 L. R. A. 656; Sprague v. Warren, 3 L. R. A. 679; and Harvey v. Merrill, 5 L. R. A. 200; also Cashman v. Root, 12 L. R. A. 511; Pope v. Hanke, 28 L. R. A. 568; Central Stock & G. Exchange v. Bendinger, 56 L. R. A. 64 L. R. A.

875; and Winward v. Lincoln, 64 L. R. A. 160.

As to right to recover on gambling contracts generally, see, in this series, Snoddy v. American Nat. Bank, 7 L. R. A. 705; Jackson v. City Nat. Bank, 9 L. R. A. 657; White v. Wilson, 37 L. R. A. 197; Olson v. Sawyer Goodman Co. 53 L. R. A. 648; Appleton v. Maxwell, 55 L. R. A. 93; and Ullman v. St. Louis Fair Asso. 56 L. R. A. 606.

A PPEAL by defendant from a decree of the Circuit Court for Allegany County enjoining the withdrawal from a bank of money which had been advanced as margins in a stock-gambling transaction. *Reversed.*

The facts are stated in the opinion.

Messrs. Robert R. Henderson, Gans & Haman, and W. Calvin Chesnut, for appellant:

Baxter was the absolute owner of this money.

The bank was not a stakeholder between Baxter and his customers as to this account.

23 Am. & Eng. Enc. Law, p. 18; 2 Bouvier, Law Dict. p. 543.

The moneys paid by the customers were payments on account, and not in the nature of stakes.

McClain v. Fleshman, 46 C. C. A. 15, 106 Fed. 881.

The transactions between Baxter and his customers were gambling transactions within the eyes of the law.

Burt v. Myer, 71 Md. 467, 18 Atl. 796; *Stewart v. Schall*, 65 Md. 289, 57 Am. Rep. 327, 4 Atl. 399; *Cover v. Smith*, 82 Md. 586, 34 Atl. 465; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077.

This suit is, in substance, merely an effort on the part of the customer to recover margins paid to his broker. If a court of law could not entertain a suit founded on such a transaction, surely equity would not. Neither law nor equity will enforce any rights claimed under gambling transactions.

The effect of sustaining the decree in this case means the supervision by courts of equity of gambling agreements. It means the establishment of a new branch of equity jurisdiction.

Cover v. Smith, 82 Md. 586, 34 Atl. 465; *Albertson v. Laughlin*, 173 Pa. 529, 51 Am. St. Rep. 777, 34 Atl. 216.

Messrs. Benjamin A. Richmond and Pearre & Lewis, for appellees:

The bank was in fact a stakeholder, not only because it held a joint stake, but because it was so understood by the parties to the stake. Whether the bank knew it was such a stakeholder is wholly immaterial.

Alford v. Burke, 21 Ga. 46, 68 Am. Dec. 449.

Our remedy in equity to have an account of this fund and to have a decree against said bank for our share thereof is clear. Equity clearly had jurisdiction, in the first place, to restrain Baxter from withdrawing the fund from the bank on the ground of fraud, and, having once acquired jurisdiction for this purpose, it may proceed to determine the whole cause.

1 Pom. Eq. Jur. § 37; *Socher's Appeal*, 104 Pa. 615; 14 Am. & Eng. Enc. Law, 2d 64 L. R. A.

ed. p. 595, note 1; *Gough v. Pratt*, 9 Md. 526.

Either party to a gambling contract may repudiate the same while it remains executory or unexecuted, or before the event has been determined, and demand the return of the stakes.

Dauler v. Hartley, 178 Pa. 23, 35 Atl. 857; 14 Am. & Eng. Enc. Law, 2d ed. 632, note 7; *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Johnston v. Russell*, 37 Cal. 670; *Wheeler v. Spencer*, 15 Conn. 28; *Jacobs v. Walton*, 1 Harr. (Del.) 496; *Vischer v. Yates*, 11 Johns. 23; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358; *Roberts v. Taylor*, 7 Port. (Ala.) 251; *McKee v. Manice*, 11 Cush. 357; *Forscht v. Green*, 53 Pa. 138; *Siegel v. Funk*, 3 Pittsb. 28.

A stakeholder holds the money deposited as a bailee, so that the depositor can recover his deposit at any time before it is paid to the winner.

Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787; *Deucees v. Miller*, 5 Harr. (Del.) 347; *Shannon v. Baumer*, 10 Iowa, 210; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Morgan v. Beaumont*, 121 Mass. 7; *Deaver v. Bennett*, 29 Neb. 812, 26 Am. St. Rep. 415, 46 N. W. 161; *Bates v. Lancaster*, 10 Humph. 134, 51 Am. Dec. 696; *Guthman v. Parker*, 3 Head, 233.

Money deposited in an illegal wager may be recovered from a stakeholder who has paid it over after notice.

Perkins v. Eaton, 3 N. H. 152; *Wood v. Wood*, 7 N. C. (3 Murph.) 172; *Alexander v. Mount*, 10 Ind. 161; *Oonklin v. Conaway*, 18 Pa. 329; *M'Allister v. Hoffman*, 16 Serg. & R. 147, 16 Am. Dec. 556; *Love v. Harvey*, 114 Mass. 80.

A court of chancery has jurisdiction to compel a stakeholder to return money deposited with him on a wager.

Dauler v. Hartley, 178 Pa. 23, 35 Atl. 857; *McKinney v. Pope*, 3 B. Mon. 93; *Tantum v. Arnold*, 42 N. J. Eq. 60, 6 Atl. 316; *Rucker v. Wynne*, 2 Head, 617; *Smith v. Bruning*, 2 Vern. 392; *Symes v. Hughes*, L. R. 9 Eq. 475, 39 L. J. Ch. N. S. 304, 22 L. T. N. S. 462; *Gough v. Pratt*, 9 Md. 526; *Manning v. Puroell*, 7 DeG. M. & G. 55, 24 L. J. Ch. N. S. 522, 3 Eq. Rep. 387, 3 Week. Rep. 273; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Vischer v. Yates*, 11 Johns. 23; *Nace v. Boyer*, 30 Pa. 110; *Moore v. Trippe*, 20 N. J. L. 263; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358; *Barker v. Callihan*, 5 Ala. 708; *Cook v. Barnett*, 25 Ga. 664.

The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but

because it is his property wrongfully withheld from him.

Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332, 16 Atl. 497; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722, 20 Am. St. Rep. 442, 45 N. W. 1049; *Rusk v. Newell*, 25 Ill. 226; *School Trustees v. Kirwin*, 25 Ill. 73.

If a court of equity can trace money or property unlawfully obtained from the true owner into any other shape, it will intervene to secure it for him, by holding it to be his, or by giving him a lien on it.

19 Am. & Eng. Enc. Law, 2d ed. p. 22; *Merchants' Exp. Co. v. Morton*, 15 Grant, Ch. (U. C.) 274; *Hubbard v. Stapp*, 32 Ill. App. 541.

Whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it, a constructive trust will arise, whether the money came into the possession of such person by accident, mistake of fact, or fraud.

10 Am. & Eng. Enc. Law, p. 22; 2 Pom. Eq. Jur. § 1047; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; 14 Am. & Eng. Enc. Law, p. 176, *Constructive Trusts*.

Where the depositor is not the rightful owner of the property, and the owner claims it, or forbids its delivery to the depositor, the depositary is justified in refusing to deliver it.

9 Am. & Eng. Enc. Law, p. 266; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045; *Bates v. Stanton*, 1 Duer. 79; *Union Bank v. Johnson*, 9 Gill & J. 297; *Bank of Utica v. McKinst*, 11 Wend. 473.

Equity will impose a constructive trust upon property unlawfully acquired or in the prosecution of an unlawful enterprise, in favor of the party beneficially entitled.

Hill, *Trustees*, 4th Am. ed. ** 164, 173; Wharton, *Contr.* p. 641, § 454, ed. 1882, §§ 352, 353; 1 Purdon's *Digest*, p. 691; *Harrisburg Nat. Bank v. Hiester*, 2 Pearson (Pa.) 256; *Adams v. Beach*, 1 Phila. 99.

When Deneen intervenes and shows that the money delivered to the bank was his money, to which he is now entitled, the credit in the bank as a matter of law is no longer a credit due to Baxter, but is a credit due to Deneen. A court of equity having the fund in its control in the hands of the third party can declare to whom the trustee shall satisfy that credit accordingly.

First Nat. Bank v. Mason, 95 Pa. 117, 40 Am. Rep. 632; *Harrison Bank v. Tyler*, 3 Watts & S. 373; 3 Am. & Eng. Enc. Law, 2d ed, p. 832, note 1, *Banks & Banking*; *Union Bank v. Johnson*, 9 Gill & J. 297; *Swift v. Williams*, 68 Md. 249, 11 Atl. 835.
64 L. R. A.

Schmucker, J., delivered the opinion of the court:

The appellee, Deneen, in the bill filed by him in this case, declares his purpose to repudiate certain contracts made with the appellant, Baxter, a stockbroker, for speculating in stocks on margins, and asks the court to compel the return to him of the margins paid by him to Baxter under the contracts. He also asks for an injunction to prevent the withdrawal from bank by Baxter of certain money standing there to his credit, upon the ground that it consists of the margins so paid. Both parties to the record admit on their briefs that the contracts in question were mere gambling contracts, predicated upon the expected rise or fall of the stock market, and were not intended to be executed by actual purchases or sales of stocks. They both also concede the proposition that equity will not lend its aid to enforce gambling contracts, but the appellee contends that his bill does not ask the court to enforce any contracts, but simply to compel the return to him of the margins which he paid upon gambling contracts that he now repudiates.

The material facts of the case, as we find them from the record, may be stated as follows:

Early in September, 1902, Baxter, at his office in Pittsburg, Pennsylvania, informed Deneen that he was considering the desirability of opening what is commonly called a "bucket shop," for speculating in stocks on margins, in the city of Cumberland, where Deneen resided. A similar business had theretofore been conducted in Cumberland by one Cummings, who is said to have decamped with all the funds of the business; thereby inflicting serious losses upon Deneen and other persons who were his customers. Deneen replied to Baxter that it would be useless to send a stranger there, as he could get no trade, and advised him to get H. H. Hartsock, who had been Cummings's agent, to take charge of the office, if he determined to open one, and to permit Hartsock to handle the money. To this Baxter replied that he would not put money in Cumberland in any other name than his own, but he was willing to do anything else, and would not object to permitting it to be known how much money he had in bank in Cumberland from time to time. Within a few days thereafter, Baxter opened a bucket shop in Cumberland, and placed it in charge of Hartsock, as manager. He at the same time deposited \$10,000 in his own credit in the Third National Bank of Cumberland, and instructed the bank to inform Hartsock from time to time of the amount standing to the credit of the account. Hartsock thereafter deposited to the credit of

the bank account thus standing in Baxter's name all margins received from customers in the course of the business at the Cumberland office. When the deal of any customer at the office was closed, the balance, if any, due to him, was paid out of this money standing to Baxter's credit in the bank, which was drawn out by checks signed by Baxter, and not by Hartsock. Deneen, who was a frequent, if not habitual, speculator in stocks on margins, at once began operating through the Cumberland office, and soon became its chief customer. Within a few days after opening the office, Hartsock, its manager, wrote, with the knowledge of Deneen, the following letter to Baxter, his principal:

Cumberland, Md., Sept. 10th, 1902.

Mr. A. B. Baxter, Pittsburg, Pa.:—

Everybody seems to be pleased with our arrangements except on one point and that is a weak one and makes the whole structure without a good foundation, and that is you can withdraw all the funds in bank at any time and we are left as we were last week by Cummings & Co.

Cannot you fortify the point and then we can get the trade? The president of the 3d Nat'l B'k thinks you should do so, in fact unless it is done, certain large and the best trade cannot be secured and it may be hardly any business can be retained, as there is an effort being made to have a N. Y. Stock Exchange open an office here which would get that trade at least.

Let me hear from you on this matter and favorably. The Cumberland trade has had a hard knock and something out of ordinary must be done to restore confidence.

Very truly yours,

H. H. Hartsock.

To that letter Baxter sent the following reply, which was shown to Deneen:

Pittsburg, Pa., Sept. 11th, 1902.

H. H. Hartsock, Esq., Cumberland, Md.

Dear Sir:—

Your favor of 10th inst. rec'd & noted. We talked the matter of which you speak over with both Mrs. Deneen when they were here & told them that we would not consent to anybody controlling our funds. There is no doubt that a good many of your people there feel very badly over the treatment received from Cummings & Co. I told them (Mess. Deneen,) to inquire as to our standing here, not only at the Bank, but on the street generally, & from other brokers & I am satisfied that they would find that we are regarded in a different manner from which the people regarded Cummings & Co.

We would like to have your business; we
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could not under any circumstances agree to have anybody interfere with the management of our finances.

Yours truly,

A. B. Baxter.

Subsequently, after Deneen had been trading for some time with the Cumberland office, he was called by it for over \$6,000 additional margins. When he responded to that call with the money asked for, he said to Hartsock that his understanding was that all margins were to remain in bank until the trades for which they were put up were closed, or the margins were exhausted, and he desired to know something more about it. Hartsock thereupon telegraphed to Baxter for information on the subject, and received from him a reply saying: "We will always have more money than the sheet is worth there. We don't want—draw any money down or have not done so. Ask the bank for balance." The precise meaning of the technical expression, "more money than the sheet is worth," was the subject of a conflict of testimony, but it is not necessary, in the view which we take of this case, to settle that controversy.

After these occurrences, Deneen continued to deal heavily with the Cumberland office in similar stock transactions, until October 7, 1902, up to which time he had paid to Hartsock \$18,253 as margins on deals then remaining open and unfinished. At that time \$33,253 stood to the credit of Baxter on the account already referred to, in the Third National Bank. On that day, October 7th, just before the bank closed, Baxter drew out of it \$15,000, through an agent whom he had sent to Cumberland for that purpose, and who on the next morning presented a check for \$17,000. The bank refused to pay this check, as Deneen, having gotten wind of Baxter's purpose to withdraw the money, had filed the present bill, and procured an injunction thereon restraining the bank from paying out any of the money standing to Baxter's credit until the further order of the court. Deneen also sued out of the law side of the court an attachment against Baxter for the recovery of the \$18,253 of margins, and laid it in the hands of the bank.

The bill of complaint alleges that all of the contracts were entered into by the plaintiff, and the margins thereon paid by him, upon the distinct understanding and agreement between him and Baxter, with the knowledge and assent of the bank, that the margins were to remain in the bank until the contracts on which they were paid were closed. The evidence, however, does not satisfy us that Baxter made any positive agreement to do more than keep money enough

there to make the sheet good, whatever may be the exact meaning of that expression, although he disclaimed any desire to withdraw the balance of his account. There is no evidence at all that the bank had any knowledge of, or gave any assent to the arrangement or understanding between Deneen and Baxter relative to the retention of the money in bank. The bill also charges that the drawing of the \$15,000 out of bank by Baxter, and the attempted drawing of \$17,000 more, constituted flagrant violations of the agreement under which Deneen had paid his margins, and that it had been done with a deliberately fraudulent intent and purpose to remove the money from this state and convert it to his own use, and cheat and defraud Deneen and the other customers who had dealt with him at Cumberland upon the same terms. It is also averred that the other persons who are named as defendants had similar stock dealings with Baxter, and may be interested in the balance to his credit in bank, and also that he is financially irresponsible. The prayer for relief asks for a decree for an accounting between the parties to the suit in respect to their relative rights to the money in bank to Baxter's credit, and for an injunction to restrain the bank from parting with the money *pendente lite*, and for general relief. An injunction was granted as prayed, and the defendant made a motion for its dissolution.

The bank's answer admits the making of the several deposits with it, and that it was instructed by Baxter to let Hartsock know the balance whenever he wished, but it flatly denies that it had any knowledge of any agreement between Deneen and Baxter as to the deposits, or the uses to which they were to be put. Baxter's answer admits the dealings on margins in stocks with Deneen, but insists that it was definitely understood that the margins were to be paid by Hartsock to him for his own account, to be dealt with as he saw fit, and that he only agreed to keep as much money in Cumberland as the sheet was worth; and he avers that he did keep that much money there.

Two other defendants (Botchford and Swartzwelder) answer the bill, admitting that they had dealings with Baxter through Hartsock, but do not state the particulars thereof, and they submit their rights to be determined by the judgment of the court.

The court below, by its decree of May 23, 1903, overruled the motion to dissolve the injunction, and held the plaintiff to be entitled to the relief for which he prayed, and sent the case to the auditor to state an account. An account was stated and returned by the auditor, distributing the net balance of the money in bank to Deneen to

the extent of \$18,096.86, to Hetzel to the extent of \$68.60, and to Swartzwelder to the extent of \$88.20. This account was ratified, and Baxter appealed from the decree of May 23, 1903, and also from the order ratifying the account.

We do not agree with the conclusion arrived at by the learned judge below. It plainly appears by the record that Baxter, when urged by Deneen and Hartsock to keep some money in bank at Cumberland upon such terms that he could not withdraw it at will, positively refused to do so; saying to them that he would under no circumstances agree to have anybody interfere with him in the management of his finances. The most that he could at any time be induced to agree to was to keep more money there than the sheet was worth, accompanied by the statement that he did not wish to draw down any money. With these facts staring him in the face, Deneen did not require the moneys supplied by him for margins to be retained under the joint control of Baxter or Hartsock and himself, or to be held by some third person as stakeholder; nor did he retain any lien thereon. He deliberately paid them over absolutely to Hartsock, knowing that they would be deposited in bank to the credit of Baxter, and would thus pass under his absolute control. He thus voluntarily parted with his title to the money, and relied solely for his protection upon the personal agreement of Baxter, which he himself asserts formed a material part of his gambling contracts. He now by his bill in this case in effect asks a court of equity to compel the performance of this agreement. He does not in terms ask for a decree for a specific performance, but he does so in effect, for the avowed purpose for which he asks an injunction against the bank is to prevent Baxter from violating his agreement by withdrawing from the bank the balance of the money still standing to his credit. To prevent Baxter from violating his agreement is, to all intents and purposes, simply to compel him to perform it. Equity regards the substance of a transaction, and not its mere form. Nor can we yield assent to the appellee's contention that the money in bank should be treated as affected by a trust, or subject to an equitable lien in his favor, without in effect enforcing the agreement, for such a trust or lien must rest upon or arise out of the terms of the agreement, which the appellee insists required that the money should remain in the bank until the deals in connection with which it was paid were completed.

This court has repeatedly held that even the law does not permit actions to be maintained on contracts like those now under consideration, for fictitious purchases and

sales of stocks, because they are regarded as gambling contracts. *Stewart v. Schall*, 65 Md. 289, 57 Am. Rep. 327, 4 Atl. 399; *Burt v. Myer*, 71 Md. 467, 18 Atl. 796; *Billingslea v. Smith*, 77 Md. 519, 26 Atl. 1077; *Cover v. Smith*, 82 Md. 614, 34 Atl. 465. Much less does equity lend its aid to their enforcement. A court of equity undoubtedly has jurisdiction to trace money or property unlawfully obtained from its true owner, and to intervene and secure it for him by impounding it by injunction or giving him a lien on it, but it will not exercise that jurisdiction on behalf of one who was himself a voluntary participant in the unlawful transaction by which he lost his money. The doctrine that equity will not actively interpose for the relief of a party who has been a *particeps criminis* in an illegal or fraudulent transaction is not only one of general acceptance, but it has on different occasions received the direct sanction of this court. *Roman v. Mali*, 42 Md. 513; *Snyder v. Snyder*, 51 Md. 80; *Brown v. Reilly*, 72 Md. 489, 20 Atl. 239. This rule, as was said in *Roman v. Mali* by former Chief Judge Alvey, "is most salutary and conservative, as a means of suppressing illegal and fraudulent contracts, and nothing should be done by the courts to weaken its force or operation."

If Deneen desires to repudiate his gambling contracts, and sue Baxter for the recovery of the margins paid on account of them, as constituting the stakes of executory wagers, a court of law is the appropriate forum in which to test his rights in that respect. Conceding, for the sake of the argument, without so deciding, that he would be entitled to recover in such a suit at law, we see no special circumstances in the facts appearing in this record which should induce a court of equity to depart from the salutary rule to which we have already referred, and intervene in his behalf. The bill alleges that a number of persons named as defendants were similarly interested with the plaintiff in the money in bank, and that an accounting between all parties interested would be necessary in order to determine their conflicting interests, and to prevent a multiplicity of suits at law. But only two of those persons answered the bill, and they declined to state what transactions they had had with Baxter, or the circumstances under which they were made, and simply in the most general terms submitted their rights to the determination of the court. After the case was sent to the auditor, Swartzwelder, one of the defendants, testified that he had put up \$90 with Hart-

sock on a deal, and that he saw no other way to get back his money than to claim a percentage of the money in bank. Another witness (Hetzel) testified that he had put up \$70 as margins with Hartsock on some deals, but had afterwards dropped the deals. In our judgment, the facts disclosed by this evidence afford no sufficient ground upon which to rest the jurisdiction of a court of equity in a case like this.

The case of *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857, in which a court of equity did intervene for the relief of persons who had put up money to be used as margins in stock-gambling adventures, was much relied on by the appellees, but it is distinguishable from the one at bar. In that case a person, to whom a number of individuals had intrusted money to be employed in speculation in stocks, put all of the money in the hands of a banking firm, to the credit of the broker through whom the dealings were to be made, upon the express understanding that the bankers were not to allow the broker to draw any of the money without the consent of the depositor. There were many deposits, and still more numerous withdrawals of money, which was applied to different stock dealings. The court here held the controversy to be over a resulting balance, in which many persons were interested, and took jurisdiction of the case because the remedy at law would have been inadequate. Under the circumstances of that case, the depositors of the money not only had retained control over it, but were the actual owners of the balance remaining in the hands of the bankers. It was quite a different case from the one now before us, in which the plaintiff voluntarily paid over the margins to the broker in reliance upon a mere personal agreement, the practical enforcement of which is essential to affording him the relief which he now seeks.

Nor will the court exercise its equitable powers, at the suit of Deneen, to prevent Baxter from violating his agreement to allow the money to remain in the bank at Cumberland, upon the ground of preventing the accomplishment of a gross fraud on his part by its withdrawal from bank, and its removal from the limits of this state. The same difficulty lies in the way of the court's actively interfering in any manner which would practically give to Deneen the benefit of the enforcement of any of the provisions of these gambling contracts, into which he voluntarily entered without oppression or compulsion, and with a full knowledge of their nature and effect.

The decree and order appealed from will be reversed, and the bill dismissed. *Decree*

and order reversed, and bill dismissed, with costs.

McSherry, Ch. J., dissenting:

After a careful examination of the record in this case, I find myself unable to agree to the conclusions reached by the majority of the court, and, though it is exceedingly distasteful to dissent, I am constrained to do so, for the reasons which I will now briefly state:

Without narrating the facts disclosed by the evidence, it is sufficient to say that the litigation had its origin in a gambling transaction between the appellant and the appellees. The gambling transaction was a betting on the rise or fall of the market price of stocks, and was made between some very foolish men, on the one side, and, according to the evidence, a very tricky man, on the other side. The appellant conducted in Cumberland what is known as a "bucket shop." The foolish people bet on the market price of stock, and put their money in the hands of the bucket-shop proprietor. They might just as well have bet their money against loaded dice or marked cards. The money which they put up was deposited in the name of the bucket-shop proprietor in the Third National Bank of Cumberland, to abide the result of the bet; but it did not, even under the terms of the contract between them, thereby become the property of the appellant, or cease to belong to the appellees, at least until the gambling transactions were actually closed, and the money was in fact paid over by the stakeholder to the winner. Before the event had occurred upon which the wager depended, the appellees rescinded their contract, and demanded from the stakeholder, the Third National Bank, a return of the money they had staked. They did this by way of attachment, and they followed that proceeding by filing a bill in equity to restrain the stakeholder from paying to the appellant the money held by the bank. The court below decreed that the money belonged to the appellees, and made the injunction perpetual. As I understand it, a majority of this court now holds that the decree thus passed was erroneous, because both parties to the gambling transaction, namely, the foolish men, on the one side, and the tricky man, on the other, were in equal fault, and, being in equal fault, the court will leave them where they have placed themselves, and will give its aid to neither. That conclusion seems to me to be contrary to the whole current of judicial decisions both in England and in this country. The doctrine of *in pari delicto* cannot possibly, it seems to me, have any application to the situation disclosed by this record, and for two reasons:

First. In a sense, both parties to the gambling transaction were equally in fault for violating the law in making these bets, but there the equality of fault comes to an end. Their conduct was not criminal or immoral, but it was illegal. The appellees, besides acting illegally, were guilty of folly, just as they would have been if, instead of betting on the rise and fall of the market, they had bet against loaded dice or marked cards; but the appellant, if the evidence adduced be worthy of credit, was involved in a scheme to defraud, which, of course, included a degree of moral turpitude which cannot be ascribed to the appellees. After the funds had been deposited with the stakeholder, to be held under stipulated conditions, the appellant surreptitiously endeavored to withdraw the funds that remained in the custody of the stakeholder, after secretly checking out a considerable portion of the money that he had agreed should remain on deposit in the Third National Bank. I fail to see, in the light of these circumstances, how the folly of the appellees can be said to be on a footing of equality with the turpitude of the appellant; and, if there is no equality in this regard, there can be no such equal fault as to justify the application of the doctrine that, where the plaintiff and defendant are *in pari delicto*, the condition of the defendant is the better. There is a distinction between contracts which are immoral or criminal, and those which are simply illegal and void. To the latter class, gambling contracts belong. They are made void by the statute of 9 Anne, chap. 14. In *Vischer v. Yates*, 11 Johns. 23, Chancellor Kent said: "And the courts take a distinction between contracts that are immoral or criminal, and such as are simply illegal and void. Assistance is usually given to the party in the latter cases to recover back his money, and this court lent such assistance in the case of *Mount v. Waite*, 7 Johns. 434." But beyond this, the policy of our statutory law is distinctly against the application of the *in pari delicto* doctrine to gambling contracts, and that doctrine furnishes no defense to an action brought by the loser to recover back money won from him, and actually paid over to the winner. By Code, art. 27, § 127, it is enacted that "any person who may lose money at a gaming table may recover back the same as if it were a common debt." And § 128 provides that "all games, devices, and contrivances at which money . . . shall be bet or wagered shall be deemed a gaming table within the meaning of the six preceding sections." And by § 130 it is declared that "the courts shall construe the preceding sections relating to gambling and betting, liberally, so as to prevent the mischiefs in-

tended to be provided against." Surely a defendant who has been sued for money which he won from the plaintiff by gambling could not successfully invoke as a defense the maxim, *In pari delicto potior est conditio defendentis*. Why should he be able to do so in a court of equity?

Secondly. But, in addition to this, I have never known it to be suggested that a man who bets, and then recants and repudiates the transaction whilst the wager is still in the hands of the stakeholder, is precluded from recovering the money he had staked, if the holder of the stakes refused, upon demand, to return it. This, if authority were needed for the proposition, has been explicitly decided by the supreme judicial court of Massachusetts in *Morgan v. Beaumont*, 121 Mass. 7. That case arose in this way: The defendant prior to May 22, 1875, received of the plaintiff the sum of \$100 as a stakeholder on a wager between the plaintiff and one Woodward upon the result of a horse race which actually took place on May 22, 1875. This money was to be paid to the winner of the bet after the race. After the race, while the money was still in the hands of the defendant, the plaintiff, claiming that the race was not fairly had, and that the decision of the judges of the race was not fairly made, forbade the defendant paying the money to Woodward, and requested the defendant to pay the same to him, which the defendant refused to do. Afterwards, the money still remaining in the defendant's hands, the plaintiff commenced this action. The defendant well knew of the wager, and knew that the deposit of money was made in aid of illegal trotting and horse racing; and, at the time of the racing, both the plaintiff and defendant were present, encouraging it. The court, speaking by Chief Justice Gray, thus disposed of the controversy: "The wager was illegal; the winner had no right to the money; the stakeholder was a mere depositary; and the plaintiff, having demanded the money before it was paid over, was not in *pari delicto*, and was entitled to recover his deposit from the stakeholder, whether it was still in his hands, or had been paid by him to the winner after notice from the plaintiff not to do so. The fact, insisted upon at the argument, that the defendant knew of and promoted the illegal wager, affords him no protection. *White v. Franklin Bank*, 22 Pick. 181-189; *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80; *Fisher v. Hildreth*, 117 Mass. 558."

The jurisdiction of a court of equity in Maryland to grant relief in a case like this is clear, unless *Gough v. Pratt*, 9 Md. 526, and several cases which have followed it, be treated as flatly overruled. In the case just

cited a bill was filed by Gough for an injunction to restrain execution of a judgment recovered against him on a bond, upon the ground that the consideration of the bond was money won in betting and gambling at cards. The bond was given by Gough to Sollers, who was named as the payee therein, and who, as was alleged, had won at cards from Gough \$869, the amount payable on the bond. The bond was assigned by Sollers to James Kent, and, at its maturity, suit was instituted in the name of Sollers, for the use of Kent, against Gough, and judgment by default was subsequently entered thereon. Thereafter a *fieri facias* was issued upon the judgment. Thereupon Gough filed his bill against Sollers and Kent to restrain an execution of the judgment upon the ground above stated. Kent being dead, his administrator, Pratt, appeared, and demurred to the bill. It was insisted that a court of equity had no jurisdiction to restrain execution of the judgment, because, first, the bond was not void; and, secondly, because, even admitting it to be void as between Gough and Sollers, still Kent, being an innocent purchaser for value, without notice of the gambling transaction, was entitled to enforce the judgment. But this court, following closely and unequivocally adopting the opinion of the late Chief Justice Taney in *Thomas v. Watson*, Taney, 297, Fed. Cas. No. 13,913, decided in the circuit court of the United States for the district of Maryland, held that the bond was void under the statute of 9 Anne, chap. 14, which was then and still is in force in Maryland; that, being void, equity had jurisdiction to restrain its payment, even though it had been reduced to a judgment; and, finally, that, as the circulation of gambling bonds is an evil no less to be discontinued than the giving of them, a holder thereof by assignment for value, without notice of the illegal consideration, was in no better condition to collect the money apparently due on the bond than the payee himself would have been. In the course of the very lucid opinion of Chief Justice Taney, above referred to, and distinctly adopted by this court in *Gough v. Pratt*, it was stated by that eminent and distinguished jurist: "And as regards a security for money lost by gaming, it was, indeed, said by Lord Talbot that it could not be recovered, both parties being equally in default. But that point did not arise in the case before him, and was an *obiter dictum*, when deciding upon a question of usury, and the point was decided otherwise in the case of *Rawden v. Shadwell*, 1 Ambl. 269. In the last-mentioned case a bond had been given for money lost at play, and part of the money paid upon the bond, yet the court, upon the bill

fled for that purpose, decreed that the bond should be delivered up to be canceled and the money repaid. Indeed, there can be no sound reason for distinguishing securities for money won at play from securities founded in usury, so as to give any advantage to the former over the latter, for they are both prohibited by law, both contrary to its settled policy. And while the laws against usury are intended to protect the necessitous against the oppression of the money lender, and against hard and ruinous contracts forced upon them by their wants, the laws against gaming are founded upon a policy equally sound and clear, and are intended to discountenance and discourage a vice injurious to society, and often most ruinous to the individual. If, therefore, the money has been paid by Lloyd upon these two notes, it is evident the complainant might, by a bill filed, have recovered it back; and, if the court of chancery would have interfered after the money had been actually paid, is there any principle of equity which will prevent it from interposing where the party has omitted to defend himself at law and confessed a judgment?

. . . If it will lend its aid to a party after he has acknowledged the justice of a debt by the payment of the money, there can be no sufficient reason for refusing to interpose where the party has omitted to make the defense in an action at law, and acknowledged the debt by confessing the judgment. In either case the court acts to prevent the party from retaining an advantage which he has obtained under a contract forbidden by law, and to uphold an established public policy intended in the one case to guard against oppression, and in the other to suppress a vice injurious to society.

. . . When the public policy established by the legislature is so obvious, and is so clearly founded in the principles of justice and required by the interests of society, it would ill become a court of equity by narrow and technical constructions to deprive itself of the power of enforcing it." *Gough v. Pratt* has been followed in *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *Huntington v. Emery*, 74 Md. 70, 21 Atl. 495; *Spies v. Rosenstock*, 87 Md. 17, 39 Atl. 268; and it seems to me it ought not, after the lapse of nearly fifty years, to be overruled, when the result of overruling it is to enable the tricky gambler to get from the stakeholder the money which the foolish better deposited there, but, upon repenting of his folly, now seeks, after rescinding his illegal bargain, to get back. If a court of equity, under these circumstances, has no power by injunction to prevent the bucket-shop gambler from drawing the funds belonging to the appellees out of bank, and has no process by which

those funds can be kept from going into the pocket of the trickster, though the unlawful contract has been repudiated, it is high time that a legislative enactment should explicitly confer such a jurisdiction. I think a court of equity is clothed with both the power and the process to administer redress and to afford relief in this case, and I am decidedly of opinion that the decree passed by Judge Boyd in the circuit court was right, and that it ought to be affirmed.

A motion for reargument having been filed, *Schmucker, J.*, on March 23, 1904, handed down the following response:

The appellee has made a motion for a reargument of this case, and has filed a carefully prepared brief in support of his motion. The brief reasserts the arguments advanced in his brief used at the hearing of the case, and urgently contends, first, that the money paid on account of the gambling contracts by Deneen to Baxter, and by the latter deposited in bank to his own credit, must be considered to be the property of Deneen, to which Baxter never had any legal or equitable title, and the bank must be treated as holding it in the capacity of a stakeholder; and, secondly, that under the authority of the decision in *Gough v. Pratt*, 9 Md. 526, Deneen, upon repudiating the contracts, was entitled, not only to sue in a court of equity to recover back the money which he had paid under the contracts, but was also entitled to the active aid of that court to prevent, by injunction, the withdrawal by Baxter of the money deposited by him, and standing to his unconditional credit in the bank.

This money is clearly not stakes, in the ordinary sense of that term, which signifies something deposited by two persons with a third on condition that it is to be delivered to the one who shall become entitled to it by the happening of a specified contingency. Deneen voluntarily paid the money to Baxter, with full knowledge of the latter's positive refusal to hold it subject to any condition or any joint control. Although it is now in the bank, it was deposited by Baxter alone, and for his own account, and was entered to his credit by the bank. Deneen himself distinctly admitted on cross-examination that he knew that Baxter had the right to withdraw the money from the bank at any time, and that he had dealt with Baxter on the faith of the latter's promise that he would not withdraw it, and not upon the idea that he had no legal right to withdraw it. Furthermore, when Deneen determined to repudiate his contracts, he did not at first claim that this money was his own, or that it was held by the bank as a stakeholder and appeal to a court of

equity to compel its return to him; but, acting advisedly and with the aid of counsel, he, as he informs us in his brief, sued out an attachment from a court of law against Baxter to recover it from him, and laid the writ in the hands of the bank, to bind the money as a credit due from it to Baxter. Copies of the account filed and affidavit made by Deneen in the attachment case appear in the present record, and they charge Baxter with the indebtedness as for money loaned to him by Deneen—a form of pleading entirely inappropriate to the recovery of money knowingly paid or advanced as the stakes of a gambling venture. The record contains no indication that this attachment suit has ever been dismissed or abandoned. The evidence shows that the money was in fact paid to Baxter on account of the gambling contracts as margins, just as the margins were paid which were involved in the case of *Burt v. Myer*, cited in our opinion now on file in this case, with the additional circumstance that Baxter agreed, as part of the contracts in the present case, to keep money enough on deposit in Cumberland to make the sheet good, or, as Deneen, in his cross-examination, expresses it: "The sheet was to be covered at all times,—more than enough money left here."

Nor do we think that the case of *Gough v. Pratt*, when rightly understood, furnishes any authority for granting the relief prayed for in the present case. What was decided in that case was that equity would prevent the enforcement of a gambling contract, by enjoining the issue of execution on a judgment which had been recovered on a gambling debt. The case was decided upon the authority of *Thomas v. Watson*, and the opinion of Judge Taney in that case was inserted in full by our reporter as an appendix to *Gough v. Pratt*. In *Thomas v. Watson* the bill was filed by an assignee of the alleged debtor for discovery, and for relief by injunction against an execution on a judgment that had been recovered on two notes, one of which was alleged, on information and belief, to have been recovered for a gambling debt, and the other for a usurious debt. That, also, was a case in which equity extended relief against the attempted enforcement of gambling and usurious debts. Nothing that was required to be decided in either of those two cases affords any authority for the active interference of equity in aid of the practical enforcement of any of the stipulations of a gambling contract, which we have, in our opinion already filed, shown is the relief which the court is, in effect, asked to afford in the present case. In Judge Taney's opinion in *Thomas v. Watson* there appear the *obiter* statements that in a case of usury or gambling, although the party

pays his money, not only with a knowledge of the facts, but with a knowledge of the law also, equity will relieve him and compel the adverse party to refund the money, and that in such cases the money may be recovered back again, either by a suit at law or a bill in equity; but an examination of the authorities cited in support of the statements satisfies us that that distinguished jurist could not have intended by what he there said to assert that the plaintiff in such cases might resort to either law or equity, according to his own preference or caprice, or that a court of equity would entertain his suit for the recovery of his money in the absence of facts constituting recognized grounds of equity jurisdiction. In *Fonblanque's Equity*, bk. 1, chap. 4, § 7, the authority cited in reference to usurious contracts says that equity will give relief to the borrower in cases where the law will not reach the lender. In *Rawden v. Shadwell*, 1 Amb. 269, the authority relied on for gambling contracts, the bill was filed for the cancelation of a bond which had been given for money lost at gaming, and to recover back a part payment which had been made on account of the bond. No opinion appears in the report of the case, but there were plain grounds of equitable jurisdiction in that case, for, if the plaintiff had sued at law, and recovered the money which he had paid on account, the bond, which was an illegal instrument, would have remained outstanding against him. In such cases we have recognized as recently as in *Oppenheimer v. Levi*, 96 Md. 296, 60 L. R. A. 729, 54 Atl. 74, the jurisdiction of equity to grant relief. Money lost at gaming could not be recovered at common law. The statute of 9 Anne, which is relied on in *Gough v. Pratt*, only authorized the recovery of money lost at gaming in "an action of debt," although it required anyone liable "to be sued" under the statute to answer a bill of discovery filed in aid of the action of debt for discovering the money or thing lost at gaming. Our own Code (art. 27, § 127) authorizes the recovery of money lost at gaming "as if it were a common debt." Certainly nothing in either of these statutes confers jurisdiction on equity to entertain proceedings for the recovery of such debts, when unaccompanied by special circumstances which render a court of law inadequate to grant relief. There is no contention that the bill in the present case was filed for discovery, and we have already expressed our views upon the inadequacy of the facts relied on in it as affording special grounds for the equitable relief for which it asks. The decision in *Gough v. Pratt* has been several times affirmed by this court, but in no case, so far as we are aware, has the proposition that one, having

lost money at gaming, may elect whether to proceed at law or in equity for its recovery, been the subject of approval by us; nor are we aware of any case in which this court has upheld a court of equity in giving effect directly or indirectly to the terms of an illegal contract at the suit of a voluntary party to that contract. The cases of *Morgan v. Beaumont*, 121 Mass. 7; *Mount v. Waite*, 7 Johns. 434, and *Vischer v. Yates*, 11 Johns. 23, relied on by the appellee in support of his motion, were cases at law, and cannot be regarded as controlling precedents upon the question of equitable jurisdiction which

we have considered in the present case. The case of *Petillon v. Hipple*, 90 Ill. 420, 32 Am. Rep. 31, also relied on in support of the motion, was a bill in equity "to restrain the enforcement of an unexecuted contract founded on a wager," and it was upon that express ground that the court assumed jurisdiction of the controversy. The case is, in our judgment, entirely consistent with the position assumed by us in the present one.

The motion for reargument will be overruled. All judges present, except *Boyd* and *Page*, JJ.

MISSOURI SUPREME COURT.

Antoine DE GEOFROY *et al.*, *Appts.*,
v.
MERCHANTS' BRIDGE TERMINAL
RAILWAY COMPANY, *Resp't.*

(.....Mo.....)

1. A track erected on pillars from 15 to 25 feet above the surface of the street for carrying railroad trains is inconsistent with the use of the place as a public street, and, although title to the fee is in the public, an abutting owner may enjoin the use of such track until compensation is made for the injury thereby inflicted on him.
2. The construction in a public street of an elevated railroad track for the use of trains to be operated by steam, so as to interfere with the abutting owner's right to light, air, access, and privacy, is a taking of his property for which, under the Constitution, he is entitled to compensation.
3. The statute of limitations begins to run against a right of action to recover for the injury inflicted upon abutting property by the erection of a permanent structure in the street for the operation of railroad trains upon an elevated track at the time the structure is completed and permanent injury inflicted.

(*Valliant, J., dissents in part.*)

(December 23, 1908.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for the City of St.

Louis in favor of defendant in an action brought to recover damages for injury to plaintiffs' property by reason of the construction and operation of an elevated railroad track in the adjoining street. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sale & Sale and *David Goldsmith*, for appellants:

Abutting owners are entitled to compensation for damage to their property, occasioned by the construction and operation of a railroad in a public street, when the railroad is not constructed upon the grade of the street.

Sherlock v. Kansas City Belt R. Co. 142 Mo. 183, 64 Am. St. Rep. 551, 43 S. W. 629; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 158; *Cross v. St. Louis, K. O. & N. R. Co.* 77 Mo. 322; *Smith v. Kansas City, St. J. & C. B. R. Co.* 98 Mo. 24, 11 S. W. 259; *Rude v. St. Louis*, 93 Mo. 413, 6 S. W. 257; *Knapp, Stout & Co. v. St. Louis Transfer R. Co.* 126 Mo. 35, 28 S. W. 627.

The defendant is liable to plaintiffs for the injuries to their abutting property by reason of the construction and maintenance of defendant's elevated railway.

Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 269, 10 N. E. 528; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 634, 19 Am. St. Rep. 461, 25 N. E. 496; *Kane v. New York Elev. R. Co.* 125

NOTE.—For other cases in this series as to construction of elevated railroad in street, see *Newman v. Metropolitan Elev. R. Co.* 7 L. R. A. 289; *Tallman v. Metropolitan Elev. R. Co.* 8 L. R. A. 173, and *note*; *Cane v. New York Elev. R. Co.* 11 L. R. A. 640; *Abendroth v. Manhattan R. Co.* 11 L. R. A. 634, and *note* as to servitude of light and air; *Pappenheim v. Metropolitan Elev. R. Co.* 13 L. R. A. 401; *Moore v. New York Elev. R. Co.* 14 L. R. A. 731; *Somers v. Metropolitan Elev. R. Co.* 14 64 L. R. A.

L. R. A. 344; *Koch v. North Ave. R. Co.* 15 L. R. A. 377, and *note*; *Selden v. Jacksonville*, 14 L. R. A. 370; *Sperb v. Metropolitan Elev. R. Co.* 20 L. R. A. 752, and *note*; *Spencer v. Metropolitan Street R. Co.* 22 L. R. A. 668; *Garrett v. Lake Roland Elev. R. Co.* 24 L. R. A. 396; *Pueblo v. Strait*, 24 L. R. A. 392; *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246; *Doane v. Lake Street Elev. R. Co.* 36 L. R. A. 97; and *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237.

N. Y. 186, 11 L. R. A. 640, 26 N. E. 278; *Doane v. Lake Street Elev. R. Co.* 166 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Stewart v. Chicago General Street R. Co.* 166 Ill. 61, 46 N. E. 765; *Lake Roland Elev. R. Co. v. Webster*, 81 Md. 529, 32 Atl. 186; *Lake Roland Elev. R. Co. v. Hibernian Soc.* 83 Md. 420, 34 Atl. 1017; *Fifth Nat. Bank v. New York Elev. R. Co.* 28 Fed. 231, Affirmed in 135 U. S. 432, 34 L. ed. 231, 10 Sup. Ct. Rep. 743; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 597, 4 Am. St. Rep. 390, 7 S. W. 579; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo. 315, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658.

If the plaintiffs have no constitutional right to the compensation sued for, they nevertheless have a statutory right thereto.

Sess. Acts 1887, p. 39; Rev. Stat. 1889, §§ 6116, 6117.

The plaintiffs are entitled to sue for the damage to their property as compensation due them under the constitutional provisions for the taking of it.

Allen v. Wabash, St. L. & P. R. Co. 84 Mo. 646; *Webster v. Kansas City & S. R. Co.* 116 Mo. 114, 22 S. W. 474; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24, 14 L. R. A. 462, 10 So. 267; *Ft. Scott, W. & W. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. 583; *Atchison, T. & S. F. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. 787; *Mayesville & B. S. R. Co. v. Ingram*, 16 Ky. L. Rep. 853, 30 S. W. 8; *White v. Northwestern N. C. R. Co.* 113 N. C. 610, 22 L. R. A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Pennsylvania S. Valley R. Co. v. Ziemer*, 124 Pa. 560, 17 Atl. 187.

The action herein is not barred by the statute of limitations.

Pennsylvania S. Valley R. Co. v. Zeimer, 124 Pa. 560, 17 Atl. 187; *Doyle v. Kansas City & S. R. Co.* 113 Mo. 280, 20 S. W. 970; *Webster v. Kansas City & S. R. Co.* 116 Mo. 114, 22 S. W. 474; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 145, 13 L. R. A. 788, 28 N. E. 479; *Organ v. Memphis & L. R. R. Co.* 51 Ark. 265, 11 S. W. 96; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343, 28 N. E. 175.

Mr. M. N. Sale, also for appellants:

Property in a determinate object is composed of certain constituent elements, to wit: The unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of the property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or 64 L. R. A.

physical invasion of the *locus in quo*. The use of a given object is the most essential and beneficial quality or attribute of property; without it other elements which go to make up property would be of no avail. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and barmecidal title; and what is true of property rights as an integer is true of each fractional portion.

St. Louis v. Hill, 116 Mo. 533, 21 L. R. A. 226, 22 S. W. 861; *Broadwell v. Kansas*, 75 Mo. 218, 42 Am. Rep. 406; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 579, 4 Am. St. Rep. 396, 7 S. W. 579; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo. 315, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658.

Mr. John H. Overall, for respondent:

Legislative authority over the streets of St. Louis is in the city.

O'Connor v. Pittsburgh, 18 Pa. 187.

There is full legislative authority in the city of St. Louis to permit the use of its streets for the construction, maintenance, and operation of a railway, and such use does not subject such streets to a new servitude inconsistent with and subversive of their proper use as streets.

Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Stevens v. St. Louis Merchants' Bridge Terminal Co.* 152 Mo. 212, 53 S. W. 1066; *Porter v. North Missouri R. Co.* 33 Mo. 128; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149; *Randle v. Pacific R. Co.* 65 Mo. 325; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.* 97 Mo. 457, 3 L. R. A. 240, 10 S. W. 826; *Ruckert v. Grand Ave. R. Co.* 163 Mo. 260, 63 S. W. 814; *Nagel v. Lindell R. Co.* 167 Mo. 89, 66 S. W. 1090.

The power to regulate the use of streets is not limited to a mere right of way, but extends to all beneficial uses which the public good and convenience may, from time to time, require, whether such uses are upon, or above, or below the surface of the street.

Ferrenbach v. Turner, 86 Mo. 416, 56 Am. Rep. 437; *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *Schopp v. St. Louis*, 117 Mo. 131, 20 L. R. A. 783, 22 S. W. 898; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 34 L. R. A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 42 L. R. A. 113, 46 S. W. 991; *Stevens v. St. Louis Merchants' Bridge Terminal R. Co.* 152 Mo. 212, 53 S. W. 1066.

If the erection and maintenance of defend-

ant's railway do not subject the street to a new servitude inconsistent with and subversive of its proper use as a street, then plaintiff cannot recover.

Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Gay v. Mutual Union Teleph. Co.* 12 Mo. App. 485; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 559, 4 Am. St. Rep. 659, 13 Atl. 690; *Panton v. Holland*, 17 Johns. 99, 8 Am. Dec. 369.

The claim of appellants, if any ever existed, is barred by the 4th clause of § 4273, Mo. Rev. Stat. 1899.

Chicago & E. I. R. Co. v. McAuley, 121 Ill. 160, 11 N. E. 67; *James v. Kansas*, 83 Mo. 567; *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651.

The bills should be dismissed because of plaintiffs' laches.

Stevenson v. Saline County, 65 Mo. 425; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *Smith v. Clay*, 2 Ambl. 645; *Murphy v. DeFrance*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; *Kline v. Vogel*, 90 Mo. 239, 2 S. W. 408; *Bliss v. Prichard*, 67 Mo. 181; *Badger v. Badger*, 2 Wall. 94, 17 L. ed. 838; *Harwood v. Cincinnati & C. Air-Line R. Co.* 17 Wall. 81, 21 L. ed. 559; *McQuiddy v. Ware*, 20 Wall. 19, 22 L. ed. 312; *Bergen v. Bennett*, 1 Cal. Cas. 19, 2 Am. Dec. 281; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Kerr, Fraud & Mistake*, 303.

Gantt, J., delivered the opinion of the court:

This is an action by plaintiffs, who are abutting owners of real estate on Front street, in the city of St. Louis, for damages to their said realty occasioned by and resulting from the construction and operation of an elevated steam commercial railroad along and over said Front street in front of plaintiffs' lots. In the circuit court a demurrer to the petition was sustained on the ground that it did not state facts sufficient to constitute a cause of action. The propriety of that action by the circuit court presents the sole and only question for our determination at this time.

Omitting caption, the plaintiffs allege that the defendant is a railroad corporation, engaged as a common carrier, operating a steam railroad with locomotives and cars, at and in the city of St. Louis; that plaintiffs are now, and for many years have been, the owners in fee simple of a lot in city block 5, fronting 76 feet on the west line of Wharf or Front street, in the city of St. Louis, with a depth of 75 feet, on which lot there were at all the times mentioned in the petition, and now are, erected three substantial four-story brick buildings, known as Nos. 203, 204, and 205 South Levee or Front street; that plaintiffs acquired the

said lot and premises prior to the year 1890, and have owned and occupied the same by themselves and their tenants continuously since April, 1890; that said Front street, known as the "Levee or Wharf," is, and was for many years prior to the construction of defendant's said railway as hereafter set out, a public street and highway of the city of St. Louis, and held by said city in trust for the maintenance thereof, as public streets are generally used and maintained; that plaintiffs were and are seised of an easement in said street, and are entitled to have the same kept and used as a public highway, and to be protected from unusual and extraordinary interferences with the light, air, and access to and use of their premises not occasioned by ordinary street uses; that, as an incident and appurtenant to plaintiffs' ownership of said premises, plaintiffs, at least until condemnation, compensation, or purchase, have and had in said Front street the right and easement to its free and unimpaired use, for the uses and ordinary purposes of a public street or highway, and to exemption from noise, smoke, soot, dust, cinders, obstructions, and unusual impairment of the easements of light, air, and access and ingress and egress to and from said premises, etc.; that defendant's structure, and the operation of its engines and cars on said street, in front of plaintiffs' premises, are of a permanent and continuous nature.

The petition avers that the railroad of the defendant was an elevated road, the superstructure of which rested upon iron columns, which were erected perpendicularly to a height of from 15 to 25 feet above the surface of the street or sidewalk; that these columns supported cross-girders or framework, upon which were laid four single railroad tracks, or two double railroad tracks, and that the railroad of the defendant has ever since the erection of the structure been, and still is, operated upon these tracks, and that the superstructure extends out on either side, so that the western line thereof approaches the eastern or building line of plaintiffs' premises within 12 feet, more or less; that these structures are of a permanent nature, and are built and intended by the defendant to be used permanently for the transportation of freight and passengers; "that large numbers of freight and passenger trains daily pass in front of plaintiffs' premises, and produce a flickering and darkening of the light, and deprive and have hitherto deprived plaintiffs of the beneficial use of such light as comes to said premises, and interferes with the air, ventilation, and access to said premises, and the privacy thereof; that said structure, as it now exists, and as above described, has been erected

and maintained without legal right, and is a special injury to plaintiffs and their premises; that the operation of said railroad is not an ordinary street use of said street authorized by law; that on the road thus constructed the defendant every day ran, and still does run, many trains of cars; that said railroad and structure greatly obstructed, and still do greatly obstruct, said premises and the passageway to and from said buildings; that they excluded, and still do exclude light and air from the same; that the trains made, and still do make, loud and disagreeable noises, caused, and still do cause, vibrations of the buildings erected on said premises, whereby the security of such buildings is greatly impaired and their strength lessened, and injured, and still do injure, said buildings, and said trains and said structures injure and impair plaintiffs' easements of light, air, and access; that the value of the use and occupation of said premises has thereby been greatly damaged."

The petition further avers that the aforesaid structure and the railroad of the defendant impose a new and additional burden on the property of the plaintiffs, and one which was not within the power of the city of St. Louis to authorize, without compensating plaintiffs for their property thus taken and damaged; that no compensation has ever been made for the aforesaid taking and damage of plaintiffs' property; that the rental of value of said property has been greatly damaged, to wit, to the extent of \$2,500 per annum, by the construction and operation of defendant's railroad in said street; and that the property itself has been permanently damaged, in the sum of \$25,000.

That the city of St. Louis did heretofore, to wit, on July 9, 1887, adopt an ordinance which undertook to authorize the construction of defendant's railroad, and the use of the streets therefor, which said ordinance is set forth in full in the petition, and which, among other things, required the construction of said railroad to be commenced within one year after the approval of the ordinance, and to be completed within five years from February 3, 1887, and which said ordinance was subsequently amended by another ordinance, approved December 21, 1889; that the defendant, with the view of availing itself of the provision of said ordinance, and claiming to act under the same, has constructed its road as aforesaid; and that said ordinance is in conflict with article 2, § 21, of the Constitution of this state, and also in conflict with article 2, § 30, of the Constitution of this state, and also in conflict with the 14th Amendment to the Constitution of the United States; "that 64 L. R. A.

plaintiffs' property has been taken and damaged for the uses of defendant's railroad as herein set out, without just compensation; that plaintiffs have been deprived of their property by the defendant, without due process of law;" and that the construction of the railroad of the defendant was completed in May, 1890, and the railroad been operated ever since that time; and that the operation of the road will continue, unless restrained by order of this court.

The petition then prays that the damages of the plaintiffs may be ascertained and determined, and that they may have judgment therefor, to wit, for the sum of \$25,000; also that the defendant may be enjoined from further obstructing and encumbering the aforesaid street, and also from maintaining, continuing, or operating its railroad and structure in front of the premises of the plaintiffs; and further be required to remove said structure in front of plaintiffs' property, unless, within such time as should be fixed by the court, the defendant pay to plaintiffs a sum of money sufficient to compensate the plaintiffs for their property taken, and for the permanent injury and damage done thereto, by reason of the aforesaid acts of the defendant.

It is stated by counsel that the action of the trial court in sustaining the demurrer to the petition of the plaintiffs was predicated exclusively on the theory that the cause of action of the plaintiffs was barred by the statute of limitations, in that it appeared from the face of the petition that the action was not instituted within five years after the completion of the defendant's railway; but this is not disclosed in the record, and we cannot take notice of the reasons which moved the circuit court to sustain the demurrer.

1. As said by Judge Andrews, for the court of appeals of New York, in *Kane v. New York Elev. R. Co.* 125 N. Y. 175, 11 L. R. A. 640, 28 N. E. 278: "Few questions have come before the courts in this generation of greater practical importance, or involving larger pecuniary interests, than those growing out of the construction of railways in city streets. Whether such streets may, under legislative and municipal authority, be occupied by railroad tracks to the inconvenience of abutting owners without making compensation, and what limitation, if any, there is to the legislative power over streets which cannot be transgressed without violating the legal and constitutional rights of lot owners, are questions which have excited the gravest debate, and have been the subject of the most careful judicial consideration."

Rorer on Railroads, p. 518, says that, as to the right of a railroad to run along a

public street without additional compensation, "American authorities differ so widely that it is impossible to lay down any positive rule of law upon the subject."

A *résumé* of the decisions of this court on this subject will greatly aid us in arriving at a proper conclusion. The easement of the plaintiffs in Front street is too firmly established to admit of doubt.

In the case of *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 113 Mo., on page 315, 18 L. R. A. 339, 35 Am. St. Rep. 706, 20 S. W. 658, MacFarlane, J., says: "It must be conceded by the defendant, because it is too well settled to admit of question, that every owner of a lot abutting on a public street, besides the ownership of the property itself, has rights appurtenant thereto, which form a part of the estate. Those rights are said to be 'as much property as the lot itself.' Of these may be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from his property. . . . 'Every lot owner has a "peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground, an incidental title to certain facilities and franchises," which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be the owner.' Depriving the owners of these incorporeal hereditaments, or interfering with their full enjoyment by appropriating the street to a new and different public use to that originally contemplated, would undoubtedly be a damage within the foregoing constitutional provision. . . . We think a public use which would interfere with these incorporeal rights, whereby the property was depreciated in value, would be a damage to the property within the meaning of the Constitution, and would entitle the owner to compensation." To the same effect: *Knapp, Stout & Co. v. St. Louis Transfer R. Co.* 126 Mo. 35, 28 S. W. 627; *Sherlock v. Kansas City Belt R. Co.* 142 Mo. 182, 64 Am. St. Rep. 551, 43 S. W. 629; *Egerer v. New York C. & H. R. R. Co.* 130 N. Y. 108, 14 L. R. A. 381, 29 N. E. 95; *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 155, 20 L. R. A. 752, 32 N. E. 1050.

In some of the states the right of the abutting owner to compensation by reason of the construction of a steam railroad in front of his premises has been made to depend on whether the fee in the street was located in the municipality or the abutting owners; but in this state the right of the owner of a lot in a city or town to the use of the street and to damages for its obstruction does not

depend on his ownership of any of the soil under the street. His right flows from the fact that his lot abuts on a public highway. *Lackland v. North Missouri R. Co.* 31 Mo. 187.

At an early day in the judicial history of this state it was ruled that the laying of tracks and the operation of a steam railroad on the grade of a public street or highway did not constitute a new or additional servitude, and did not warrant compensation for damages resulting to the owners of abutting property. While this is true, as was said by this court in *Knapp, Stout & Co. v. St. Louis Transfer R. Co.* 126 Mo., *loc. cit.* 36, 28 S. W. 627, it was "a modified rule," "a rule that has been hedged about with many qualifications."

Thus, in the very first case (*Lackland v. North Missouri R. Co.* 31 Mo. 188) it was said: "We have not observed any case, even where this power is conceded, which allows the erection of depots or car buildings or any other structures which materially obstruct the use of the street or highway as a public easement." In that case it appeared that the company built a side track along the main track in the street fronting the plaintiff's lot, and a switch track connecting the two others; that these tracks rested on embankments which of themselves entirely obstructed all passage of vehicles over any part of the street. In addition to the three tracks, two switch frames and a catlélway had also been erected. The side track was used for a standing place of freight and passenger cars. In short, the street was used as a depot yard. Judge Napton, in the course of the opinion referred to the decision of the supreme court of Pennsylvania in *Com. v. Erie & N. E. R. Co.* 27 Pa. 351, 67 Am. Dec. 471, a court which has maintained at all times the absolute control of the state over all its highways, wherein it was ruled that a grant of right of way over and along streets, highways, etc., but with the restriction "not to obstruct or impede their free use," did not authorize the company to place any material obstructions in the streets or highways, and any change of grade, unless the road or street was adapted to the new grade at the expense of the company, was unauthorized; and this court, in said *Lackawanna Case*, affirmed a judgment for damages growing out of the said acts of the railway company.

In *Porter v. North Missouri R. Co.* 33 Mo. 128, the opinion proceeded on the ground that the plaintiff's access to his property was not affected by the construction of the road at grade.

In *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149, the *Porter Case* came under review, and it was held that the principles an-

nounced therein only applied to a railroad constructed on the grade of the street, where the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the railroad; and, accordingly, in the *Tate Case* damages were allowed the abutting owner where the railroad company built an embankment in the street in front of the plaintiff's lot. To the same effect is *Swenson v. Lexington*, 69 Mo. loc. cit. 166; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo., loc. cit. 322; *Smith v. Kansas City, St. J. & O. B. R. Co.* 98 Mo. 24, 11 S. W. 259; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 488, 1 S. W. 86.

In *Schopp v. St. Louis*, 117 Mo. 131, 20 L. R. A. 783, 22 S. W. 898, this court held that an abutting owner on a street has equal right with the public to use the street, and, in addition thereto, he has certain rights which are special to himself, *e. g.*, that of ingress and egress; and that the city had no power to lease spaces on a street, in front of business houses, for produce dealers. Judge Black, speaking for the court, speaking of the building of market houses in the streets of a city, quotes Judge Dillon to the effect that "they are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons" (Dill. Mun. Corp. 4th ed. § 383), and says "the public highways belong from side to side, and end to end, to the public," and "the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler"; and the abutting property owner has the right to the free and unobstructed passage to and from his property."

In *Lockwood v. Wabash R. Co.* 122 Mo. 86, 24 L. R. A. 516, 43 Am. St. Rep. 547, 26 S. W. 698, it was pointed out that § 2543, Rev. Stat. 1889, now § 1035, Rev. Stat. 1899, provides that, when a railroad builds its tracks in a public street by permission of the city authorities, it must restore the street to its former state, or to such a state as not necessarily to impair its usefulness, and that the mayor and assembly of the city are restricted in their grant by the Constitution and laws of the state. In that case, while the court felt constrained by the unbroken line of decisions to the effect that a city in this state may permit and authorize by ordinance the laying of a railroad track at grade along its streets, it held that this was not an unqualified power, and consequently ruled that, while the railroad was laid at grade, yet, owing to the narrowness of the street and

the width of the tracks, the use of the street by the railroad company amounted to a monopoly and exclusive use of the street by the company, to the denial of the rights of abutting owners, and was in effect a taking and damaging their property without compensation, and accordingly affirmed the decree of the circuit court perpetually restraining the company from operating its cars and locomotives on said street.

In *Knapp, Stout & Co. v. St. Louis Transfer R. Co.* 126 Mo. 37, 28 S. W. 627, the *Lockwood Case* was approved, and this court, after reviewing all the above cases, perpetually enjoined the defendant railroad company from operating a switch track in Hall street, in St. Louis, in front of plaintiff's property, and on what would have been the west sidewalk had one been constructed. Judge Black, speaking for this court, said: "Taking these cases all in all, it is very clear a municipal corporation has no power to grant to a railroad company such use of a street as will destroy its usefulness as a public thoroughfare, or destroy or unreasonably interfere with the right of an abutting property holder to access to and from his property."

The petition in the present case presents sharply, for the first time in this court, the rights of an abutting owner to compensation for the new and additional servitude to which a street in front of his property has been subjected by the construction and operation of an elevated railroad thereon, on a permanent structure, such as is described in plaintiff's petition. Starting with the unquestioned easement which the plaintiffs have to light and air and access to and from their buildings, and the adjudications of this court already reviewed, can it be said that the proposition is *stare decisis*, and plaintiffs are precluded from recovering compensation because the defendant's railroad is not a new or additional servitude? Our opinion is that there is nothing in our decisions up to this time that precludes a recovery, and the point is before us for adjudication in the light of reason and the analogies of the law.

The question is not a new one in our sister states. Thus, in New York the question arose in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146. The case is notable, not only on account of the question involved and the thoroughness with which it was considered, but the ability of the counsel who argued it. In that case the trial court found that the structure of the elevated railroad in that case would to some extent obscure the light of the abutting premises; that the passing trains would do this also, and would impair the usefulness of the plaintiff's premises; that the line of

columns abridges the sidewalks, and interferes with the street as a thoroughfare where such columns are located; that the fronts of the buildings will be exposed to observation from passengers in passing trains, and their privacy invaded; and these things will be of a continuing character. We quote this finding because it is practically the very things of which plaintiffs in this case complain. Danforth, J., who delivered the majority opinion, assumed as the basis of his opinion that the fee to the street was in the city, and thus in this respect the opinion is in harmony with our own on this subject, viz., that, irrespective of the title in the street, the abutter had the easement of air and light and access to and from the street, until by legal process and upon just compensation it was taken from him. While conceding that a railroad on grade was not a new servitude, the court said: "Can the street be lawfully appropriated to such a structure [as this] without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure without compensation its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage way at 15 feet above the bed of the street, one may be authorized which spans the entire street from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles." Tracy, J., concurring, further said: "The argument has been pressed upon our attention with great ability, that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure, or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the

fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken, and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street, and filling the roadway at 15 feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and, in respect to the land in question, violates the covenant of the city made with the plaintiff's grantor, and, in respect to lands acquired under the act of 1813, violates the trust for which such lands are held for public use." The conclusion was that an abutting owner had an easement in the street which constitutes private property of which he cannot be deprived without compensation.

Such a structure as that described in plaintiffs' petition is inconsistent with the use of Front street as a public street, and the plaintiff was entitled to an injunction until compensation had been paid therefor.

In *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 288, 10 N. E. 528, the court of appeals expressed the opinion that the defense had been conducted with a view to have the *Story Case* overruled or limited. The court reaffirmed the *Story Case*, and deduced therefrom the following principles: "We hold that the *Story Case* has definitely determined: First. That an elevated railroad in the streets of a city, operated by steam power, and constructed, as to form, equipments, and dimensions, like that described in the *Story Case*, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners. Second. That

abutters upon a public street . . . acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street, for the benefit of property situated thereon. Third. That the ownership of such easement is an interest in real estate constituting property within the meaning of that term as used in the Constitution of the state, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use. Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitute a taking of the easement, and its appropriation by a railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

In *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574, 4 Am. St. Rep. 396, 7 S. W. 579, this court expressly approved the decision in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146, saying "that a railroad company which had the right conferred on it to alter the grade of the street for the purpose of constructing its road would also be liable to an abutting property owner for damages to his property by reason of such alteration. In such case the privilege granted the railroad 'would be yoked with a liability.' That the owner of property abutting on a street has such an easement therein as would support an action for damages peculiar to him is sustained by the following cases: *Lackland v. North Missouri R. Co.* 31 Mo. 181; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146."

In *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520, while denying a remedy by injunction on the ground that the city of Chicago was the owner of the fee in its streets, and was empowered to permit the railroad company to build an elevated street railway therein, the decision throughout recognizes the right of an abutting owner to damages at law, and, because he had a complete legal remedy for the damages resulting to him as an abutting owner, relief in equity was denied.

In *Rude v. St. Louis*, 93 Mo. 413, 6 S. W. 258, this court, after reviewing the prior cases in this court on this question, said: "These cases recognize the right of a rail-

road company to lay down and use its track upon a street when that right is conferred upon it by the municipality, the municipality having the power delegated to it to grant that right; still the track must be laid upon the grade of the street, and the railroad so used as not to unreasonably deprive the owner of the property of the use of the street."

From these cases we deduce the following propositions: First. The owner of property abutting on a public street or highway in this state has an easement in such street of air, light, and access to and from his property by said street, whether the fee to the same is in the municipality or the abutting owners, and this easement is property of which he cannot be deprived without just compensation. Second. That the construction and maintenance of a steam or street railroad on the grade of such street in pursuance of municipal authority, the municipal corporation having power to grant it, is not a new or additional servitude on the land upon which the street is constructed, but falls within the use contemplated when the street was laid out or acquired by the public. *Porter v. North Missouri R. Co.* 33 Mo. 137. Third. That the power of a city or other municipal corporation in Missouri to authorize the construction of railroads in the public streets is "a modified right," a right hedged about with many qualifications; that it does not include the right to grant a railroad the exclusive use of the surface of a street, even when laid at grade. *Lockwood v. Wabash R. Co.* 122 Mo. 86, 24 L. R. A. 516, 43 Am. St. Rep. 547, 26 S. W. 698; *Sherlock v. Kansas City Belt R. Co.* 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; *Knapp, Stout & Co. v. St. Louis Transfer R. Co.* 126 Mo. 26, 28 S. W. 627; *Schulenburg & B. Lumber Co. v. St. Louis, K. & N. W. R. Co.* 129 Mo. 455, 31 S. W. 796; *Corby v. Chicago, R. I. & P. R. Co.* 150 Mo. 457, 52 S. W. 282. Neither can the municipal authorities grant to a railroad company such use of a street as will destroy or unreasonably interfere with the right of an abutting property holder to access to or egress from his property, or deprive him of his easement of light and air from the street. The street on which a railroad is constructed on the grade cannot be used for side tracks, the storing of cars, for water tanks, or like structures. *Lackland v. North Missouri R. Co.* 31 Mo. 180; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149; *Spencer v. Metropolitan Street R. Co.* 120 Mo. 154, 22 L. R. A. 668, 23 S. W. 126. Fourth. That the right to construct a railroad in a public street at grade, by authority of municipal grant, has been too long acquiesced in, and too many rights

have been vested on the faith of the decisions affirming such right, to question such a right to acquire on the faith of such adjudication. Fifth. That whether an elevated railroad constructed on permanent pillars or arches in the street so as to shut out the light and air of abutting owners and interfere with the free use of the street and their access to and from their premises is not a new and additional servitude, one not in the contemplation when the street was acquired or laid out, is an open question in this state, and one which we are at liberty to decide on reason and the analogies of the law.

On the part of plaintiff, we are not asked to reverse the unbroken line of decisions in this state which hold that a steam or street railroad constructed and maintained on the grade of a street, by authority of municipal authority duly delegated, is not a new and additional servitude; neither is it insisted that the municipal authority may not grant an elevated railroad the right to occupy a street, subject to its liability to pay abutting owners damages for injuries to their easement as abutters on such street. But they do contend that this court has not gone to the extent of holding that an elevated railroad, built on permanent structures in a public street which interfere with and deprive the owners of their easement of free access to and from buildings, and deprive them of light and air, is not an additional servitude, and one not contemplated when the street was established and laid out. They insist that the logic and reasoning of our decisions, on the contrary, lead to the conclusion that such structures as those described in their petition are inconsistent with the original dedication of the street, and are such an injury to the abutting property owners as entitles them to damages therefor. On the other hand, defendants assert that the construction of an elevated street or steam railroad on a street differs from one constructed on the grade of the street in degree only, and not in principle; that the principle upon which our decisions holding that a railroad built in the grade is not a new servitude is not that they do not in fact inconvenience and damage the abutting owners, and depreciate their property, but is that the city has the right to apply the street to any public service which will not destroy it as a highway or as a means of egress or ingress to and from the abutting property, and that all other resulting damages are only such as were contemplated in the original dedication of the highway, whether by donation, purchase, or condemnation; that a long freight train passing on grade might make as much noise, emit as much smoke, and raise as much dust as a train on an elevated road; and that an

elevated road does not destroy the street as much as a surface road.

That the expression that "a city may authorize a steam railroad to be built on the grade of a street" is not a careless one, we think, every decision of this court in which it is used will demonstrate. It is used advisedly, and in contradistinction to a road built on an embankment or in an excavation. As said by Judge Black, the right to build a steam railroad in a street is "hedged about with many qualifications," and one is "that, if built otherwise than on the grade, it is an unwarranted interference with a highway dedicated to the use of the traveling public, and with the rights of property owners abutting thereon."

In the *Story Case*, 90 N. Y. 122, 43 Am. Rep. 146, the distinction was made between a surface railroad and an elevated road on a public street. In the former, no part of the street was rendered impossible of passage with any vehicle or by any wayfarer or traveler. There was nothing exclusive in its use of the street. The rails, being on grade, did not obstruct the passage of any other vehicle along or across the tracks, and the delay by the passage of trains no greater than that occasioned by vehicles and carriages of private citizens, to which, of course, every person using the streets must submit; whereas an elevated railroad, built and constructed on a superstructure supported by heavy and permanent pillars of iron, stone, or brick, constitutes a permanent perversion of the use of the street, in that the space it occupies with the pillars is permanently diverted from use by the public, to which it was originally dedicated to the exclusive use of the railroad, and deprives the public of that free and unobstructed use of the street "from end to end" and "from side to side" to which it is entitled, and seriously impairs the easement of free and uninterrupted passage and circulation of light and air to which abutting owners are entitled.

The doctrine thus announced has been adhered to in all the subsequent cases in New York. *Lahr Case*, 104 N. Y. 288, 10 N. E. 528; *Kane Case*, 125 N. Y. 164, 11 L. R. A. 640, 26 N. E. 278.

In *Fobes Case*, 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919, Judge Peckham reviewed the *Story Case*, and pointed out that prior to the *Story Case* that court had held, as we have held in Missouri, that a surface railroad was not a new servitude, and that as to surface railroads the *Story Case* did not overrule or change the law in regard to railroads laid on the grade, but "embodied the application of what was regarded as well-established principles of law to a new combination of facts, such facts amounting,

as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant; and such permanent obstruction and total and exclusive use, it was further held, amounted to a taking of some portion of plaintiff's easement in the street for the purpose of furnishing light, air, and access to his adjoining lot. . . . The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from plaintiff some portion of the light and air which otherwise would have reached him, and, in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent, and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. Such a permanent, total, exclusive, and absolute appropriation of a portion of the street as this structure amounted to was held illegal and wholly beyond any legitimate or lawful use of a public street." He says, further on: "In the *Story Case* it was argued that no real distinction in principle existed between a steam surface and an elevated railroad resting on such a structure as was proved in that case." "This court, however, made the distinction," and held "that it was so real and tangible in fact as to call for a different judgment than would have been proper and appropriate in the case of the ordinary steam surface railroad." What was then said was reasserted in *Sperb v. Metropolitan Elev. R. Co.* 137 N. Y. 155, 20 L. R. A. 752, 32 N. E. 1050, and in which it was added: "The doctrine of the elevated railway cases has been of steady and consistent growth, since its rise in the decision of the *Story Case*." The last-mentioned case was decided by a divided court, but all of that court had subsequently concurred in that doctrine. When it is considered that the court of appeals of New York held, and still holds, just as this court has always held, that a surface railroad is not a new servitude on the street, but distinguishes an elevated from a surface railroad, its opinions are entitled to great consideration on a question which originated in that state, because the city of New York was the first to authorize an elevated road on its public streets. Upon fundamental principles as to the right of easement by the abutting property owners, the nature and purpose of a public street, and the permanent and obvious nature of the injury to the abutting property by the construction of

such a structure as plaintiffs describe in their petition, we think the distinction between the fitful, intermittent use of a street by a surface railroad, and the permanent exclusive use of the same by an elevated railroad, shutting out the air and light and interfering with that free access which every abutting owner has to and from the street, is too plain to be obscured or disregarded, and that it is *pro tanto* a taking of plaintiffs' easement within the meaning of our Constitution and laws, and entitles them to compensation therefor.

It is true that some very able courts and law writers, notably the supreme court of Minnesota in *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 78, 10 L. R. A. 268, 47 N. W. 455, and *Wood v. Railroad*, 45 Minn. 778 [1 Wood, Railroads, Minor's ed. p. 798?], find difficulty in reconciling the doctrine of the *Story Case* with the former decisions of the New York court as to surface railroads; but it seems to us that the essential difference is that urged by Judge Danforth, to wit, "the change of grade by permanent structures which result in the injury to or destruction of the abutting owner's easement." Were it a new question, we would be greatly inclined to say that a steam railroad emitting steam, smoke, and cinders in front of an abutter's property was a servitude never contemplated in the establishment of the street, but the rule to the contrary, as already said, has been too long maintained, and too many rights have been vested on the faith of it, for us now to disturb it, but there is no sound argument or reason, in our opinion, for extending it ~~one~~ whit further than we have heretofore gone.

Our conclusion is that the plaintiffs state a good cause of action, and one entitling them to damages, irrespective of §§ 6116 and 6117, Rev. Stat. 1899, which, in our opinion, did not change the law as to railroads constructed on the grade or surface of the street, as was ruled in *Ruckert v. Grand Ave. R. Co.* 163 Mo. 260, 63 S. W. 814, and *Nagel v. Lindell R. Co.* 167 Mo. 89, 66 S. W. 1090.

2. But conceding that plaintiffs had a cause of action, the question arises, on the face of the petition, whether that action is not barred by our statute of limitations. The defendant's structure is of a permanent character, and the injury to plaintiffs' property was susceptible of ascertainment when the said superstructure and railroad was completed in 1890, as alleged in the petition. In *Howard County v. Chicago & A. R. Co.* 130 Mo. 652, 32 S. W. 651, this court said: "While there is some conflict between the American cases on this subject, the rule, sustained by the great weight of authority,

seems to be that when by wrongful acts a permanent nuisance is created and the injury therefrom is direct, immediate, and complete, so that the damages can be immediately measured in a single action, the statute will begin to run from the erection of the nuisance. On the other hand, when the injury, as in this case, is not complete, so that the damages can be measured at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the seasons or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom;" citing cases; among others, *James v. Kansas*, 83 Mo. 567.

In *James v. Kansas*, 83 Mo. 567, it was said: "Where the damage is complete by the original act of trespass, the statute begins to run from that time." In this case the structure was permanent and complete in 1890. The theory of the plaintiffs is that they were entitled to damages for the construction of such permanent structure, and that theory is correct, and hence they were required to bring their action within five years after its completion. Their damages could have been estimated in one action at that time, and the five years' limitation must and does control. Rev. Stat. 1899, § 4273, cl. 4; *Smith v. Sedalia*, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907. It followed that the plaintiffs were barred when they commenced their action, and on this ground alone the judgment of the Circuit Court must be, and is, affirmed.

Robinson, Ch. J., and Brace, Burgess, and Fox, JJ., concur in toto.

Marshall, J., concurring:

I concur in the result, and am of opinion that all steam railroads on a public street are an additional servitude, and, when constructed on the grade, necessarily destroy the street for ordinary street purposes; but the elevated roads are not as injurious to abutting property as grade roads, as is shown by the grade road on Poplar street, and the elevated road on Front street, in St. Louis. I am further of opinion that, if the matter as to surface steam roads was not settled by the doctrine of *stare decisis*, they ought not to be allowed on the streets of a city.

Valliant, J., dissenting:

This court has, in numerous decisions, beginning in 1862 with *Porter v. North Missouri R. Co.* 33 Mo. 128, and ending in 1902 with *Nagel v. Lindell R. Co.* 167 Mo. 89, 64 L. R. A.

66 S. W. 1090, said that it was lawful for a city to authorize the construction and operation of a railroad in a street, and that such a use of the street was not a new servitude. Under these decisions, street railroads and steam railroads have been constructed and operated in the streets of all the cities in this state, and in many instances the value of property abutting the streets so used has been destroyed or greatly impaired, yet the court has said that the owner of the property has no remedy. An elevated railroad in a street may, in point of fact, according to the particular circumstances, be more or less destructive of the value of the property than a surface road, but in point of law there is no difference between the right to subject the street to the servitude of a railroad on the surface and to that of a railroad on an elevated structure. If the one is not a new servitude, the other is not; the principle is the same in both cases. If the court is now of the opinion that its former decisions were wrong, it would be better now, at this late date, to say so. But as long as we uphold our former decisions, we cannot, in my opinion, with consistency, say that an elevated railroad is a new servitude.

For this reason I am unable to concur in the first paragraph of the opinion in this case.

Petition for rehearing denied.

Sue L. LONGAN, *Resp't.*,

v.

S. A. WELTMER *et al.*, *Appts.*

(.....Mo.....)

1. To entitle one to recover damages for injuries negligently inflicted upon him by a magnetic healer from whom he is receiving treatment for disease he is not bound to show that the treatment received was not proper or usual in magnetic healing, but it is sufficient to show that it was not proper to be given in any case to one in plaintiff's condition at the time of receiving it.
2. To render a magnetic healer liable for injuries caused by magnetic treatment of a patient it is not necessary that he should be, or claim to be, a practicing physician; it is sufficient that he undertakes to cure plaintiff's malady, and in-

NOTE.—As to liability for negligence in applying X-ray, see, in this series, *Henslin v. Wheaton*, 64 L. R. A. 126.

As to degree of skill or care generally which physician or surgeon must exercise, see *Whitesell v. Hill*, 37 L. R. A. 830, and *note*; also *Burk v. Foster*, 59 L. R. A. 277.

licts injury by negligent or unskilful treatment.

3. Physicians not claiming or pretending to know anything about the practice of magnetic healing are competent to testify as to the propriety, in any case, of giving particular treatment to a patient in the condition of one to whom it was given by such healers.
4. To justify an inference that the amount of damages awarded by the jury was not the result of fair and unprejudiced consideration the facts in evidence should be such that no other conclusion can be entertained.
5. A party cannot complain of a general instruction on the measure of damages which is correct as far as it goes, unless he calls the court's attention to the matter, and requests a limitation of the general language used.
6. Where, in instructing upon the measure of damages, the court permits a recovery for certain injuries, "if any," and then adds, "together with" damages for other injuries, it is not necessary to repeat the words "if any," in case of every additional element of damages mentioned.
7. A hypothetical question may be predicated upon the testimony of plaintiff in an action to recover damages for malpractice.
8. An objection that a hypothetical question "is not a proper" one is too general to raise any question for a review by the appellate court.

(March 1, 1904.)

A PPEAL by defendants from a judgment of the Circuit Court for Henry County in favor of plaintiff in an action brought to recover damages for malpractice. *Affirmed.*

The facts are stated in the opinion.

Messrs. Harkless, O'Grady, & Cryslar, for appellants:

The instruction upon the measure of damages was clearly erroneous.

Goss v. Missouri P. R. Co. 50 Mo. App. 614; *McGowan v. St. Louis Ore. & Steel Co.* 109 Mo. 518, 19 S. W. 199; *Carpenter v. McDavitt*, 53 Mo. App. 403.

Instructions which assume disputed facts are erroneous.

Linn v. Massillon Bridge Co. 78 Mo. App. 116; *Robertson v. Drane*, 100 Mo. 273, 13 S. W. 405.

The plaintiff's instruction, to the effect that it was the duty of Krewsom to treat the defendant with ordinary skill, and such as an ordinary, skilful man would have used, was clearly erroneous.

Vanhoozer v. Berghoff, 90 Mo. 487, 3 S. W. 72.

The hypothetical questions to the physicians were erroneous.

State v. Meyers, 99 Mo. 121, 12 S. W. 516; 1 Greenl. Ev. § 440, p. 531. 64 L. R. A.

Messrs. H. H. Blanton, C. G. Burton, and **W. E. Owen**, for respondent:

Instruction No. 4, given for plaintiff on the measure of damages, is proper.

Young v. Webb City, 150 Mo. 338, 51 S. W. 709; *Browning v. Wabash Western R. Co.* 124 Mo. 55, 24 S. W. 731; *Haymaker v. Adams*, 61 Mo. App. 581; *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675.

Instruction No. 2, on the part of plaintiff, is more favorable to defendants than the requirement of the law.

14 Am. & Eng. Enc. Law, pp. 76-79, notes; *Musser v. Chase*, 29 Ohio St. 577; *Ruddock v. Love*, 4 Post. & F. 519; *Nelson v. Harrington*, 72 Wis. 591, 1 L. R. A. 719, 7 Am. St. Rep. 900, 40 N. W. 228; *Higgins v. McCabe*, 126 Mass. 13, 30 Am. Rep. 642.

The court properly permitted the hypothetical questions to the physicians to be asked and answered. The objections thereto were not sufficiently specific.

State v. Young, 153 Mo. 445, 55 S. W. 82; *Rosenheim v. America Ins. Co.* 33 Mo. 230; *State v. Wright*, 134 Mo. 417, 35 S. W. 1145; *State v. Yandle*, 166 Mo. 589, 66 S. W. 532; *Houland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983; *Crocker v. Carpenter*, 98 Cal. 421, 33 Pac. 271.

The questions do assume and state the material facts which the testimony of plaintiff tended to prove.

Underhill, Ev. ed. 1894, § 188, pp. 272, 273; *Russ v. Wabash Western R. Co.* 112 Mo. 45, 18 L. R. A. 823, 20 S. W. 472; *Fullerton v. Fordyce*, 144 Mo. 531, 44 S. W. 1053.

Said questions do not, as assumed by appellants, call for an opinion on the ultimate facts to be found by the jury.

Com. v. Mullins, 2 Allen, 295; *Luning v. State*, 2 Pinney (Wis.) 215, 52 Am. Dec. 153; *Hunt v. Lowell Gaslight Co.* 8 Allen, 160, 85 Am. Dec. 697.

Even though we concede, for the sake of the argument, that the objection is sufficiently specific, and that the questions do call for opinions on the ultimate facts to be found by the jury, still such an objection is not valid.

Benjamin v. Metropolitan Street R. Co. 133 Mo. 288, 34 S. W. 590; 12 Am. & Eng. Enc. Law, 2d ed. p. 424; *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. ed. 477; *Atchison, T. & S. F. R. Co. v. Myers*, 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788; *Johnson v. Moffett*, 19 Mo. App. 159; *Johnson v. Missouri P. R. Co.* 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Branson v. Turner*, 77 Mo. 489; *State v. Meyers*, 99 Mo. 121, 12 S. W.

516; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Goss v. Missouri P. R. Co.* 50 Mo. App. 614; *Woolwine v. Bick*, 39 Mo. App. 495; *Riley v. Sparks Bros.* 52 Mo. App. 572; *Eyerman v. Sheehan*, 52 Mo. 221; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *Hicks v. Citizens' R. Co.* 124 Mo. 115, 25 L. R. A. 508, 27 S. W. 542; *Powers v. Kansas City*, 56 Mo. App. 573; *Cooke v. Kansas City, Ft. S. & M. R. Co.* 57 Mo. App. 471.

Burgess, J., delivered the opinion of the court:

This is an action for damages for injuries alleged to have been sustained by plaintiff by reason of the negligent, careless, and unskilful treatment by one of the employees of defendants, "magnetic healers," under whose treatment she was at the time for some derangement of the stomach. The suit was brought in the circuit court of Vernon county, but thereafter, on the application of plaintiff, the venue was changed to the circuit court of Henry county, where, upon a trial before the court and a jury, plaintiff recovered a verdict and judgment in the sum of \$7,500, from which defendants, after unavailing motion for a new trial, appeal.

The salient facts of the case are about as follows: In January, 1899, plaintiff had malarial fever, in consequence of which she was confined to her bed for about eight weeks. About the 10th of March next thereafter, as she had not recovered from the effects of the fever, Dr. Henry Evans, of Sedalia, where she then was, was called to attend and treat her. She, at that time, was in a very weak and debilitated condition; had some stomach trouble. She remained at Sedalia, under the care and treatment of Dr. Henry Evans, until May 1st, when he advised her to go to Eldorado Springs for her health. She went to Eldorado Springs, and remained there for about three weeks, and returned to Sedalia, where she remained under the care of Dr. Evans until the middle or latter part of June, 1899. She went to Eldorado Springs again about the 15th or 20th of June, and remained there about one week. About July 1st she went to Nevada, Missouri, to be treated for stomach trouble, at the institution kept and maintained by the defendants. On her arrival at defendants' institution she was directed to one Mallott, an employee of defendants called the "diagnostician" of their institution, for diagnosis of her case. Mallott diagnosed her case, and assigned her to A. L. Krewsom for treatment. Krewsom gave plaintiff a treatment each day for about one week, when she went again to Eldorado Springs, where she remained about one week, and returned

to Nevada, and took treatments from Krewsom at said institution until August 13, 1899, when she took her last treatment from him. On the 13th day of August, 1899, A. L. Krewsom, while treating plaintiff at defendants' institution, placed her on her back on a padded table, and put one hand on her stomach and the other hand under her knees, and bent her so that her knees almost touched her breast. He then placed her on her stomach on the padded table, and put his left hand on the small of her back over her spine, and his right hand under her knees, and bent her legs up until she screamed with pain. These manipulations resulted in the following injuries: The ligaments connecting the backbone and hipbone were ruptured and torn, and the back and spine and pelvic organs were permanently injured. No one was present at the time these injuries were inflicted, excepting plaintiff and Mr. Krewsom, he having, a few days prior thereto, directed plaintiff's sister, who had been accompanying her to defendants' institution, to remain away, stating that the presence of a third person would probably prevent plaintiff taking the suggestions. From the moment of Mr. Krewsom's manipulations of plaintiff she suffered intensely and almost constantly for a number of weeks, with pains in the lower part of the back and through the hips, and finally her condition, on account of the injuries so inflicted, became such that it was necessary for her physician, Dr. Ammerman, to place her in a plaster of paris brace. Four days after she was injured by Krewsom she employed Dr. I. W. Ammerman, of Nevada, Missouri, to treat her, and on that day he made a cursory examination. Two or three days afterwards he made a thorough examination, and found her in the condition above described. On September 6, 1899, Drs. Priest and Buchanan, of Nevada, Missouri, in connection with Dr. Ammerman, made an examination of plaintiff, and on the 14th and 16th of September, 1899, Drs. Halley and Fulton, of Kansas City, Missouri, respectively, examined her while confined to her bed in Nevada, Missouri, with the results above set forth.

During the trial of the case all of the above physicians, as well as Drs. Evans, of Sedalia, and Gibbons and Shankland, of Clinton, made a thorough examination of plaintiff, and each of them testified to her injuries as above described, and that said injuries were permanent, and a majority of them testified that her life would be shortened thereby.

Plaintiff also read in evidence the deposition of Krewsom, wherein he admits that he manipulated plaintiff in the manner de-

scribed by her, and at one time she complained that he hurt her.

Defendants did not offer any testimony as to the nature and extent of plaintiff's injuries, but introduced certain witnesses, residents of Nevada, who testified that they saw plaintiff indulge in certain calisthenic exercises, and to having gone buggy riding with Dr. Ammerman on several occasions after the time of the alleged injuries, and other evidence which tended to show that she had sustained no injury by reason of her treatment by Krewsom.

Over the objection and exception of defendants the court instructed the jury as follows: "(1) The court instructs the jury that the defendants admit that at the time of the alleged injury to plaintiff they were copartners. (2) The court instructs the jury that if you shall believe from the evidence that A. L. Krewsom was the agent, servant, or employee of defendants, and that, as such agent, servant, or employee, said A. L. Krewsom rendered treatment to plaintiff, then it was his duty to treat her with ordinary care and skill; and if you shall believe from the evidence that while he was treating her, as the agent, servant, or employee of defendants, he violently bruised, bent, twisted, or wrenched plaintiff's back or spine, and that such treatment was improper, and not such as an ordinary, careful, and skilful man would have given the plaintiff under the circumstances, you will find that defendants' treatment of the plaintiff by said A. L. Krewsom, as their agent, servant, and employee, was careless, negligent, and unskilful. (3) The court instructs the jury that if you shall believe from the evidence that A. L. Krewsom, as the agent, servant, and employee of the defendants, did carelessly, negligently, and unskilfully treat plaintiff, as defined in the previous instructions, and that by such treatment he did hurt, bruise, and injure plaintiff in and upon her back, spine, or pelvic organs, your verdict must be for the plaintiff. (4) The court instructs the jury that if from the evidence they find for the plaintiff, then, in estimating her damages, they will take into consideration the physical injury inflicted, if any, whether temporary or permanent, and the bodily pain and mental anguish endured, if any, by the plaintiff by reason of such injury, if any; and in assessing her damages you shall assess them at such a sum as you shall believe from the evidence will reasonably compensate her for said injury received, together with the suffering caused by reason of said injury, together with such reasonable sum as you shall believe, from the evidence, she has paid out or has become liable for on account of medical attention and treatment for 64 L. R. A.

said injury, not to exceed in the aggregate \$50,000, as prayed for in plaintiff's petition.

(5) The court instructs the jury that under the law the plaintiff is not liable for any medical services rendered her by Drs. Halley and Fulton and Evans, and, in case you find for the plaintiff, in assessing damages you will not allow the plaintiff anything for such medical services."

The court, at the instance of the defendants, gave to the jury the following instructions, numbered 2, 3, and 5, as follows, to wit: "(2) The court instructs the jury that, although you may believe and find from the testimony that Mrs. Longan, the plaintiff, has received and suffered an injury to her back, yet, unless you can further find, from a greater weight of the testimony, that said injury was produced by treatment received from A. L. Krewsom on or about the 12th day of August, 1899, your verdict should be for the defendants. (3) The opinion of experts who have testified in this cause is testimony which the jury should consider and examine in connection with all the other testimony in this case, subject to the same rules of credit and disbelief as the testimony of other witnesses." "(5) The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony; and in determining such credibility and weight, they will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feeling toward the parties, the probabilities or improbabilities of his statements, as well as all the facts and circumstances given in evidence. In this connection you are further instructed that, if you believe that any witness had knowingly and wilfully sworn falsely to any material fact, that you are at liberty to recall all or any portion of such witness's testimony."

The defendants asked the court to give instructions 4, 8, and 9, which were refused, and defendants excepted. "(1) The court instructs the jury that, if you find from the testimony that a person receiving the injury to their back such as claimed by the plaintiff to have been received at the hands of A. L. Krewsom, an employee of the defendants, would suffer great pain immediately following such injury, and that such pain would be severe and continuous thereafter, and you further find from the testimony that after August 12, 1899, to and during the first few days in September thereafter, she did not suffer or complain of pain in her back, then your verdict must be for the defendants." "(4) The court instructs the jury that the burden of proof in this case is on the plaintiff to prove her case by a pre-

ponderance of the evidence, and, unless you find and believe from a preponderance of the evidence that plaintiff has sustained the injuries complained of, and that she received such injuries at the hands of A. L. Krewsom, you will find for defendants." "(8) The court instructs the jury that before they can find for the plaintiff in this case they must find and believe, from a preponderance of the evidence, that plaintiff has sustained the injuries complained of in her petition, and said injuries were sustained at the hands of said A. L. Krewsom. (9) The court instructs the jury that, although you may find from the testimony that the plaintiff has received and sustained an injury to her back, before you can find a verdict for the plaintiff you must further find, from a preponderance of the testimony, that said injury was caused by A. L. Krewsom on or about the 12th day of August, 1899, although you may not be able from the testimony to find what caused said injury."

The court refused to give said instructions, numbered 1 and 4, but modified the same, and gave them as modified, which said instructions, as modified by the court, are as follows: "(1) The court instructs the jury that, if you find from the testimony that a person receiving the injury to their back such as claimed by the plaintiff to have been received at the hands of A. L. Krewsom, an employee of the defendants, would suffer great pain immediately following such injury, and that such pain would be severe and continuous thereafter, and you further find from the testimony that after August 12, 1899, to and during the first few days of September thereafter, she did not suffer or complain of pain in her back, then this is a fact which you should take into consideration in determining the fact whether or not the injury claimed to have been received by plaintiff was received at the time in the manner and by the means as claimed by her." "(4) The court instructs the jury that the burden of proof in this case is on the plaintiff to prove her case by a preponderance of the evidence, and, unless you find and believe from a preponderance of the evidence that plaintiff has sustained the injuries complained of, and that she received such injuries at the hands of A. L. Krewsom, you will find for the defendants. By preponderance of evidence, as in this and other instructions herein used, is not meant the greater number of witnesses, but the greater weight and credibility of all the evidence and facts and circumstances in evidence."

Defendants contend that, as plaintiff's action is based solely upon the negligent treatment of her, in order to constitute unskillful L. R. A.

fulness it devolved upon her to show that the kind and manner of treatment adopted was not proper or usual in magnetic healing, and that, as she failed to do so, she was not entitled to recover. If this action was being prosecuted upon the theory that defendants were physicians, or that magnetic healing was one of the recognized profession, there would be more force in this position, but it is not, but upon the ground that they held themselves out as magnetic healers, claiming and pretending to heal and cure all mental and physical ailments and disease of the human mind and body through some power which they possessed peculiar to themselves. Nor was it necessary, in order to their liability for injuries sustained by plaintiff, that they should have been, or claimed to be, practising physicians; but if they undertook to cure plaintiff of her maladies, and by the negligent or unskillful treatment of her either by themselves or their employees, and by reason of such treatment, she sustained the injuries sued for, she was entitled to recover, just the same as she would be entitled to recover damages for the negligent or unskillful performance of any other kind of contract. It is a legal truism that any person who is legally responsible for his conduct is liable for all damages suffered by another which are the proximate result of negligence, carelessness, or want of ordinary care; and the reasons which prevail in such cases are much more cogent in the case of a person who deals with health and life, instead of property. In the case of *Nelson v. Harrington*, 72 Wis. 591, 1 L. R. A. 719, 7 Am. St. Rep. 900, 40 N. W. 228, it is said: "One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation. Failing in this, he must be held liable for any damages proximately caused by unskillful treatment of his patient. This is simply applying the rule of liability to which all persons are subject who hold themselves out, and accept employment, as experts in any profession, art, or trade. The theory upon which an expert practises his profession, art, or trade, the sources from whence he derived his knowledge of it, the tools and appliances he employs in the exercise of his calling, his methods of work, are not controlling considerations. The courts pass no judgment upon these matters. they look only to results. Thus a person may rely entirely upon his genius or normal intuitions for some line of mechanical work, and hold himself out as an expert, and accept employment therein, without previous training or practice. The law holds him responsible if he does his work unskillfully, although he does the best he can. He takes

the risk of the quality or accuracy of his genius or intuitions. On the same principle one who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition. If these move him so imperfectly or inaccurately that, although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences. The only difference in the two cases is, the mechanic acts under normal, and the physician acts under abnormal, influence or intuitions. The law does not concern itself with the quality of the mechanic's genius, or with the reality or nature of such alleged occult influence or intuition which controls the physician in his treatment of his patient. It only takes cognizance of the question. Did the practitioner or expert render the service he undertook in a reasonably skilful manner? That question, as applied to the defendants, the jury, upon sufficient proofs, have answered in the negative." While it is true that the physicians who testified on the part of plaintiff did not claim or pretend to know anything about the practice of magnetic healing, they were nevertheless competent, from education and experience, to testify whether the treatment which plaintiff underwent was proper in any case, and especially in her condition. Simply because a person claims or pretends to possess certain powers of healing peculiar to himself is no reason why other persons, who do not claim such powers, but who know from education and practice, are not competent to judge whether the treatment administered was negligently or carelessly done. Otherwise any nonprofessional person might undertake to treat a certain disorder, and—if defendants' position be correct in law, it matters not how carelessly or negligently performed—because, forsooth, no one could be found of the same pretensions to testify with respect to such treatment, the injured person would be without remedy. The contention is, we think, untenable.

It is said that the damages awarded by the jury were excessive and the result of prejudice, passion, and bias. There seems to be no way by which it can be proved that in making a large verdict the jurors were controlled by improper influences, and therefore it can only be inferred when the verdict is so out of line with reason and justice as to shock the conscience and to satisfy the un-

biased mind that it is not the result of fair and unprejudiced, consideration. To justify such an inference, the fact in evidence ought not to justify any other conclusion (*Hollenbeck v. Missouri P. R. Co.* 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448), and there is nothing disclosed by the record in this case which would justify us in holding that the verdict was not the result of fair and unbiased deliberation.

Defendants argue that instruction No. 4 given for plaintiff is erroneous, and to it is to be attributed the excessiveness of the verdict. This instruction is criticised upon the ground that it is so general and indefinite as to leave the jury a roving commission to do absolutely as they pleased in reference to the damages. No instruction was asked by defendants on the measure of damages. It requires but a casual reading of this instruction to show that it is not in accord with the rule announced in the case of *Carpenter v. McDavitt*, 53 Mo. App. 393, and kindred cases; but that case was overruled by the same court in the case of *Haymaker v. Adams*, 61 Mo. App. 581, and all other cases announcing the same rule were in effect overruled by the case of *Browning v. Wabash Western R. Co.* 124 Mo. 55, 24 S. W. 731, in which it is said: "The defendant asked no instruction on the measure of damages whatever. No attempt was made by it to point out the proper elements of damage in such cases, or to modify the general language of the instruction. The instruction is not erroneous in its general scope, and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations, in an instruction embodying its views. The court is not required, in a civil case, to instruct on all questions, whether suggested or not, and, as there is nothing in the amount of the verdict to indicate that the jury were actuated by any improper motive in their assessment, the general nature of the instruction is no ground for reversal." The instruction is good as far as it goes, and, if defendants desired to restrict plaintiff's right to recover to more limited bounds than were covered by the instruction, they should have asked an instruction to that effect. *Roberston v. Wabash R. Co.* 152 Mo. 383, 53 S. W. 1082; *Harmon v. Donohoe*, 153 Mo. 263, 54 S. W. 453; *Mattheus v. Missouri P. R. Co.* 142 Mo. 645, 44 S. W. 802. *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675, was an action for damages alleged to have been sustained by the malpractice of defendant, who was a physician, and *Browning v. Wabash Western R. Co.* 124 Mo. 55,

24 S. W. 731, with respect to the subject-matter now under consideration, was followed with approval.

It is also insisted that this instruction is vicious in that it assumed the existence of facts disputed, in saying that, "together with the suffering caused by reason of said injury, together with such reasonable sum," etc.; but it will be observed that before the use of the words complained of, and in the same instruction, there was submitted to the jury the same question in these words, "and the bodily pain and mental anguish endured, if any, by the plaintiff by reason of such injury, if any;" and it was wholly unnecessary to again add the words "if any" after the words "together with the suffering caused by reason of said injury." It cannot in fairness, we think, be said that the instruction is erroneous upon the ground urged against it, or that it was misleading in its character.

A number of physicians were introduced as experts on behalf of plaintiff, and among them Dr. Halley, of Kansas City.

He testified as follows:

Q. Where did you meet her?

A. Nevada, Missouri.

Q. State to the jury whether or not you made an examination of that lady on the 14th of September, 1899, and, if so, what you found as a result of your examination.

A. I examined her in Nevada and found some bruises, some contusions on her back down near the hips, extending up from the hips over the small of the back, some marks, the effusion of blood underneath the skin and into the tissues, close down over the median line. There was a small black spot still, the result of blood effused under the skin and into the tissues underneath. I found that part of the back very painful to pressure; also that she manifested pain on bending the body,—bending the limbs forward or backward; that on making a pressure over the discolored parts I found her suffering with pains in the knees and ankles and wrists and shoulders. She had some uterine trouble as well, but these were the principal things she complained of when I examined her.

Q. Describe to the jury, if you will, what peculiar parts of the back were injured.

A. Well, it was the lower part of the small of the back and the upper part of the hips, extending from about the middle line of the hips up to the middle or small of the back; and spots were perhaps 5 inches in length, and 2, or 2½ inches in width.

Q. How are the hipbone and backbone or sacrum there joined together.

A. They are joined by a tough, dense, and

tolerably hard substance called fibro-cartilage; it is the fibrous tissue with cartilage cells in it, which makes it very stiff and very strong.

Q. State to the jury if you know whether or not those ligaments or that cartilage were in any way affected by this injury.

A. On the left side the attachment of the sacrum to the hipbone was probably torn and the vertebræ or ligament of the vertebræ were also torn.

Q. The backbone?

A. That is, the lower spine between the first or second and third lumbar vertebra were evidently injured.

Q. State to the jury in what way the rupture or tearing of those ligaments would make itself manifest on the surface.

A. By black and blue places, and by the effusion of blood, the blood being extravasated.

Q. "Extravasated" means thrown out toward the surface.

A. Yes, sir; the blood vessels were torn, and the bleeding was into the tissues.

Q. State whether or not you have since that time examined this lady, and, if so, when and where.

A. I examined her this morning there at the hotel.

Q. Well, state to the jury what you found with reference to injuries now on her back or spine.

A. Well, I find that she is still suffering pain over the part where the black spot was when I examined her last September; that is, at the point where the hipbone joins the sacrum on the left side.

Q. That is, the backbone, the sacrum is—

A. A part of the backbone; yes, sir.

Q. Doctor, I will ask you this hypothetical question. Suppose that a lady twenty-five or twenty-six years of age has suffered a spell of malarial fever in Porto Rico, of about two months' duration, in which she was confined to her bed during that time, returned to this state in a weak, debilitated condition, incident to that fever, and is suffering from some derangement of the stomach in consequence of the fever, should be placed upon a padded table on her back, and a man should place his left hand over her stomach and his right hand or arms under her limbs or knees, and should bend her forward so that the knees should almost touch the breast, and should then turn the lady over on her face on this padded table, and place his left hand on the small of her back over her spine and his right hand under her knees, and violently bend the limbs and body upward, the lady never having suffered any injury to the back or spine or any com-

plaints whatever with her back previous to the placing on the table as I have explained, and that afterwards there should be injuries to the spine and backbone, and to the ligaments and cartilage connecting the hipbone and backbone, what would you say had produced those injuries? (Defendants object to the question for the reason it is incompetent, and not a proper hypothetical question, and not founded on the testimony. Objection overruled, and an exception taken.)

A. I would say it was caused by the manipulations.

Q. I will ask you to state to the jury whether or not, assuming the facts as I have stated them in the hypothetical question which I have just asked you, a treatment of that character for the debilitated condition of the stomach and derangement of the stomach or any womb trouble would be the proper treatment.

A. Such manipulations could have no beneficial effect in a remedial way in treating any of the diseased conditions that have been enumerated.

Q. That could have no beneficial effect? What other sort of an effect would it have, if any? I am asking you whether or not that was proper treatment, in your opinion.

A. No, it was certainly not; for all medical treatment or manipulations are supposed at least to be for the benefit of the individual, and for the purpose of effecting a cure, and this could not benefit an individual suffering with the conditions that have been enumerated.

Q. Doctor, from the examination that you have made of this lady, state what, in your opinion, will be the effect of these injuries on her health.

A. I think it will give her a weak back, a painful back, for the rest of her life. It is a year since I examined her, or nearly so, and she is still suffering with pain in that part of the back, and the repair of it should have been effected within a year; should have been so complete that if she was going to be entirely cured it would have been effected already.

Q. Doctor, state, in your opinion, what will be the result of these injuries on this lady's life as to duration of life?

A. I do not think that it will materially affect her life.

The hypothetical questions submitted to the experts were practically the same, varying only in phraseology, but defendants insist that error was committed in allowing them to be answered over their objections, and many suggestions are presented by this 64 L. R. A.

appeal why the judgment should be reversed for those reasons, but most of them are too technical to merit consideration. The plaintiff had the right to predicate a hypothetical question upon her own testimony, and, in so far as Dr. Halley is concerned, the question propounded to him was in accordance therewith, in so far as the injury to the back was concerned. It is not so, however, with respect to hypothetical questions propounded to other experts, but it does not appear from the record that there was any objection to any of these questions, except the general one, to wit, "for the reason it is not a proper hypothetical question," but this was entirely too general, and amounted to no objection at all. It has always been held by this court that, when an objection is made at the trial to the admission of evidence, the reason for the objection must be stated. *Rosenheim v. America Ins. Co.* 33 Mo. 230; *State v. Young*, 153 Mo. 445, 55 S. W. 82; *State v. Wright*, 134 Mo. 417, 35 S. W. 1145; *State v. Yandle*, 166 Mo. 589, 66 S. W. 532. In the case of *Houland v. Oakland Consol. Street R. Co.* 110 Cal. 513, 42 Pac. 983, it was held that an objection to a hypothetical question asked of a physician in the general form that it is "irrelevant, immaterial, and incompetent, and not a proper hypothetical question," is insufficient to call the court's attention to any particular objection to it. As was said in that case, "appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated." See also *Crocker v. Carpenter*, 96 Cal. 421, 33 Pac. 271. If the objection to the question had been pointed out, it is probable that it could have been obviated, and in fairness to plaintiff she should have been afforded an opportunity of doing so, had she so desired, and if necessary.

It is also insisted that the hypothetical questions were all improper for the reason that the experts were permitted by them to tell the jury that in their opinions the particular treatment produced the injury, thus usurping the province of the jury, whose duty it was to pass upon that question. But this objection cannot be considered by this court, for the reason before indicated in regard to the generality of the objection to its admission.

Finding no reversible error in the record, we affirm the judgment.

All concur.

MINNESOTA SUPREME COURT.

CROOKSTON WATERWORKS, POWER,
& LIGHT COMPANY, *Appt.*,

v.

Daniel E. SPRAGUE, *Respnt.*

(.....Minn.....)

¶1. Section 2385, Gen. Stat. 1894, declares that all rivers within the state, of sufficient size for floating logs, timber, and lumber, are public highways, so far as to prevent obstructions to the same for such purposes. By § 2386 riparian owners are authorized to construct dams across such streams, provided they are equipped with locks, sluiceways, or booms sufficient and so arranged as to permit such materials to pass through without unreasonable delay. *Held*, the right of the public to the use of streams for driving logs is not paramount and unqualified, but subject to the incidental delays and hindrances occasioned by dams, if the means of passage through or around them is reasonably sufficient for the purpose.

* Headnotes by LEWIS, J.

NOTE.—*Liability for injuries caused by attempted exercise of rights of navigation.*

- I. *General rights of navigator*, 193.
- II. *Must not exceed capacity of stream*, 194.
- III. *Excessive speed*, 195.
- IV. *Collision*, 195.
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- VI. *Injury to fishing rights*, 198.
- VII. *Floating logs*, 199.
- VIII. *Injury to banks*, 202.
- IX. *Contributory negligence*, 203.

I. *General rights of navigator.*

The right to use a navigable body of water for purposes of navigation is similar to the right to use the King's highway. It is one of the rights which citizens hold in common, and which cannot be taken from them except by authority of the government in the exercise of its sovereign power; and even then special injury must not be inflicted upon individuals. See note to *Hutton v. Webb* (N. C.) 59 L. R. A. 33. But, the right being a common one, each user must exercise it so as not to infringe upon the equal right of others; and he must remain within the right,—that is, he must not trespass upon private rights of riparian owners.

So far as is necessary, and so long as the interests of the general public are not impaired unreasonably, the owners of a tug may properly exercise their own judgment as to the size, arrangement, and management of the tow which they are attempting to take along a public navigable river. There is no law which limits the space a boat may occupy, or which prescribes how fast it may go, or how much swell it may cause, or how near it may pass to another boat. The rule of permission or restriction depends in each case upon the reasonableness of the thing done. A slow-sailing tow may not occupy unreasonably the entire channel of the river and thus impede its navigation by all other vessels. A leviathan may not rush through the

2. What constitutes a sufficient means of passage must depend upon the conditions of each particular case. A dam constructed with sufficient sluiceways to permit the free passage of logs, but which is not equipped with piling or piers to which sheer booms may be attached, or some other means provided by which the logs may be directed to the sluiceways, does not meet the requirements of the statute, and creates an unreasonable hindrance to the passage of logs at periods of high water, when it is difficult and impracticable to attach sheer booms, and guide the logs into the sluiceways, and keep them from running over the crest of the dam. *Held*, that, under the facts of this case, the owner of logs, who permitted the same to pass over the dam without guiding them through the sluiceways by means of sheer booms, and without taking out the sluice boards, was not responsible for damage to the dam occasioned thereby.

3. The facts found by the trial court are not inconsistent. They justify the judgment as ordered, and appellant is not entitled to judgment upon the facts found.

(February 11, 1904.)

water with a speed that will overwhelm in its surges all the craft ordinarily to be found on a river. The waters are open to all kinds of craft, large as well as small, and, while the rights of the smaller are to be carefully guarded, they are not to be made a pretense for excluding or preventing the practical use of larger or different vessels. The *Daniel Drew*, 13 Blatchf. 523, Fed. Cas. No. 3,565.

The navigator of a public river must conduct his craft with ordinary care and caution, and with the same circumspection, and in that careful, prudent manner, which would seem to be dictated by common sense, and with due regard to the rights, property, and lives of others. *Com. v. Bilderback*, 2 Pars. Sel. Eq. Cas. 447.

During the navigation of a public stream in a reasonable manner, no liability will be incurred when, notwithstanding the exercise of ordinary care, the navigation of the stream is necessarily and unavoidably impeded or obstructed temporarily. *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573.

One who unlawfully obstructs a stream by his boats is liable if he endangers another boat waiting to pass, and meanwhile endangered from a rising stream. *Scott v. Hunter*, 46 Pa. 192, 84 Am. Dec. 542; also cases collected in note to *Hutton v. Webb* (N. C.) 59 L. R. A. 33, II. b, 1.

The right of navigation, while paramount, is not exclusive, and cannot be exercised to the unnecessary or wanton destruction of ice fields, or so as to deprive riparian proprietors or the public of the use of the stream for legitimate purposes which will not unreasonably interfere with the right of navigation. *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

The launch of a newly built ship into the water of a crowded harbor is an event of such danger that the builder must be cautious to give ample warning to passing vessels. *Malster v. Humphreys*, 5 Hughes, 180, 2 Fed. 535.

A PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action brought to recover damages for injuries inflicted on plaintiff's dam by defendant's attempt to use a stream for running logs. *Reversed.*

The facts are stated in the opinions.

Messrs. Rome G. Brown and Charles S. Albert, for appellant:

It was not plaintiff's duty to provide sheer booms, and its failure to provide them was not negligence.

Even independent of the statute, the right of the riparian owner to construct, maintain, and operate dams upon the rivers of this state, both those that are technically navigable and those that are not, is firmly established.

No recovery can be had for injury to gas pipes laid in the bed of a navigable river by an anchor dragging thereon, which is prohibited by ordinance, as, if it be a proper act of navigation for vessels passing up and down a navigable river to drag their anchors on the bottom as incident to their sailing and towing them out of harbors or narrow streams, an ordinance of the city cannot prohibit it. *Milwaukee Gaslight Co. v. The Gamecock*, 23 Wis. 144, 99 Am. Dec. 138.

But if, with proper care and diligence, injury to a gas pipe laid in the bed of navigable waters could have been prevented after the dragging anchor of a passing vessel came in contact therewith, recovery may be had for damages occasioned thereby. *Ibid.*

II. Must not exceed capacity of stream.

The right to use a body of water for purposes of navigation is limited to its natural capacity or, in case it has been improved, to that imparted to it by the improvement.

But in an action against a person navigating a river for injury to oysters lying upon the bed of the river which were injured by the vessel grounding during low tide, it was held that one navigating a tidal river which is so shallow at certain states of the tide that vessels cannot float there is not required to reach his destination in a single tide; and a vessel which cannot so reach its destination may remain aground upon the bed of the stream until the tide again removes it. In determining this, the court says no authority directly in point was cited at the bar, nor have we been able to find any after considerable search; but, upon principle, the matter seems clear. It cannot be disputed that the channel of a public and navigable river is properly described as a common highway, although the analogy between it and a highway on land is not complete in all particulars; and there is no one circumstance which more decisively affixes upon the river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it. Now, if, in such rivers, it was to be held that the character did not extend higher up than the water sufficed to float vessels at all times, or was suspended during such periods of the tides as left the channel too shallow for that purpose, rights of the public, invaluable and immemorial in numerous rivers, would be abridged or rendered in many particu-

Brisbane v. St. Paul & S. C. R. Co. 23 Minn. 114; *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *State v. Minneapolis Mill Co.* 26 Minn. 229, 2 N. W. 839; *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 7 L. R. A. 722, 44 N. W. 1144; *Minnesota Loan & T. Co. v. St. Anthony Falls Water Power Co.* 82 Minn. 506, 85 N. W. 520; *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Lamprey v. Nelson*, 24 Minn. 304.

After the dam owner has provided sluiceways required by statute for the use of the log driver, then the right of neither the log driver nor the dam owner is paramount to the right of the other. Each is bound to the other simply by the rule of reasonable use.

lars vexatiously uncertain, and in many cases be rendered nearly, if not entirely, useless. To say that the river ceased to be navigable, ceased to be a highway, at the ebb or other states of the tide when such vessels could not float, is in effect to say that, except for a short portion of every month, they should not use the river at all for the purpose of trading with places. It is more reasonable to hold that the term "navigable" is a relative and comprehensive term, containing within itself such rights upon the waterway as, used with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along the channel. When will this be repugnant to any legal principle applicable to the case? It does not interfere with the rights of individuals on the banks, but stands on this broad ground. The right of soil in arms of the sea and public navigable rivers, which the Crown prima facie has independent of any ownership in the adjoining land, must in all cases be considered as subject to the public right of passage, however acquired; and any grantee of the Crown must take subject to such right. In this large sense, the river is navigable, and is a highway at all times, and at all states of the tide. *Colchester v. Brooke*, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090.

The mere fact that a vessel is grounded in a stream at low tide does not prove that such vessel is unfit, by reason of her draught of water, to navigate such stream, so as to render such grounding a public nuisance. *Cummins v. Spruance*, 4 Harr. (Del.) 315.

If a steamship, although touching bottom, is actually progressing through the soft mud by the force of its screw, it is not liable for breaking a telegraph cable unless the cable is shown to have been laid so as not to obstruct navigation. *Western U. Teleg. Co. v. Inman & I S. S. Co.* 8 C. C. A. 152, 20 U. S. App. 247, 59 Fed. 365, Affirming 43 Fed. 85.

If the stream is not navigable, a person who injures the dam of one owning the land on both sides of the stream by attempting to float logs in the stream will be liable for the injury. *Hoskins v. Archer*, 6 Ky. L. Rep. 671.

So, one seeking to justify the running of logs down a stream, which resulted in the breaking down of the dam of a riparian owner, must show that the stream was navigable, the declaration having alleged, in effect, that the stream would not have been navigable but for the said dam. *McLaren v. Buck*, 26 U. C. C. P. 539.

Brisbine v. St. Paul & S. C. R. Co. 23 Minn. 114; *Morrill v. St. Anthony Falls Water Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *Kretschmar v. Meekhan*, 74 Minn. 211, 77 N. W. 41.

The right of floatage in such cases is not paramount to the use of the stream and the water therein for machinery.

Middleton v. Flat River Boom Co. 27 Mich. 533.

The rights and duties of the dam owner and the log driver, the one to the other, are such that the dam owner is not bound to furnish sheer booms for the use of the log driver, to guide the logs to the sluices.

In this case the dam owner is hindered by the necessity of building a sluiceway in his dam for logs, and of allowing, when

necessary, sufficient water for the sluiceway to carry the logs through. The log driver, on the other hand, may be hindered by being compelled to guide his logs through the sluice, instead of letting them come free down the river as they would without the existence of the dam. It is the same principle as the common use of a street or highway, where each user gives way to the other to a certain degree, and no one has a paramount right against the other.

Dumont v. Kellogg, 29 Mich. 423, 18 Am. Rep. 102; *Cary v. Daniels*, 8 Met. 477, 41 Am. Dec. 532; *Hayes v. Waldron*, 44 N. H. 584, 84 Am. Dec. 105; *Baltimore v. Appold*, 42 Md. 456; *Platt v. Johnson*, 15 Johns. 217, 8 Am. Dec. 233; *Rindge v. Sargent*, 64 N. H. 294, 9 Atl. 723; *Red River Rolling*

While in a sense a man has a right to float logs when he chooses, he cannot make others suffer because of his unreasonable attempt to float logs which he ought to know will not float. *Bellows v. Crane Lumber Co.* 126 Mich. 476, 85 N. W. 1103.

The owner of a dam on a stream not navigable for boats, vessels, or rafts is entitled to damages for injuries to the dam by logs thrown into the stream and floated down over the dam. *Munson v. Hungerford*, 6 Barb. 265.

III. Excessive speed.

A steamer navigating a narrow channel must regulate its speed so as not to injure by its swell craft proceeding at slower speed through the same channel. *The C. H. Northam*, 13 Blatchf. 81, Fed. Cas. No. 2,690, Affirming 7 Ben. 249, Fed. Cas. No. 2,689.

In plying about rivers and harbors where their swell and suction are likely to produce injury to other craft following their legitimate business, steamers must give heed to their presence, and by slowing or stopping the engine temporarily, as the case may be, avoid doing them unnecessary damage. *The New York*, 34 Fed. 757; *De Lelle v. The Atalanta*, 34 Fed. 918.

A steamer will be liable for maintaining so great a speed that, by reason of the shallowness of the water, injury is caused to boats moored in her path. *The Drew*, 22 Fed. 852; *The Morrisania*, 13 Blatchf. 512, Fed. Cas. No. 9,838; *The Massachusetts*, 10 Ben. 177, Fed. Cas. No. 9,258.

A steamer running at such speed in a river as to cause a boat loading at a wharf to thump on the bottom because of her suction is liable for the injuries thereby caused. *Cornwall v. New York*, 38 Fed. 710.

But a charge that, in navigating rivers where small boats are accustomed to ply and may be reasonably expected, steamboats are bound to navigate with caution and at a rate of speed sufficiently slow to avoid danger from their attendant swells, is erroneous, since a steamboat is not bound, as matter of law, under all circumstances to proceed at such a rate of speed as to avoid the danger to other vessels from her swells. *Bell v. New Jersey S. B. Co.* 54 App. Div. 526, 86 N. Y. Supp. 1031.

A boat owner may recover for the destruction of his vessel while moored at a wharf, due to the negligence of a steamer which ran rapidly through a river filled with ice, causing large

pieces thereof to strike the boat so that it sank. *O'Reilly v. New Brunswick, A. & N. Y. S. B. Co.* 26 Misc. 195, 55 N. Y. Supp. 1133.

It is the duty of a steam vessel passing near docks or other mooring places to pass at such a rate of speed that no danger will be likely to result from her swells, provided she has timely notice of the presence of other vessels at such docks as are likely to be damaged from the suction or swells of the steamer. *Bell v. New Jersey, S. B. Co.* 54 App. Div. 526, 86 N. Y. Supp. 1031.

The destruction of an ice field formed within a boom by running a vessel rapidly up and down the river close to the boom, so that the swell thereby created broke up the ice field, gives a cause of action for damages within the boat and vessel law. *People's Ice Co. v. The Excelsior*, 43 Mich. 336, 5 N. W. 398.

A steamer in a navigable river, which has abundant room to proceed on her course without deviation or delay, and at such a distance from a boom maintained for the protection of an ice field that no injury will be done, is liable for passing and repassing so close to it that the resulting swell breaks up the field. *Id.* 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.

IV. Collision.

The general subject of collision between vessels for violation of the sailing rules or otherwise is not within the scope of this note, which deals only with the general duty of the navigator to avoid the infliction of injury by propelling his vessel against the property of others to its injury.

One navigating a stream is liable for running into a wharf and injuring it, although it constitutes a public nuisance, where he might have avoided it with reasonable convenience, as one cannot abate a public nuisance in a highway or navigable stream if he can avoid it with reasonable convenience by passing around it. *Dimes v. Petley*, 15 Q. B. 276, 19 L. J. Q. B. N. S. 449, 14 Jur. 1132.

A steamer is not liable for injury to a bridge, which is the result of mere accident and without fault on the part of the steamer. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 81 Fed. 761.

The fact that a boat has been driven against a bridge, and is pounding against it to its damage, is prima facie evidence of negligence on the part of its owner, and the onus is upon him to

Mills v. Wright, 30 Minn. 253, 44 Am. Rep. 194, 15 N. W. 167; *Pinney v. Luce*, 44 Minn. 369, 46 N. W. 561; Angell, Watercourses, 7th ed. § 541a.

The dam owner does not have to conduct the logs through the sluice any more than a bridge owner who has constructed a bridge across a navigable river has to take the boats from above or below and conduct them through and past the draws of the bridge.

Texas & P. R. Co. v. Interstate Transp. Co. 155 U. S. 585, 589, 39 L. ed. 271, 272, 15 Sup. Ct. Rep. 228; Angell, Watercourses, 7th ed. § 556; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Parks v. Morse*, 52 Me. 260.

The great law of reasonable use applies

in this case, because it is the law of reasonable use which was established to govern the relations as to the use by two different persons who had a right to use the same thing.

3 Kent, Com. 439; Washburn, Easements, § 11, p. 317; Angell, Watercourses, §§ 136, 137, 140b, 140d; *Red River Roller Mills v. Wright*, 30 Minn. 254, 44 Am. Rep. 194, 15 N. W. 167; Gould, Waters, §§ 95-97; Wood, Nuisances, § 481; *Page v. Mills Lacs Lumber Co.* 53 Minn. 492, 55 N. W. 608, 1119; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573; *Veazie v. Duinel*, 50 Me. 479; *Foster v. Searsport Spool & Block Co.* 79 Me. 508, 11 Atl. 273; *Pearson v. Rolfe*, 76 Me. 380; *Stratton v. Currier*, 81

prove the contrary. *Catarqui Bridge Co. v. Holcomb*, 21 U. C. Q. B. 273.

Where a pile had been placed in the soil of the bed of a stream more than twenty years since, in front of a wharf, by the owner of the wharf, and is essential to the enjoyment of the wharf, it will be presumed that it has not become a part of the soil, but that it was placed there by virtue of an easement granted by the Crown, or whoever had a right to grant it, to the occupiers of the adjoining wharf; and they have such possession of it as will entitle them to maintain an action against one negligently running into and injuring it. *Lancaster v. Eve*, 5 C. B. N. S. 717, 28 L. J. C. P. N. S. 255, 5 Jur. N. S. 683.

In *Submarine Teleg. Co. v. Dickson*, 15 C. B. N. S. 758, 33 L. J. C. P. N. S. 139, 10 Jur. N. S. 211, 10 L. T. N. S. 32, 12 Week. Rep. 384, an action against the owner of a vessel for negligently dragging its anchor so as to injure a telegraph cable, the court said: It would assume, for the purpose of the case, that the bottom of the sea may be used for lawful purposes, and we take it, inasmuch as there are acts of Parliament on the subject, that the placing of telegraph cables at the bottom of the sea is a known mode of using that part of the earth's surface. The plaintiff's property was therefore lawfully placed where it was.

A statute making the owner of vessels liable for injuries done by the vessels to a pier or dock was held in the *River Wear Comrs. v. Adamson*, L. R. 1 Q. B. Div. 546, 46 L. J. Q. B. N. S. 83, 24 Week. Rep. 872, 35 L. T. N. S. 118, as not applying to a case where the damage to a pier was occasioned by a vessel driven against it by the wind and waves at a time when the master and crew were compelled to escape from it. This was upon the ground that a statutory liability did not extend to and include injuries resulting from an act of God in the absence of express provision to that effect. The decision was affirmed in L. R. 2 App. Cas. 743, 37 L. T. N. S. 543, 47 L. J. Q. B. N. S. 193, 26 Week. Rep. 217, but upon different grounds. The lord chancellor based his decision upon the ground that the statute was one regulating the procedure and mode in which the right of action for damages already existing was to be asserted, and that it did not create any liability in addition to the common-law liability. Lord O'Hagan placed his decision upon the ground that the statute, as construed by him, only ap-

plied to cases in which someone was in charge of the ship, and that in this case, the ship having been abandoned, the statute did not apply.

But later it was held that under the harbors, docks, and piers clauses act of 1847, the owner of a vessel doing damage to the piers or works of a harbor must in all cases make good the damage, and is not relieved by the fact that the injury was the result of an inevitable accident caused by stress of weather. *Dennis v. Tovell*, L. R. 8 Q. B. 10, 42 L. J. M. C. N. S. 33, 27 L. T. N. S. 482, 21 Week. Rep. 170.

The owners of a vessel are liable for injuries to a sea wall caused by their vessel being driven by wind and tide against the wall after it had struck on a sand bank as the result of the negligence of the crew. *Romney Marsh v. Trinity House*, L. R. 7 Exch. 247, 41 L. J. Exch. N. S. 106, Affirming L. R. 5 Exch. 204, 30 L. J. Exch. N. S. 163, 22 L. T. N. S. 446, 18 Week. Rep. 569.

One who uses ordinary prudence, skill, and diligence to preserve his fleet by the use of lines during a sudden, extraordinary, and unexpected rise of the river is not liable for damages inflicted by a boat, which was carried away at night and collided with the boats of the libellant. *Neel v. Blythe*, 42 Fed. 457.

No liability attaches for damage to a bridge injured by a boat released from its moorings without the owner's negligence during an extraordinary condition of the water. *McCauley v. Logan*, 152 Pa. 202, 25 Atl. 499.

A boat fast in the ice, which floats against a bridge, may constitute a nuisance to the latter which the owner of the bridge is authorized to remove, using ordinary care to do no unnecessary injury, without liability for injury thereby done to the boat. *Mark v. Hudson River Bridge Co.* 108 N. Y. 28, 8 N. E. 243, Affirming on this point 56 How. Pr. 108.

Where a sand-boat company entered into an agreement with a bridge company constructing a bridge across a river that, if a space were left in the navigable portion, it would navigate its boats through that space, and did so for some weeks, but, subsequently, contrary to such agreement, ran a boat close to shore, thereby breaking guy ropes, which resulted in the fall of a derrick upon an employee of the bridge company, the sand-boat company may not, in an action by the employee to recover for his injuries, defend on the ground that the bridge company had not obtained permission from the

Me. 497, 3 L. R. A. 809, 17 Atl. 579; *Har-rington v. Edwards*, 17 Wis. 587, 84 Am. Dec. 768; *A. C. Conn. Co. v. Little Suamico Lumber Mfg. Co.* 74 Wis. 652, 43 N. W. 660; *Enos v. Hamilton*, 27 Wis. 256; *Mid-dleton v. Flat River Boom. Co.* 27 Mich. 533; *White River Log & Boom. Co. v. Nel-son*, 45 Mich. 578, 8 N. W. 587, 909; *Bu-chanan v. Grand River & G. Log Running Co.* 48 Mich. 364, 12 N. W. 490; *Pratt v. Brown*, 106 Mich. 628, 64 N. W. 583; *Morgan v. King*, 18 Barb. 277; *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621.

Even in cases involving merely the bare rights of riparian owners who have not constructed dams, and log drivers, the re-spective rights of the two conflicting inter-

ests in the river are common, and, although the log driver's rights in such cases are in one sense of the word "paramount," still the law of reasonable use governs.

Doucette v. Little Falls Improv. & Nav. Co. 71 Minn. 206, 73 N. W. 847; *Coyne v. Mississippi & R. River Boom. Co.* 72 Minn. 533, 41 L. R. A. 494, 71 Am. St. Rep. 508, 75 N. W. 748; *Reeves v. Backus-Brooks Co.* 83 Minn. 339, 86 N. W. 337; *Woodbury v. Day*, 24 Minn. 463; *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Anderson v. Munch*, 29 Minn. 414, 13 N. W. 192.

Messrs. Koon, Whelan, & Bennett, for respondent:

Appellant's failure to equip its dam with means and appliances to guide logs into the sluiceways, and to open and furnish ap-

Secretary of War to construct the bridge, as provided by statute. *Stewart-Peck Sand Co. v. Reyber* (Kan.) 71 Pac. 242.

There is no liability for running upon a wreck sunk in the channel of a river unless its presence is plainly marked so as to warn approaching vessels of danger. *The Fred. Schlesinger*, 71 Fed. 747.

Care must be taken, in moving about harbors and other crowded places, to avoid injury to vessels properly moored. *The Martino Cilento*, 22 Fed. 859.

As to obstruction of navigation by mooring which will place the moored vessel in fault, see *note* to *Hutton v. Webb* (N. C.) 59 L. R. A. 33.

A vessel improperly moored cannot throw the entire blame on the moving vessel. *The Cani-ma*, 17 Fed. 271; *Shields v. New York*, 18 Fed. 748; *The Baltic*, 2 Ben. 452, Fed. Cas. No. 823; *The Cornwall*, 8 Ben. 212, Fed. Cas. No. 3,248.

V. Mooring.

A steamer must, in general, avoid a boat at anchor, even though the anchorage be in the line of navigation. *Knowlton v. Sanford*, 32 Me. 149, 52 Am. Dec. 649.

The general question of the liability arising out of collision between vessels is not included in this note.

The master of a vessel is not guilty of negligence in mooring the vessel at a buoy in a port without examining it for latent defects, where the mooring of ships to the buoy was sanctioned by the authorities of the port, who treated it as a proper and sufficient mooring place. *Doward v. Lindsay*, L. R. 5 P. C. 338.

Refusal of the owners of a vessel to shear it off with spars, as requested to do, renders them liable for damages to a hulk moored alongside, and which was injured and sunk by such vessel. *Vallette v. Patten*, 9 Rob. (La.) 367.

One is not bound, before casting an anchor on the high seas, to inquire whether there is a telegraph cable at the bottom which may be injured by the exercise of his natural right, wherever the safety or convenience of the ship requires it, although he will be liable if he does it in a negligent manner. *Submarine Telegr. Co. v. Dickson*, 15 C. B. N. S. 759, 33 L. J. C. P. N. S. 139, 10 Jur. N. S. 211, 10 L. T. N. S. 32, 12 Week. Rep. 384.

Where the anchor of a ship becomes entangled in a telegraph cable lying on the bottom of the sea, the ship is liable if the crew cut 64 L. R. A.

the cable when, by the exercise of ordinary nautical skill, they might free it without cutting it. *The Clara Killam*, L. R. 3 Adm. 161, 39 L. J. Adm. N. S. 50, 23 L. T. N. S. 27, 19 Week. Rep. 25.

A vessel anchored about a mile from shore on a calm, clear night, awaiting the arrival of a tug in the morning, is liable, on the ground of wilful injury or culpable negligence, for cutting a telegraph cable which had caught fast to its anchor, under a statute providing that a cable shall be cut only when necessary to save life, limb, or a vessel, and in view of art. 7 of the treaty of 1884, providing for the remuneration of vessel owners who have sacrificed an anchor to avoid injury to a cable. *The William H. Bailey*, 100 Fed. 115.

A telegraph company acting under a null and void charter cannot recover damages from the owner of a vessel, the anchor of which fouled and brought up such company's cable, which one of the crew severed. *Doboy & U. I. Teleg. Co. v. De Magathias*, 25 Fed. 697.

If the injury to the cable is caused by a peril of the sea, the vessel is not liable. *The Carl Frederick*, 33 Fed. 589.

Navigators of a river have the right to land at such wharves as suit their convenience; and if, in so doing, their boat overlaps an adjoining wharf for a portion of its length, they are but in the exercise of a legal right, and are not responsible for any consequential damages which such adjoining wharf owner may sustain by other boats being thereby prevented from landing at his wharf; provided that, in thus exercising their right, they use due care, skill, and despatch, and subject such wharf owner to as little inconvenience as possible, consistently with the exercise of their own rights. *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302.

One navigating a river and landing at a public wharf with his vessel in the regular course of his business is not guilty of a trespass if his boat overlaps an adjoining wharf without touching it, and will not be liable for damages occasioned by his boat preventing other boats from landing at such wharf, or for injury to the wharf, if there is no want of skill and care on the part of the navigator. *Ibid.*

Although a wharf boat is entitled to the same immunity from obstruction as the shore. *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644.

A vessel owner who is obstructed in the use

pliances for opening the same, will bar its recovery herein.

The primary right was in the respondent, as one of the individuals composing the public, to use the waters for navigation. That right could not be taken away, impaired, or limited, without authority of legislative power.

16 Am. & Eng. Enc. Law, p. 242; Gould, Waters, § 107; *Arundel v. McCulloch*, 10 Mass. 70; *Moor v. Veazie*, 32 Me. 343, 52 Am. Rep. 655; *Pearson v. Rolfe*, 76 Me. 380; *Knox v. Chaloner*, 42 Me. 150; *Dwinel v. Barnard*, 28 Me. 554, 48 Am. Dec. 507; *Brown v. Chadbourne*, 31 Me. 19, 50 Am. Dec. 641; Angell, Watercourses, § 554, note 2; *Page v. Mille Lacs Lumber Co.* 53 Minn. 495, 55 N. W. 608, 1119; *Gniadok v. North-*

western Improv. & Boom Co. 73 Minn. 87, 75 N. W. 894; *Re Minnetonka Lake Improvement*, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295.

Appellant, being the owner of the soil over which said non-navigable stream flowed, had the right, at common law, to build a dam across it, provided it did not interfere with the use of the stream for floating the logs of respondent.

Gould, Waters, § 110; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; *Knox v. Chaloner*, 42 Me. 150.

To guard against such interference the common law imposed upon appellant the absolute duty to provide a suitable, convenient, and safe passage through or by its dam for respondent's logs.

of a particular wharf by another in the reasonable exercise of the public right of navigation suffers *damnum abaque injuria*, unless some private right is shown to have been injured. *Hall v. Ewart*, 33 U. C. Q. B. 491.

A steamboat when mooring in a stream is not liable for injuries thereby caused by its smoke to buildings on shore. *Hodgens v. Pim*, 2 Hud. & B. 459.

A hulk so moored as to obstruct the bank of a river and interfere with its public use cannot be abated by a private person as a nuisance by destroying it without the authority of law. *Vallette v. Patten*, 9 Rob. (La.) 367.

VI. Injury to fishing rights.

Since the manner of exercising the right to fish in navigable waters is such that a temporary suspension of it will not ordinarily cause preceptible loss, it is required to give way before the right of navigation, especially in view of the fact that, if it were regarded as a permanent paramount right, it would amount to an obstruction of the right of navigation, and would, therefore, be unlawful. But the navigation right must not be exercised arbitrarily so as to cause unnecessary injury to the fishing rights.

A boat on a navigable stream has a right to "take her course" and to go to the bank, when and where it is necessary to do so, doing no unnecessary damage, and acting without wantonness or malice, and is not obliged to stop or go out of her way or wait upon the movements of those who are managing a fishing seine or net, as the right of fishery is subordinate to that of navigation, and enjoyed by the suzerainty of the sovereign, and not as of right conferred by grant. *Lewis v. Keeling*, 46 N. C. (1 Jones L.) 299.

A seine placed in the regular course of navigation and in such part of a channel that, if a steamship had attempted to avoid it she would have been in danger of grounding, is an obstruction to navigation, and the owners of the seine cannot recover damages for injury to it by a passing vessel, or for loss of the fish secured in it at the time. *The City of Baltimore*, 5 Ben. 474, Fed. Cas. No. 2,744.

The right of fishery on a navigable river is subject to the right of the public to use the river for all purposes of navigation, and a ship interfering with the right of fishery in mooring or unloading its cargo is not liable to the owner 64 L. R. A.

of the fishery right unless he abuses his right. Anonymous, 1 Campb. 517, note. Wood, B., stated that the only case he could remember of the kind was where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recovered.

But, while the right of navigation is paramount, it is not exclusive, so as to excuse from liability the owner of a steam tug and barge which damaged fishing nets placed outside the regular channel of navigation, and visible at a considerable distance before reaching them. *Hopkins v. Norfolk & S. R. Co.* 131 N. C. 463, 42 S. E. 902.

When a vessel owner on a public river is warned of his approach toward the net of a fisherman, he is liable for damage resulting from failure to change his course only if he can do so without prejudice to the reasonable prosecution of his voyage. *Cobb v. Bennett*, 75 Pa. 326, 15 Am. Rep. 732.

The owner of a tug is liable for damages to a fish net, caused by running through it, where he negligently failed to see and avoid such net when it could have been avoided without detriment to the prosecution of the voyage, although the right of navigation is paramount to that of fishing, and such act was not maliciously or wantonly done. *Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 46 N. W. 1045.

While the right of navigation is paramount to the right of fishing on a river where the tide ebbs and flows, it is to be exercised fairly and with due regard to the subordinate right; and the master of a vessel who designedly and wantonly injures the property of, and interferes with, a fisherman, is liable in damages. *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

One who knowingly and without necessity or any reasonable commercial purpose anchors his vessel within the limits of a fishery so as to interrupt the same, or remains therein under such conditions, is liable to the owner of the fishery for damages. *Mason v. Mansfield*, 4 Cranch C. C. 580, Fed. Cas. No. 9,243.

The master of a vessel is not liable for obstructing a fishery, where he anchored his vessel in the channel for the purpose of taking in the residue of his cargo, and although he did not immediately depart when required to do so, when his conduct is not attributable to malice,

Gould, Waters, § 110; *Veazie v. Duinel*, 50 Me. 479; *Parks v. Morse*, 52 Me. 260; *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561; *Knoæ v. Chaloner*, 42 Me. 150.

Appellant's failure to equip its dam with sheer booms was necessarily a proximate cause of the injury complained of to the dam; and its own breach of duty to respondent, or negligence, will bar its recovery in this action.

St. Cloud Water-Power & Mill Co. v. Mississippi & R. River Boom Co. 43 Minn. 380, 45 N. W. 714; *Miller v. Sherry*, 65 Wis. 129, 26 N. W. 612; *Lilley v. Fletcher*, 81 Ala. 234, 1 So. 273; *Huff v. Kentucky Lumber Co.* 20 Ky. L. Rep. 39, 45 S. W. 84; *Newbold v. Mead*, 57 Pa. 487; *Gates v.*

Northern P. R. Co. 64 Wis. 64, 24 N. W. 494.

The stream was public and navigable generally at the site of the dam, which was a public nuisance. Said stream is a navigable water of the United States.

The Montello, 20 Wall. 430, 439, 22 L. ed. 391, 394; *Miller v. New York*, 109 U. S. 385, 395, 27 L. ed. 971, 975, 3 Sup. Ct. Rep. 228; *Escañaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; Gould, Waters, § 34.

Rivers are navigable for all purposes if capable of being used for the purposes of commerce, no matter in what mode the commerce may be conducted.

and he removed his vessel as soon as wind, weather, and tide would permit. *Ibid.*

One who anchors his boat to the nuisance of those engaged in a fishery in public waters cannot be forced to desist by one who desires to exercise the public right of fishery, although such nuisance is wilfully created for the hindrance of the particular person seeking its abatement. *Day v. Day*, 4 Md. 262.

The measure of damages for negligent injury to a fishing net by a tug is the value of the use of the net during the time the owners were necessarily deprived of its use. *Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 46 N. W. 1045.

A vessel injuring oysters placed upon the bed of a navigable stream is not justified upon the ground that they constituted an obstruction to navigation, unless it appears that the vessel could not with due care and skill have prevented the injury, as one cannot abate a public nuisance who suffers no special inconvenience therefrom. *Colchester v. Brooke*, 7 Q. B. 339, 15 L. J. Q. B. N. S. 59, 9 Jur. 1090.

Fishermen employed by the owner of a fishery, and compensated by a share of the spoil, are not proper parties to such owner's action against the master of a vessel for destroying the nets and interfering with the fishing rights, and have no interest in the damages recovered. *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

VII. Floating logs.

Many of the injuries which have been caused by attempted navigation have occurred through the floating of logs in the stream. On the general question of the right to use the stream for that purpose, and of the liability for injuries caused by the exercise of that right, attention is directed to the *note* to *Coyne v. Mississippi & R. River Boom Co.* (Minn.) 41 L. R. A. 494.

In addition to the cases there cited, it may be stated that, in the presence of concurrent rights, the one to float timber and the other, as a mill and landowner, to have his property protected from unnecessary and damaging displacement of water and obstructions of floating timber, the former is bound to use ordinary care in conducting his business that damage by him be averted from the latter's property. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. 374.

The same degree of care not to affect the rights of others will be required from one exercising the public right of navigation in a river capable of such use, to float logs on a large scale, as from an individual floating only a small number of logs. *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171.

The right to run rafts in navigable waters must be exercised with due regard to the rights of others and to the general usages and customs of navigation and commerce. The proprietor of a raft while so exercising his rights is entitled to claim from others due observance of the fundamental principle of navigation that the craft having the best facilities for its own management is charged with the corresponding duty to employ those facilities so as to avoid collision and injury. *The Athabasca*, 45 Fed. 651.

The right of passage on a navigable stream is a common and paramount one, but must be exercised with due regard for the rights of riparian owners and with ordinary care and skill. Floating logs may cause damage to the riparian owner, but against this the navigator does not insure; he is only obliged to drive the logs in an ordinarily careful and prudent manner. *Coyne v. Mississippi & R. River Boom Co.* 72 Minn. 533, 41 L. R. A. 494, 75 N. W. 748.

The gist of an action for injury from the alleged improper use of a floatable stream is negligence. *Hunter v. Grande Ronde Lumber Co.* 39 Or. 448, 65 Pac. 598.

Though a stream is a highway for the purpose of floating logs, persons so using it have no right to store water and then suddenly discharge the accumulation so as to increase the natural volume of the stream and overflow or wash away the adjacent banks; such erosion is in the nature of a trespass for which the property owner is entitled to recover damages. *Brewster v. J. & J. Rogers Co.* 169 N. Y. 73, 58 L. R. A. 495, 62 N. E. 164.

An accumulation of the waters of a navigable stream in a splash dam, constructed by a lumber company for the purpose of floating its logs down such stream, and the sudden tearing away of the dam, thereby releasing the accumulated water and causing it to rush down the stream carrying the logs with it, are not a lawful use of such stream for the purposes of navigation; and the riparian owners below, whose lands are damaged by the overflow caused by such floods and by the depositing of logs thereon, may recover the damages sus-

The Montello, 20 Wall. 430, 441, 22 L. ed. 391, 394; Gould, Waters, § 110.

The test of navigability is not uninterrupted use, or whether navigation is difficult, or unprofitable by reason of railroad competition.

Gould, Waters, §§ 108, 109; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, 20 Pac. 831; Angell, Watercourses, § 537; *Little Rock, M. River & T. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392, 25 Am. St. Rep. 848, 10 S. E. 60; *The Montello*, 20 Wall. 430, 441, 443, 22 L. ed. 391, 394, 395.

No length of time can confer a prescriptive right to maintain or continue a mill-

dam or other obstruction in a public stream.

Olive v. State, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653; Angell, Watercourses, § 563; Gould, Waters, § 121; *Cook v. Kendall*, 13 Minn. 324, Gil. 297; *Thornton v. Webb*, 13 Minn. 498, Gil. 457.

The true test of navigability is past or present capability of use of a stream, in its natural condition, by the public for purposes of transportation and commerce.

The Montello, 20 Wall. 430, 439, 441, 22 L. ed. 391, 393; Gould, Waters, § 54; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Walker v. Allen*, 72 Ala. 456; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; Angell, Watercourses, § 544, note 2; *Broad-*

dam or other obstruction in a public stream.

tained thereby. *Kentucky Lumber Co. v. Miracle*, 101 Ky. 364, 41 S. W. 25.

A person owning a mill site cannot be deprived of its use by the wrongful acts of mill owners; nor does the fact that he straightened the channel above his mill at their expense authorize them to fill the stream with logs beyond its fair capacity, and to such an extent as to endanger the mill. *Koopman v. Blodgett*, 70 Mich. 610, 38 N. W. 649.

Where the construction and operation of a splash dam have injured the property of persons situated on the stream below, a cause of action exists therefor. *Ford Lumber & Mfg. Co. v. Clark*, 24 Ky. L. Rep. 318, 68 S. W. 443.

But a company engaged in running logs, and which maintains a dam for flooding, is not liable for damages caused by the floods of other persons who maintain dams on the stream or its tributaries above the property flooded. *Bauman v. Pere Marquette Boom Co.* 66 Mich. 544, 33 N. W. 538.

One who wilfully lets loose logs in a navigable stream, whereby a bridge is injured, is liable for the damage done. *Cue v. Breeland*, 78 Miss. 864, 29 So. 850.

Persons attempting to use a stream for floating logs are liable for injuries to a milldam the right to maintain which has been acquired by use for more than fifty years and originally by condemnation proceedings under the county court, if caused by their negligence, either in not securing their logs until a time when they can be safely turned adrift, or in the manner in which they are sent over the dam; and in such case they are not relieved from responsibility because such stream is a navigable one. *James v. Carter*, 96 Ky. 378, 29 S. W. 19.

That a log owner employs sufficient men, and uses due diligence, to keep the river clear, does not absolve him from the statutory liability to other log owners for an obstruction of the stream, where he improperly attempts to flow logs that should be expected to sink, and which make it impossible for anyone to keep the river clear. *Bellows v. Crane Lumber Co.* 126 Mich. 476, 85 N. W. 1108.

It seems that, where a dam is constructed in a floatable stream without authority of the county court, one exercising the right of floatage cannot wilfully or negligently injure the dam without being liable to the dam owner. *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 28 L. R. A. 674, 19 S. E. 521.

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A log owner cannot be excused for destroying a bridge over the stream, unless that act results while in the use of due and reasonable care and diligence in the course of navigation, as a bridge is not necessarily a nuisance. *Thurlow Twp. v. Bogart*, 15 U. C. C. P. 9.

A log owner may adopt reasonable means for getting his logs past a dam erected on a floatable stream by a person denying the public's easement, without being liable for the damages caused thereby. In this case the removal of a portion of the dam was held reasonable. *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641.

The use of a river as a highway for the purpose of conveying logs and lumber to market is a right common to all subject to Federal control, or, in the absence of such legislation, to state regulation; but this common right gives no immunity to individuals for injuries committed while using it. *United States v. Mississippi & R. River Boom Co.* 1 McCrary, 601, 3 Fed. 548.

A boom company accustomed to run its logs over a falls will be enjoined from doing so at the suit of the government, where the exercise of such right injures improvements made under the authority of Congress in the interests of commerce; and the company will be required to guide them into a sluiceway provided for their passage. *Ibid.*

While the fact that a mill has long stood idle is not a sufficient ground for denying an injunction to restrain a boom company from so using the stream as to endanger the property and prevent its use, it affords a reason why the court should be cautious in awarding an injunction, since it increases the difficulty in laying down rules to govern the conduct of the parties when the mill shall be put in operation. *Buchanan v. Grand River & G. Log Running Co.* 48 Mich. 364, 12 N. W. 490.

One using a public stream for floating his rafts has a right, in the use of reasonable care and with no unnecessary damage, to effect a passage therefor through the dam and obstructions placed in the river by a mill owner who has not provided and maintained a suitable way. *Dwinnel v. Veazie*, 44 Me. 167, 69 Am. Dec. 94.

While temporary delays and rests may be justifiable in the driving of logs if not unreasonable in time or place, when parties deliberately, and without compulsion by nature, select

nas v. Baker, 94 N. C. 675, 55 Am. Rep. 633; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Moore v. Sanborne*, 2 Mich. 520, 59 Am. Dec. 203; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Ingram v. Police Jury*, 20 La. Ann. 226; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653.

Said stream being navigable generally, statutory authority was necessary to authorize the erection and maintenance of said dam, and in the absence of such authority it became a public nuisance.

Gniadck v. Northwestern Improv. & Boom Co. 73 Minn. 89, 75 N. W. 894; *Re Minne-*

tonka Lake Improvement, 56 Minn. 513, 45 Am. St. Rep. 494, 58 N. W. 295; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59, Gil. 59, 7 Wall. 272, 19 L. ed. 74; *St. Paul, S. & T. F. R. Co. v. First Div. of St. Paul & P. R. Co.* 26 Minn. 31, 49 N. W. 303; *Everson v. Waseca*, 44 Minn. 247, 46 N. W. 405; *Wait v. May*, 48 Minn. 453, 51 N. W. 471; *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534, 11 N. W. 114; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *State v. Minneapolis Mill Co.* 26 Minn. 229, 2 N. W. 839; 4 Am. & Eng. Enc. Law, pp. 974, 975; *Veazie v. Dwinell*, 50 Me. 479; *Know v. Chaloner*, 42 Me. 150; *Williams v. Wilcox*, 8 Ad. & El. 314; *Newark Pl. Road & Ferry Co. v. Elmer*, 9 N. J. Eq.

a particular portion of a river as a place for a season's storage of their logs, and thus completely block another's entrance into the common highway, they exceed their right, and are liable for damages caused thereby. *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270.

One engaged in floating logs is liable for withholding, of its own volition, from another log owner below, the natural flow of the stream by the use of his dam. *O'Brien v. Northwestern Improv. & Boom Co.* 82 Minn. 136, 84 N. W. 735.

Log drivers are not liable to the owners of a tug for the obstruction of a navigable stream, where their logs are detained by the logs of others in the river below them, and they remove them as soon as they reasonably can. *Gifford v. McArthur*, 55 Mich. 535, 22 N. W. 28.

The use of storage dams by a log owner for his private use in the floating of logs cannot be justified under the doctrine of eminent domain. *Brewster v. J. & J. Rogers Co.* 42 App. Div. 343, 59 N. Y. Supp. 32.

One floating logs down a stream, who negligently allows a log jam to form, is liable for injury to land caused thereby. *Hopkins v. Butte & M. Commercial Co.* 16 Mont. 356, 40 Pac. 865.

A boom company engaged in running logs, which knows of the existence of a jam which it is unable to remove, is liable in damages where it assists in bringing down more logs and adding to the jam, whereby the water is so raised as to set back on the plaintiff's land. *Bauman v. Pere Marquette Boom Co.* 66 Mich. 544, 33 N. W. 538.

A log owner has no right, by the formation of jams or otherwise, to flood riparian land to the full extent of the most extraordinary freshet of the year. He is not entitled to flow adjoining lands to a greater extent than would happen if the logs were left to themselves and allowed to float down stream naturally and without artificial interference. *Witheral v. Muskegon Booming Co.* 68 Mich. 48, 35 N. W. 758.

One having a right to maintain a log boom on a river, which he constructs and operates with due care, will be liable to riparian owners if he attempts to float in the stream an amount of timber which far exceeds its capacity so that it forms jams and casts the water from the stream onto abutting property to its injury. 64 L. R. A.

Alabama Lumber Co. v. Keel, 125 Ala. 603, 28 So. 204.

And it has been held that if, to catch logs coming down a river, the owner throws a boom across the stream, he will be liable for the injury thereby caused to the owner of a steamboat which is prevented by the boom from reaching its destination. *Crandell v. Mooney*, 23 U. C. C. P. 212. In this case the relative or respective rights of logs and vessel owners were not involved as the boom was stretched in mere anticipation, no logs having reached it at the time of injury.

In an action for injury to land from overflow caused by the formation of a log jam in a stream, evidence showing the method of operation adopted by the owner of the logs in floating them, by allowing jams to form and then breaking them by precipitating other jams upon them from above, instead of releasing them as they formed, is competent and admissible in establishing negligence. *Hopkins v. Butte & M. Commercial Co.* 16 Mont. 356, 40 Pac. 865.

The owner of logs who places the drive in the hands of an independent contractor is not thereby relieved from liability for damages from the flooding of lands by the opening of a dam to pass such logs, if such act would naturally or necessarily result in the injury complained of without negligence on the part of such contractor. *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58.

But one who owns timber lands and maintains dams for flooding purposes is not liable for injuries sustained by a landowner due to an unreasonable use of the stream through the operation of the dams by an independent contractor employed by the owner of the timber land to cut and draw logs, and authorized to use the dams for that purpose. *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572.

The owner of a toll bridge carried away by the negligent floating of logs by another is entitled to recover from him the actual damages the latter caused him to suffer, which would be the loss of tolls during the time reasonably necessary to repair or rebuild it, added to the value of the superstructure carried away and lost, and not added to the value of the franchise of taking tolls. *Sewall's Falls Bridge v. Flisk*, 23 N. H. 171.

An action for the wrongful destruction of a county bridge may be maintained by one under contract to maintain the bridge against a log

754; *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778; *State v. Freeport*, 43 Me. 198.

Respondent had the right to abate or remove said dam, and to drive his logs past the same in the manner complained of.

School Dist. No. 1 v. Neil, 36 Kan. 617, 59 Am. Rep. 675, 14 Pac. 253; 2 Story, Eq. Jur. §§ 920-925; 3 Pom. Eq. Jur. § 1349; Wood, Nuisances, 2d ed. §§ 645, 646, 732-741, 824, 825, 904; Bishop, Non-Contract Law, §§ 427-432; 16 Am. & Eng. Enc. Law, pp. 991-994; 19 Cent. L. J. p. 42; Gould, Waters, §§ 121-123, 128; *Thelan v. Farmer*, 36 Minn. 225, 30 N. W. 670; *Page v. Mille Lacs Lumber Co.* 53 Minn. 492, 55 N. W. 608, 1119; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; Cooley, Torts, 2d ed. p. 736; *Indianapolis v. Miller*, 27 Ind. 394; *Northrop v. Burrows*, 10 Abb. Pr. 365;

Veazie v. Dwinel, 50 Me. 496; *Great Falls Co. v. Worster*, 15 N. H. 412; *Jewell v. Gardiner*, 12 Mass. 311; *Cook v. Kendall*, 13 Minn. 324, Gil. 297; *Thornton v. Webb*, 13 Minn. 498, Gil. 457.

Respondent's right was the right of passage,—the dominant right; because its exercise was, in the nature of things, impossible unless appellant's right yielded to it.

Doucette v. Little Falls Improv. & Nav. Co. 71 Minn. 206, 73 N. W. 847; *Gniadek v. Northwestern Improv. & Boom Co.* 73 Minn. 87, 75 N. W. 894; *Pearson v. Rolfe*, 76 Me. 380; Gould, Waters, § 80.

Messrs. Steenerson & Loring also for respondent.

Lewis, J., delivered the opinion of the court:

Appellant owned the riparian lands on

owner who, by letting loose his logs, wilfully occasioned the injury. *Cue v. Breeland*, 78 Miss. 864, 29 So. 850.

Possession of land under claim of title is sufficient to permit one to maintain an action for damages thereto by the driving of logs, and perfect title need not be shown. *Field v. Apple River Log Driving Co.* 67 Wis. 569, 31 N. W. 17; *Witheral v. Muskegon Booming Co.* 68 Mich. 48, 35 N. W. 758.

For the destruction of a fish trap in a private stream by the unlawful use thereof for floating logs, the measure of damages is the actual loss, not the cost of rebuilding, nor the original cost of building; the actual damage is to be estimated by taking these things into consideration with its value by reason of production. *Gwalleney v. Scottish Carolina Timber Co.* 115 N. C. 579, 20 S. E. 465.

Lumbermen, jointly engaged in driving logs down a floatable, but not navigable, river, who did not place men at a municipal bridge to protect it during the drive, and took no precaution to prevent the formation of jams of logs at the piers of a railway bridge which crossed the river a short distance below the municipal bridge, but abandoned the drive before the logs had been safely boomed at the river mouth,—are jointly and severally liable for the carrying away of the municipality bridge, caused by the penning back of the water and sweeping back of a quantity of logs up the stream upon the occurrence of a sudden freshet. *Ward v. Grenville Twp.* 32 Can. S. C. 510.

A county may maintain an action for the destruction of a bridge over a river within its limits by its removal for the purpose of permitting rafts and timber to pass down the river. *Wellington County v. Wilson*, 16 U. C. C. P. 124.

When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them, the owner is entitled by statute to a remedy by arbitration to determine the amount of his damages, as well as to the right to remove the obstruction. *Cockburn v. Imperial Lumber Co.* 30 Can. S. C. 80.

VIII. Injury to banks.

Land on navigable streams is subject to the danger incident to the right of navigation. *Field v. Apple River Log Driving Co.* 67 Wis. 569, 31 N. W. 17.
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A log-driving company is not bound to erect dams or other structures to protect the land of riparian proprietors, nor liable for damages resulting thereto from wing dams, if such dams are reasonably necessary or proper to facilitate the driving of logs at the point in question. *Ibid.*

Maintaining piling in a river adjoining property of a third person to facilitate the floating of logs, and maintaining it in such a way as to turn the water, logs, and ice upon such person's property, whereby its shores are washed away, is a continuing nuisance for which successive suits for damages may be brought. *Bowers v. Mississippi & R. River Boom Co.* 78 Minn. 398, 81 N. W. 203.

If the use of the freehold or shore rights is required by one using a floatable stream, to release a log jam, they must be acquired either as individuals would acquire them, or by condemnation in a corporate capacity if so authorized. *Watkins v. Dorris*, 24 Wash. 636, 54 L. R. A. 190, 64 Pac. 840.

Vessels have no right, in navigating a river, to move so closely to docks as to interfere with property upon the same by the extension of any part of the vessel, as bows, masts, spars, or booms, along and above the line of the dock. The right of passage up and down for vessels extends only to the dock line. *Dunham Towing & Wrecking Co. v. Daudelin*, 41 Ill. App. 175.

In using a public stream, any person will be liable for his trespasses on adjoining land which are necessitated by his own carelessness. *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641.

The flowing of land without the owner's consent and without compensation is a taking of his property, within the constitutional provision prohibiting the taking of property without compensation. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

Under the common law, a riparian owner has no right to compensation of any kind, or in any degree, for logs of another thrown upon his land by a flood. *West Branch Lumbermen's Exchange v. McCormick*, 1 Pa. Dist. R. 542.

If logs are carried down a river and cast upon the land of a riparian owner without fault of their owner, he will be liable for the injury done in case he reclaims them, but not if he abandons them. *Sheldon v. Sherman*, 42

both sides of the Red Lake river, in Crookston, and the dam constructed at that point. Respondent, a citizen of Winnipeg, on June 6, 1899, owned a large quantity of logs that were collected in the river at a point about 500 feet above the dam. Respondent opened the boom, and allowed the logs to float down the stream over the dam, without any attempt on his part, and without any effort on the part of appellant, to direct or confine them to the sluiceways. The dam was considerably injured at different places, and this action was brought to recover damages arising therefrom. The court found the damages to be \$3,450, but ordered judgment for respondent.

The assignments of error present only one question, viz.: Do the findings of fact justify the conclusion of law and judgment for

respondent? If not, do the findings of fact entitle appellant to judgment for the amount of damages found? Appellant submits the case to this court wholly upon these questions of law. The findings are apparently somewhat conflicting, and, in order to properly understand their bearing and relation to the issues in the case, it will be necessary to examine them in some detail:

The court finds: (2, 3) That appellant was the owner of the riparian lands and dam, and of the flowage rights in the stream, and, in connection with its predecessor, had been in exclusive possession thereof for more than fifteen years prior to this action, and (10) in connection therewith maintained an electric and power plant. (5, 6, 7) That from 1872 to 1875, Red Lake river, in its natural condition, was

N. Y. 484, 1 Am. Rep. 569, Affirming 42 Barb. 368, where the recovery was limited to the damages occasioned by permitting the logs to remain where they lodged for an unreasonable time, which seems to have been all that was claimed in the action, there being nothing to show that any injury was caused by the mere judgment of the logs.

A license of the privilege of banking and putting logs into a floatable stream upon the lands of a riparian proprietor, without intendment of regulating the manner of doing the work, will not estop the licensor from recovery if the logs are so negligently banked and piled in the stream as unnecessarily to do him damage. *Hunter v. Grande Ronde Lumber Co.* 39 Or. 448, 63 Pac. 598.

For the destruction of a freehold by the washing away of land only the owner of the inheritance can recover. *Anderson v. Thunder Bay River Boom Co.* 57 Mich. 216, 23 N. W. 776.

The purchaser of land under a contract which does not give him possessory rights until he has fulfilled the conditions of the contract and become entitled to a conveyance cannot maintain an action for injury to the freehold due to the washing away of land. *Des Jardins v. Thunder Bay River Boom Co.* 95 Mich. 140, 54 N. W. 718.

The effect of the dock act of 1847 is to make the owners of vessels liable for all injuries inflicted by the vessels on a dock or pier, though they arise from inevitable accident. *The Merle*, 31 L. T. N. S. 447.

IX. Contributory negligence.

One who places piles in the water, and allows them to remain floating, and without a light, alongside his derrick, fastened to the shore, cannot recover for their injury by a tug, whose propeller was caught and stopped by them. *The Wm. N. Beach*, 29 Fed. 303.

The owner of a wharf, who projects a mast therefrom, extending over the river, has no right of action if the same is injured by the bowsprit of the vessel coming in contact with it on the falling of the tide, although the bowsprit overhangs the wharf. *Dalton v. Denton*, 1 C. B. N. S. 672.

One who, in a season of high water, moors a flat boat in a swift current near his storehouse

for use as a landing place, is chargeable with such negligence as will preclude a recovery, where a steamboat which had made fast to the flat boat swung against the storehouse and ruined it when the line to which the steamboat was fastened to the flat boat was thrown off to prevent it from breaking the flat boat from its moorings. *Love v. The Montgomery*, 10 La. Ann. 113.

The owner of a milldam on a stream capable of and used for floating logs must use due diligence in the protection of his property from injury from such logs; and neglect on his part to build an apron on the dam, the building of which would have avoided injuries from the logs, will prevent his recovery for such injuries, where the owner of the logs was guilty of no negligence in putting them in the stream and floating them over the dam. *Huff v. Kentucky Lumber Co.* 20 Ky. L. Rep. 39, 45 S. W. 84.

Where a corner of one of the piers to a toll bridge is knocked off by a vessel carelessly running into it in passing through the draw, the toll bridge company is not guilty of contributory negligence in failing to protect the bridge by piles, although its charter required it to maintain in good repair a suitable draw. *Toll Bridge Co. v. Langrell*, 47 Conn. 228.

But *Crookston Waterworks P. & L. Co. v. Sprague* indicates that the duty is not all upon the owner of the dam. The rights of the dam owner and of the log owner being equal the former is bound to furnish facilities for the protection of his dam but the latter is bound to make use of them. The right to construct a dam across a navigable stream being, however, not absolute but by sufferance, the legislature may impose such conditions as it chooses if its consent is expressly sought. Thus—

Under the authority given a power company by the legislature and by act of Congress to construct a dam across the Mississippi river, providing that it shall so construct the works as to provide for the free passage of saw logs, rafts, and boats, it is for the power company to do what is necessary to protect its dam from jams of logs floating down the river caused by the slack water which the dam creates; and if men are necessary for this purpose, it is for the company to employ them. *St. Cloud Water-Power & Mill Co. v. Mississippi & R. River Boom Co.* 43 Minn. 380, 45 N. W. 714.

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capable of being profitably used for transportation and commerce for about 2½ months each season, but that since 1875 it has not been, and could not have been, profitably used for such purposes; that the river has been navigable for the purpose of floating logs and lumber for fifteen years prior to the commencement of this suit, for a distance of more than 25 miles above Crookston, as well as below. (9) "That at the time said dam was constructed, and ever since, said dam was provided with sluiceways of sufficient capacity, and so arranged, when one of them is open, as to permit logs, timber, and lumber to pass through the same without any unreasonable delay or hindrance, and that said dam is not, and never has been, an unreasonable obstruction or impediment to the navigation of said river for the purposes of floating logs or lumber when the said sluiceways, or one of them, is open." (11) That about June 6, 1899, respondent did wrongfully drive and allow to be driven a number of about 24,000 logs from a point above said dam to a point below it, and, in driving said logs, did permit and cause them to run in large quantities to and over the dam, and over the crest of the same, instead of through the sluiceways provided for such purposes by appellant, although respondent at that time knew of the sluiceways, and knew that running of said logs over the crest of the dam, instead of through or over the sluiceways, was liable to injure the dam and the business of appellant, which acts of respondent in so driving, and allowing the said drive to be made, were done negligently and carelessly, and without reasonable care and prudence on the part of said defendant to prevent unnecessary injuries to the dam and appellant's business. (12) That, by reason of such negligent acts of respondent in so driving and permitting the logs to go over the crest of the dam, it was battered, broken, and weakened, all of which injuries and damages were caused by the negligence of respondent as aforesaid. (13, 14) That the injuries so occasioned by respondent in driving the logs over the dam amounted to \$3,450. (15) "That during the month of June, 1899, plaintiff had not facilities for opening said sluiceways, or any of them, when the water was running more than 2 feet over the crest of the dam, without considerable danger to the lives of those using what plaintiff provided for the purpose of opening the sluiceways, and the said dam was wholly unprovided with any boom, piers, or instruments or means whereby to guide the logs floating in said stream to any sluiceway or channel, and that plaintiff was guilty of negligence in so failing to provide proper facilities for opening said sluiceways,

and was guilty of negligence in failing to provide sheer booms, or some means whereby to guide the logs floating in the stream to one or more of the said sluiceways; that at the time defendant drove his logs over said dam as aforesaid, and during all the month of June, 1899, the water of said river was running more than 2½ feet high over the crest of said dam; that one sluiceway in said dam was open 1 foot at the top, and the other 2 feet at the top, each sluiceway being 8 feet wide and 5 feet deep from the crest of the dam when fully open and cleared of stop logs; that said openings of 1 foot in one sluiceway and 2 feet deep in the other, at the then stage of the water, were sufficient to enable defendant to get his logs past the dam by way of the sluiceways, and without any injury to the dam, and, knowing as he did, that plaintiff had not provided any means of guiding the logs to the sluiceways, he (the defendant) was guilty of negligence in not doing it, and this negligence was a proximate cause of the injury before stated; but plaintiff knew for two weeks before defendant drove his logs past the dam that he was going to do it, and failed to provide sheer booms or other means to guide the logs to the sluiceways, or one of them, and this failure on its part was negligence, which was a proximate cause of the injury, and contributed to it."

Subject to the control of Congress in proper cases, and independently of statute, the right of riparian owners to construct, maintain, and operate dams upon rivers and streams in this state is firmly established by the decisions of this court. *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399, 2 N. W. 842; *State v. Minneapolis Mill Co.* 26 Minn. 229, 2 N. W. 839; *Kretschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Minnesota Loan & T. Co. v. St. Anthony Falls Water-Power Co.* 82 Minn. 505, 85 N. W. 520.

Title 1, chap. 32, Gen. Stat. 1894, recognizes the interests of riparian owners at the common law, and while declaring all rivers in the state public highways for the purpose of the passage of logs, timber, and lumber, the rights of riparian owners is also recognized and defined. Section 2385 reads: "All rivers within this state of sufficient size for floating or driving logs, timber, or lumber, and which may be used for that purpose, are hereby declared to be public highways, so far as to prevent obstructions to the free passage of logs, timber, or lumber down said streams, or either of them." And § 2386: "No dam or boom shall be constructed or permitted on any river, as herein specified, unless said dam or boom has connected therewith a sluiceway, lock, or fixture, sufficient and so arranged as to permit logs,

timber, and lumber to pass around, through, or over said dam or boom, without unreasonable delay or hindrance." This act applies to all streams generally navigable, as well as what are termed mere floatable streams, and controls the respective rights of interested parties, subject to the acts of Congress and the Federal jurisdiction where applicable to streams generally navigable.

Assuming, therefore, that Red Lake river is a navigable stream, it not appearing that Congress has assumed any control over the river, and there being no apparent conflict between the state and Federal authority, it does not follow that the dam is a public nuisance because not authorized by Federal authority. *Gould, Waters*, 3d ed. §§ 129-132; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Pennsylvania v. Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

Our view of this legislation is that it was intended to recognize the rights of the riparian owner in the construction of the dam, and the public in the use of the stream, and that neither one is granted a paramount right. The 1st section declares that all streams of sufficient size to float logs, timber, and lumber are public highways; but the apparently unlimited authority to use such a stream is restricted in the 2d section by a further statement that the riparian owner may improve the stream for his own use, provided he does not unreasonably hinder or delay the passage of logs, timber, and lumber around, through, or over any dam that is constructed. In the case before us, appellant was authorized to construct and maintain the dam, provided it was equipped with sluiceways to admit of the passage of logs without unreasonable delay, and respondent was entitled to the use of the stream for the passage of his logs; and, if the sluiceways were so arranged, then respondent was required to direct and drive his logs through the sluiceways, and thus avoid injury to the dam. So it comes down to a question of whether the dam was properly equipped with sluiceways and appurtenances, such as not to unreasonably delay floating logs through the same, and, if so, whether respondent was in the exercise of reasonable care in driving his logs. While the findings of fact are apparently conflicting, we think that a close examination of the same, when taken into consideration with the conclusion of the court, will show that they are consistent and support the conclusion of law.

The ninth finding of fact is relied upon by appellant as conclusive upon the point that the dam was properly equipped with sluiceways, so as not to unreasonably delay or hinder the passage of logs. We think,

when considered with the other findings and the legal conclusion of the court, that it is not so far-reaching. It will be observed from the ninth finding that the court has reference to the construction of the dam proper without taking into account any appurtenances for the purpose of directing the logs into the sluiceways. So far as the dam itself is concerned it is not an obstruction to the passage of logs because suitable sluiceways were provided, so that, when one or two of the stop boards were out, unreasonable delay was not occasioned to the passage of the logs. It is not to be understood that the finding includes the proper piling or other arrangement necessary for the purpose of guiding logs through the sluiceways. This finding must be considered with that part of the fifteenth to the effect that during the time in question the water running over the dam was more than 2½ feet deep, that there were no facilities for opening the sluiceways without considerable danger, and that the dam was not provided with piers, posts, or other means by which logs might be guided into the sluiceways. These findings are not inconsistent, and, when considered together, mean that appellant constructed the dam with proper sluiceways, but, in failing to provide some means whereby logs might be directed into the sluiceways, their transportation through the same was unreasonably hindered. So much as to appellant's duties.

In the fifteenth finding, it is found that an opening in one of the sluiceways of 1, and in the other of 2, feet in depth, at the then stage of the water, was sufficient to enable respondent to get his logs past the dam and through the sluiceways without injury to the dam, and knowing, as he did, that appellant had not provided any means of getting the logs into the sluiceways, he was guilty of negligence in not doing so himself. By the eleventh finding, to the same effect, that in running the logs over the crest of the dam, instead of through or over the sluiceways, respondent knew injury was liable to result to the dam, and that such acts were not performed in a careful and prudent manner, and so as to prevent harm to the dam. These findings are relied upon by appellant as sufficient to fix the liability of respondent. If, notwithstanding the fact that appellant had not equipped the dam with proper appurtenances or approaches, yet, knowing the real condition, respondent permitted the logs to go over the crest of the dam, then in the performance of such act he was called upon to exercise reasonable care and prudence to avoid injury to the dam. If the findings referred to are to the effect that, notwithstanding the failure of appellant to properly equip

the sluiceways, yet respondent carelessly and negligently drove his logs over the dam, and unnecessarily caused the injuries complained of, when, with reasonable care and prudence, injury might have been avoided, he would be liable. But we do not think such is the necessary or proper inference, for there is no evidence to indicate that respondent was not in the exercise of reasonable care. What the court must have had in mind is that if it was the legal duty of respondent to supply sheer booms and direct his logs through the sluiceways, notwithstanding the fact that there were no fixed appurtenances to which booms could be attached, then, in allowing the logs to go over the dam indiscriminately, without any control or direction, he was guilty of negligence. In other words, the trial court assumed the possibility upon this appeal that this court might hold it was the legal duty of respondent to furnish such sheer booms or appliances, and in that case, from the facts found, the conclusion would follow that he was liable for the damages resulting. On the other hand, the court assumed that, if this court should coincide with its view of the law, then the facts found with respect to appellant's duties in the construction of the dam would justify such a conclusion.

We are not aware that there is any decision in this state defining the relative rights of those using a stream as a highway for the transportation of logs, and the riparian owner who has improved the stream for manufacturing purposes; but, as between different riparian owners, the rule is that the parties are limited to a reasonable use, with due regard to the rights and necessities of all others interested. What is a reasonable use depends upon the circumstances of each particular case. See *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167. In *Page v. Mills Lacs Lumber Co.* 53 Minn. 492, 55 N. W. 608, 1119, a controversy arose between different parties engaged in the business of driving logs upon the same stream, and the same rule was applied. With equal reason the rule of reasonable use should apply with respect to the relative rights of appellant and respondent, even in the absence of the statutory declarations already referred to. According to the evidence and findings of fact, Red Lake river had been used for many years for the transportation of logs. Appellant and its predecessors were required to take notice of the conditions liable to arise at the period of the year when logs were commonly transported. It is a matter of common knowledge that logs in the northern part of this state are cut and banked upon

the streams during the winter season, and in the spring, when the waters are swollen by the melting snow and rains, they are floated to the places of destination. This flood period, during which only it is possible to float logs, exists generally during the months of May and June. When the dam in question was constructed, and the sluiceways put in, the builders were required to anticipate that during the log-driving season the waters would be high, and that during such period the current would be swift over the dam and sluiceways, and that something more might be required than a mere opening, to afford passage for logs without unreasonable delay. Moreover, experience for a number of years should have called appellant's attention to the fact, as found by the court, that, when the water was 2½ feet deep over the crest of the dam, it was an exceedingly difficult and dangerous task to take out the sluice boards sufficiently to lower the water so that the logs would not pass over the dam, and difficult, if at all feasible, to fix sheer booms for the purpose of directing the logs through the sluiceways. Under those conditions, it was practically impossible for respondent, without great inconvenience and delay, to attach sheer booms or take out enough of the sluice boards; and having called upon appellant, as the findings disclose, to make preparation for the passage of the logs, respondent did all that was reasonably required of him to do under the circumstances. It might be that at a lower stage of the water, or under other conditions, the dam, as constructed, would be sufficient to meet the requirements. We do not intend to hold that under all circumstances it is the duty of the riparian owner who erects a dam to provide sheer booms and to keep them in place, or that he is required to assume control of the logs, and conduct them through the sluiceways. It is simply held that, under the facts in this case, the dam should have been equipped with piling, or permanent fixtures of some kind, which could be reached, and to which sheer booms could be attached by respondent, or some means should have been provided for removing the sluice boards so that the current of water through the sluiceways would be sufficient to draw the logs through the same, or some other provision made equally efficient to accomplish the purpose. We have not overlooked the case of *St. Cloud Water Power & Mill Co. v. Mississippi & R. River Boom Co.* 43 Minn. 380, 45 N. W. 714. In that case an act of Congress was construed, and the rule of reasonable use was not taken into consideration.

Judgment affirmed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down April 22, 1904:

A rehearing was ordered in this case upon the following questions:

1. Did the trial court, in holding by the eleventh finding of fact that respondent wrongfully and negligently drove the logs over the crest of the dam instead of through the sluiceways, have reference to the condition of the dam, sluiceways, and depth of the water as then existing, or did the court have in mind the neglect of respondent to furnish sheer booms, conceding it to be his duty to furnish them?

2. Is there sufficient evidence in the case to sustain the eleventh finding of fact?

3. If the eleventh finding of fact refers to the condition of the dam at the time the logs were driven over it, was respondent liable for the resulting injury?

The matter having been fully reargued, it is ordered that the former order of this court affirming the judgment be, and the same hereby is, set aside, and a new trial granted.

It will not be advisable at this time to further discuss the principles of law involved in this case. The appeal having been taken upon the ground that the findings of fact did not justify the order for judgment, the court endeavored to reconcile what it deemed to be rather indefinite and inconsistent findings. From a re-examination of the evidence and findings, we are now satisfied that the task the court assumed at that time was hardly justified, and we have concluded to remand the case for a new trial upon the ground that the findings of fact do not support the order for judgment, and do not justify an order for judgment for appellant.

TENNESSEE SUPREME COURT.

Nellie McKELVEY, by Next Friend, *Appf.*,
v.

W. J. McKELVEY et al.

(.....Tenn.....)

A child has no right of action to recover damages against his father and stepmother for cruel and inhuman treatment inflicted upon him by the latter with the consent of the former.

(November 14, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in defendants' favor in an action brought to recover damages for cruel and inhuman treatment inflicted upon plaintiff by defendants. *Affirmed.*

The facts are stated in the opinion.

Messrs. B. A. Heard and C. C. Moore for appellant.

Messrs. B. Pope, Jephtha Bright, and Tatum Thach for appellees.

Beard, Ch. J., delivered the opinion of the court:

This is a suit instituted by a minor child, by next friend, against her father and stepmother, seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father.

NOTE.—As to right of minor child to maintain action against parent for wrongful confinement in insane asylum, see, in this series, *Hawlett v. George*, 13 L. R. A. 682. 64 L. R. A.

Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of habeas corpus. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than Judge Cooley, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason it should not be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of *Hewlett v. George*, 68 Miss. 703, 13 L. R. A. 682, 9 So. 885. It is there said: "So long as the

parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor children protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for, whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presumption that it was the result of his coercion; if out of his presence, then he and she would be jointly liable for the wrong. So at last it comes back to the question as to the right of a minor child to institute a civil action against the father for wrongs inflicted upon it.

An analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture. This holding rests in part upon their unity by virtue of the marriage relation, which would preclude the one from suing the other at law, and in part upon the respective rights and duties involved in that relation. In *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27, it was held that a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who assisted him in making the as-

sault. As was said by the court, at common law the husband was the guardian of the wife, and was bound to protect and maintain her, and on that ground "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it." 2 Kent, Com. 180. In view of the evolution of the law in the amelioration of the married woman's condition, and the comparative independence that was now secured to her, it was insisted in that case that the action should be maintained. To this, however, the court replied: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. . . . She has the privilege of the writ of habeas corpus if unlawfully restrained. As a last resort, if need be, she can prosecute, at the husband's expense, a suit for divorce."

In *Phillips v. Barnett*, L. R. 1 Q. B. Div. 436, the same rule is announced, although it was insisted there, as in the case from Maine, that, the marriage relation having ceased by divorce, the wife should be let in to her action for damages against the former husband for personal injuries inflicted upon her during coverture; the argument being that the relation simply suspended the right of action, and, this relation having been terminated, the right was then in a condition to be enforced. But it was there said, as in the first case, that the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy, either during or after coverture, because there was no civil right to be redressed.

We think that the circuit judge acted in obedience to a well-settled rule controlling the relation of father and child, and in furtherance of a sound public policy, in sustaining the demurrer to the declaration in this case, and his judgment is affirmed.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1903, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND SOCIETIES.
- IV. DOMESTIC RELATIONS.
- V. TORTS; NEGLIGENCE; INJURIES; CONSPIRACY.
- VI. PROPERTY RIGHTS; WILLS; LIENS; DEEDS; MORTGAGES.
- VII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- VIII. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The right to require an examination and license as for a practitioner of medicine for the treatment of disease by baths, physical culture, manipulation of muscles, bones, spine, and solar plexus, and advice as to diet, is denied. (N. C.) 139.

Bankruptcy.

The building, sale, and repairing of vessels employed in commerce is held to be within the provisions of a statute permitting bankruptcy proceedings to be instituted against corporations engaged principally in manufacturing and mercantile pursuits. (C. C. A. 6th C.) 645.

Highways.

See also *infra*, VII.

The owner of trees in a highway is held to have no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality, which has full authority to establish the same, and full jurisdiction over the highway within its limits. (Miss.) 805.

Trees which have been standing for forty years without impeding the travel on a public highway are held not to be nuisances because they extend a few inches outside the curb on a proposed plan for the improvement of the street, where the curb can be so arranged as to carry water flowing in the gutter around them, so that it will not interfere with the flow of the water, or the improvement of the street in a workmanlike manner. (Md.) 627.

The construction, in a public street, of an elevated railroad track for the use of trains to be operated by steam, so as to interfere with the abutting owner's right to light, air, access, and privacy, is held to be a taking of his property, for which, under the Constitution, he is entitled to compensation. (Mo.) 959.

64 L. R. A.

Taxes.

The right to assess a succession tax at the death of the testator upon the corpus of the estate is denied where the property is devised in trust, which shall continue for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and, if they are not alive, among persons whom they shall appoint and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or expectation, to any property or income thereof," when the tax rate differs according to the relationship to the testator of the person who ultimately becomes entitled to the property. (Ill.) 775.

The power to tax the exercise of a power of appointment by will is held not to be destroyed by the fact that the power of appointment was created by deed prior to the passage of the statute providing for the tax. (N. Y.) 279.

A claim on a policy insuring the life of one who dies before the day on which property is to be valued for taxation is held to be assessable under a statute providing for the assessment of claims due or to become due, although proof of death has not been made, and the insurer has sixty days after such proof in which to pay the demand. (Ill.) 72.

A constitutional declaration that "property," for the purpose of taxation, shall include franchises, is held to authorize taxation of the right to exist as a corporation. (Cal.) 918.

An establishment for the collection and distribution of electricity for the purpose of power and light is held not to be for

manufacturing purposes, within the meaning of a statute permitting towns to exempt manufacturing establishments from taxation. (N. H.) 33.

Municipal corporations; ordinances.

A municipal corporation is held to have no power to contract to pay a water company for a supply a sum annually in perpetuity equal to 5 cents on the \$100 of the "present valuation of assessment," under a statute authorizing it to levy annually a tax not exceeding 5 cents on the \$100 of assessed property. (Md.) 630.

Mere acceptance of, and payment for, the service of a water company in furnishing water for general fire purposes are held not to be sufficient to establish a contract on the part of the water company to compensate the municipality for loss of property by fire, for the extinguishment of which the company negligently failed to furnish water, although the service was undertaken in compliance with a demand therefor by the municipality. (Cal.) 231.

A municipal ordinance prohibiting the maintenance of a dairy within the city limits is held not to deprive citizens of property without due process of law, or to abridge their privileges or immunities. (Mo.) 679.

Inspecting books of municipality.

A citizen and taxpayer is held to be entitled to make a general examination of the books of the municipal corporation when it is shown to be important to the public interests that such examination be made. (Tenn.) 418.

Waters.

The state is held not to abrogate its trust by granting to a municipality the shore of a tidal body of water within its limits. (Ala.) 333.

The fact that a municipality takes its water supply from a lake is held not to justify the denial, through the police power, of the right of an upper riparian owner to bathe in the lake. (Mich.) 265.

Sunday laws.

A law which prohibits the keeping open of butcher shops for the sale of meats, and other business places, on any portion of Sunday, while it authorizes confectionery and tobacco to be sold in an orderly manner on that day, is held not to be an unreasonable discrimination between these several occupations, so as to be in violation of the Constitution prohibiting special or class legislation. (Minn.) 510.

The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is held to be within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late
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to repair it on Saturday with the appliances at hand, and the owner of the mill was not negligent in not having foreseen the accident, or having appliances at hand to repair it immediately. (Ark.) 204.

Dedication.

Land dedicated as a public highway is held not to revert to the dedicators because of misuse or nonuse, unless its use for the dedicated purpose has become impossible, or so highly improbable as to be practically impossible. (Kan.) 85.

Executors and administrators.

The right of the probate court, in its discretion, to allow an administrator a reasonable amount to compensate for the services of a real-estate broker who succeeded in securing for the property belonging to the estate a materially greater amount than was bid for it at the attempted auction sale, is sustained. (Cal.) 554.

Officers.

A county officer is held not to be required to account for and pay over to his county, money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office, and which are not incompatible with, and are not included within, his official duties. (Neb.) 131.

Reward.

The vote buyer is held to have no right to claim the reward offered by a statute providing that one who furnishes information resulting in the conviction of a person for selling his vote shall be entitled to a reward. (Ind.) 780.

Libel.

A statute limiting the recovery, in an action for libel against a newspaper publisher, to actual damages only, where it appears on the trial that the article was published in good faith, and that, within a specified time after service of notice by the party libeled of his intention to bring an action specifying the statement alleged to be libelous, a full and fair retraction was published in as conspicuous a place and type in such newspaper as was the alleged libelous article, is held to be void as denying the constitutional right to a remedy by due process of law for an injury suffered. (Kan.) 790.

Attorneys' fees.

A mechanics' lien law which provides that, in an action brought by any artisan or day laborer to enforce any lien under the act, where judgment is rendered for plaintiff, he shall be entitled to recover a reasonable attorneys' fee to be fixed by the court, which shall be taxed as costs in the action, is held to be unconstitutional and void, as a denial of the equal protection of the laws. (Kan.) 325.

Insurance.

A statute providing that insurance policies shall not be avoided for the falsity of representations or warranties, unless made with intent to deceive, or increasing the risk of loss, is held to be within the police power; and it is held to be immaterial that it applies only to policies issued by old-line companies, and not to those issued on the assessment plan. (Tenn.) 451.

Sweat shops.

Prohibiting the use of a room in a tenement or dwelling house for the manufacture of men's clothing, except by the immediate

members of the family living there, and then only under permit from a public official, is held to be within the police power. (Md.) 637.

Preference of veterans.

A statute providing that those who have served in the Army and Navy of the United States in the War of the Rebellion, and have been honorably discharged therefrom, shall be preferred for appointment to office in every public department and upon all public works of the state and of the cities and towns thereof, is held to be constitutional. (Kan.) 945.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Contracts; validity.

The refusal of a court to entertain a suit to charge a person on an unsigned representation as to the credit of another person is sustained, although it is valid where made, if the statute of the place where the suit is brought provides that no action shall be brought to charge one on such a representation, unless it is in writing, signed by the party to be charged thereon. (Mich.) 119.

A contract by one selling the right to manufacture and sell a machine which he has devised, not to engage in the business of making such machines himself, nor grant anyone else the right to do so, during the life of the contract, is held not to be void as against public policy, where possible customers are limited in number and scattered throughout the country. (N. H.) 298.

Contract for permanent employment.

Employment for a year is held to be a fulfilment of a contract to give an attorney permanent employment in consideration of services rendered in the formation of a corporation, since the contract is indefinite and terminable at the will of either party. (Mich.) 673.

Banks.

A bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is held to be protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent, either expressly or by legal implication. (Kan.) 785.

Bills and notes.

Transactions of a broker which become the basis of a note given by his principal, and which are performed in one state where the note is delivered under directions of the principal by telephone or letter from another state, are held to be judged, for the purpose of determining the validity of the R. A.

consideration for the note, by the law of the place where the broker performed them. (R. I.) 160.

An indorsee of a negotiable note taken as collateral security for a pre-existing debt, there being no extension of time of payment or other new consideration, is held to be a holder for value and in due course of business; and, in the absence of any circumstances charging him with notice, to be protected against a claim of payment made to the original payee. (Kan.) 568.

Carriers.

One consigning goods to his agents in another city, for sale, is held to be bound to take notice of a certain well-established and general custom in force there, that business will be suspended on a certain holiday, so that he cannot hold the carrier liable for failure to make delivery of the consignment on that day. (Tenn.) 443.

Exclusive privilege to teamster at depot.

The right of a railroad company to give one teamster an exclusive right to enter upon the railroad property to solicit the privilege of carrying the baggage of passengers, and to exclude others from its grounds, is sustained where the reasonable requirements of passengers are thereby fully met. (N. H.) 811.

Insurance.

See also *supra*, I.

The incapacity of a man's administrator to receive the proceeds of a policy on his life, which had been assigned to his wife, because he wilfully took her life, is held not to cause their escheat to the state; but it is held that they will pass to her distributees as though the husband had never been in existence. (Tenn.) 458.

Accidental death of an assured, resulting from taking poison to frighten his wife into giving him money, is held not to be within the provision of the policy that it does not include assurance against self-destruction or suicide. (Mich.) 663.

Steeple-chase riding by one who gives his occupation as a cotton merchant is held to be a voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy exempting the insurer from liability for injuries resulting from such exposure. (Mass.) 117.

Death caused by accidentally eating spoiled oysters is held to be within a clause in an accident insurance policy providing that the policy does not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed. (Tex.) 349.

One who, without knowledge of the facts, takes an assignment of a policy of life insurance which, under the statute, is void because taken, without his consent, upon the life of one in whom the applicant has no insurable interest, and pays the premiums thereon in reliance upon the assurance by the agent of the company, confirmed by its vice president, that the policy is valid and the assignment good, is held to be entitled to recover back the premiums paid. (Ind.) 935.

The minority of one holding a policy of insurance on a dwelling house is held not to exempt him from complying with a stipulation in the policy that no suit or action for the recovery of any loss should be maintainable unless commenced within twelve months after the fire. (Kan.) 79.

Accord and satisfaction.

The insolvency of the debtor is held to be sufficient to create an exception to the rule that acceptance of part of an amount due cannot effect the satisfaction of the whole debt. (Iowa) 75.

Factors.

The sale, by a receiver, of the assets of an insolvent commission company is held to pass a claim for repayment of advances made to a produce buyer to enable him to procure produce to be shipped to the company for sale, together with a lien which had been expressly given by contract upon the property shipped to secure the advances. (Ky.) 219.

Innkeepers.

A watch is held to be within the operation of a statute providing that, if a guest at a hotel neglects to deposit jewels in the safe or other place provided by the hotel keeper for their custody, they shall be at his own risk. (Tenn.) 470.

Auctions.

An auction sale by the assignee of property of an insolvent debtor is held not to be rendered void by a combination between creditors of the estate to enhance the price by fictitious bids, which is not known to, or participated in by, the assignee. (Mass.) 190.

Salvage.

The right of the crew to recover compensation as special salvors for throwing overboard a cargo of coal from a stranded vessel which has not been abandoned is denied, although the service rendered is hazardous and perilous, and results in floating the vessel so that it is brought safely into port. (C. C. A. 7th C.) 193.

Sale.

A sale of goods on an order taken by a drummer within the state subject to the approval of his principal, and transmitted to the latter in another state, and there approved and filled by the segregation and shipment of the goods, is held to be a contract of the domicile of the vendor, and not to give rise to a vendor's privilege on the goods, unless such privilege exists under the laws of such other state. (La.) 823.

Landlord and tenant.

Under a lease providing that the tenant must return the premises in as good condition as received, except where damaged by fire, etc., it is held that this condition forbids the tenant to leave thereon his own distinguishable property, which had been injured and made worthless by a fire, where the tenancy had been terminated by agreement of parties. (Minn.) 648.

Master and servant.

See also *infra*, V.

An expert machinist employed by a machine company and sent to make repairs upon plants of other persons at their request as his services may be needed, and who is, while so employed, subject to the direction of the one seeking his services, although in his method of work he acts upon his own judgment, is held to be, during the time so employed, the servant of the latter, and the fellow servant of his employees, although he receives his wages from his own employer, who collects the pay for his time from those seeking his services. (Mass.) 114.

III. CORPORATIONS AND SOCIETIES.

Mutual benefit society.

A mutual benefit society is held to have no right to sue a former member for dues for nonpayment of which it has expelled him from the society. (R. I.) 158.
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Implied powers of corporations.

The ownership, by a manufacturing corporation, of a town or city of more than 2,000 houses, with streets, alleys, sewer systems, dwellings, tenement houses,

(DOMESTIC RELATIONS.—TORTS; NEGLIGENCE; INJURIES; CONSPIRACY.)

churches, schools, business buildings, etc., no one of which is occupied by any other than a tenant of the corporation, is held to be contrary to public policy, and in excess of the implied powers of the corporation. (Ill.) 366.

The implied powers which a corporation has in order to carry into effect those expressly granted, and to accomplish the purposes of its creation, are held not to be limited to such as are indispensable for these purposes, but to comprise all that are necessary in the sense of appropriate, convenient, and suitable including the reasonable choice of means to be employed. (Ohio) 395.

The increase of stock is held not to be within the implied powers of a corporation. (Pa.) 413.

The use of land for the erection and maintenance, by railway companies, of hotels and eating stations along their roads for the accommodation of their employees and passengers is held to be a legitimate railroad purpose only when they are reasonably necessary for the convenience of such persons. (Or.) 391.

The establishment, by a railway company, of a relief association for the benefit of its employees, the relief fund being created by voluntary contributions from the employees' wages, and the company being charged with the care of the fund and the duty of attending to the working details of the scheme, is held not to be contrary to public policy. (Ohio) 405.

IV. DOMESTIC RELATIONS.

Cruelty to child.

A child is held to have no right of action to recover damages against his father and

stepmother for cruel and inhuman treatment inflicted upon him by the latter with consent of the former. (Tenn.) 991.

V. TORTS; NEGLIGENCE; INJURIES; CONSPIRACY.

Defective highway.

See also *supra*, I.

The driver of a milk wagon, who, knowing of the existence of a manhole to a sewer which projects above the surface of the street, attempts to turn his horse and wagon around in its vicinity without paying any attention to his course, is held to be guilty of contributory negligence, so that, in case the wagon strikes the obstruction, and is overturned to his injury, he cannot hold the city liable therefor. (Mo.) 292.

The right of a bicyclist to hold a town liable for injuries caused by a defect making a highway unsuitable for ordinary travel is sustained under a statute making towns liable for injuries to any person traveling upon a dangerous embankment upon a highway by reason of any defect or want of repair of such embankment, or defective railings, which renders it unsuitable for travel thereon. (N. H.) 70.

Conspiracy.

The restriction by a manufacturer, a corporation, and its employee of the sales of its products to those who refrain from dealing in the commodities of its competitors, by fixing the prices of its goods to those who do not thus refrain so high that their purchase is unprofitable, while it reduces prices to those who decline to deal in the wares of its competitors so that the purchase of the goods is profitable to them, is 64 L. R. A.

held not to be violative of the anti-trust act of July 2, 1890. (C. C. A. 8th C.) 689.

The conveyance, by the stockholders of several competing companies engaged in the manufacturing business, to one company organized for the purpose of taking their property and consolidating their interests is held to create an illegal trust. (Ill.) 738.

Members of a combination to enhance the price of a commodity, which is void under the anti-trust act, who share in the profits secured by the combination, are held not to be able to claim exemption from suit on the part of a consumer under the provisions of a statute, on the ground that no direct purchase was made from them, nor complain that all the members of the combination were not made parties to the action. (C. C. A. 6th C.) 721.

An agreement between publishers of and dealers in books, whereby they agree not to sell books of any kind to dealers who shall be suspected of selling copyrighted books at less than the net price fixed by publishers, or who shall supply books to dealers who are suspected of making such sales, is held to violate a statutory provision that every contract whereby a monopoly in the sale of any commodity of common use is or may be created, or whereby competition in the supply or price of any such article is restrained or prevented, or whereby, for the purpose of establishing or maintaining a monopoly, the free prosecution of any

lawful business is or may be restricted, is against public policy and void. (N. Y.) 701.

An action on behalf of a quarry owner against members of a voluntary association of dealers in stone, of which he is not a member, who enforce a by-law of the association imposing a fine upon members who deal with those who are not members, so that members who desire to deal with non-members are coerced from doing so to the ruination of the business of the quarry owner, is sustained. (Mass.) 260.

Assault.

One assaulted by citizens of a town for the purpose of compelling him to leave it is held not to be bound to retreat to avoid a conflict in order to protect himself from liability to prosecution for assault, but to have the right to repel force with force so long as he uses only such force as is necessary, short of killing his assailant, even though he provoked the attack by drunkenness and disorderly conduct. (Iowa) 77.

Malicious prosecution.

Acquittal of a criminal charge is held not to be evidence of want of probable cause, in an action by accused against the prosecuting witness to recover damages for malicious prosecution. (Tex.) 474.

Nuisance.

The right to conduct a hospital in such proximity to a private residence that the sights, sounds, and smells which are a necessary part of its operation become an intolerable nuisance to those dwelling in the residence is denied. (Ill.) 215.

Injury to servant.

An employer who undertakes to furnish a domestic servant with a lodging place is held to be bound to see that it is suitable for the purpose intended, and to be liable for injuries caused to the servant by sickness due to the leaky condition of the roof. (R. I.) 156.

A corporation is held not to be liable for injuries to its employee in attempting to rescue one of its members who, in superintending and working with the employee, undermines a wall so that it is about to fall upon him, when the employee springs forward from a place of safety to avert the impending accident. (Iowa) 542.

The right of a master to delegate to a servant the duty of inspecting long ladders furnished for the use of employees, and replacing rotten rounds, so as to escape liability for injuries caused by neglect of the duty on the ground that the negligence was that of a fellow servant of one injured by a fall caused by the breaking of a rotten round, is denied. (Me.) 551.

A street-car conductor in charge of an extra car, whose duties require him to run
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onto a single track extending beyond the termination of the double tracks of the road, which the rules of the company require to be occupied by only one car at a time, is held to take the risk of injury from the absence of signals at the termination of the double tracks or schedules for extra cars for giving notice when the extension is occupied by such cars. (Pa.) 205.

An employee who undertakes to use defective or unsafe appliances with knowledge of their unsafe condition is held to assume the increased risk of danger; and the employer is held to be relieved from responsibility to the employee by reason of the latter's knowledge. (Okla.) 145.

Wrongful arrest by servant.

Employees of a mining partnership, who are charged with the care and management of its property, are held not to act within the scope of their employment in causing, long after the commission of the crime, the arrest, for the purpose of vindicating the law, of one who is suspected of having set fire to a building belonging to the partnership, so as to render the partnership liable for malicious prosecution in case the arrest proves to have been without justification. (Pa.) 685.

Delay in delivering telegram.

Mental anguish and suffering are held to be sufficient to sustain an action for breach of contract promptly to transmit and deliver a telegram. (Iowa) 545.

Confinement in unfit pesthouse.

The act of the officers of a municipal corporation, who, in attempting to guard the public health, remove a smallpox patient to a pesthouse so overcrowded and illy adapted to its purpose that he dies from the consequent exposure, is held not to render the municipality liable. (Ky.) 572.

Fall of lumber on child.

One who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is held to be liable for injuries caused by its fall upon a child who, while traveling along the street, follows its inclination to play, and attempts to climb upon the pile, and thereby causes the lumber to fall. (Wis.) 183.

Injury by electricity.

The duty of an electric light company conveying electricity by overhead wires strung through the streets of a city to keep its wires constantly insulated so as to be prepared to guard against the effect of objects coming in contact with them, regardless of the facts and causes which may bring about the contract, is held to be absolute. (La.) 101.

(TORTS; NEGLIGENCE; INJURIES; CONSPIRACY.)

Liability of seller of defective article.

The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employees, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed that the purchaser cannot detect it, is held to be liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect. (Ga.) 932.

Injury by magnetic healer.

To entitle one to recover damages for injuries negligently inflicted upon him by a magnetic healer from whom he is receiving treatment for disease, it is held that he is not bound to show that the treatment received was not proper or usual in magnetic healing; but it is held to be sufficient to show that it was not proper to be given in any case to one in plaintiff's condition at the time of receiving it. (Mo.) 969.

Injury by street car.

A person who crosses an electric street-railway track in front of an approaching car which he plainly sees and distinctly hears is held not to be negligent, if, in view of his distance from the car, the rate of speed of its approach, and other circumstances, a reasonably prudent man would accept the hazard and undertake to cross. (Kan.) 344.

A street railway company is held to be liable for injuries to persons, caused by the wrongful or negligent operation of the cars upon its road, whether operated by itself or by another corporation to which it had leased it. (La.) 222.

Ejection of passenger.

A conductor of a train running between two points connected by different routes is held to be bound to listen to the explanation of a passenger holding a ticket which does not specify the route she is to take, that the agent selling the ticket had directed her to take the route on which the conductor finds her, and to have no right to eject her from the train because of regulations of the carrier, unknown to her, requiring her to take the other route. (Miss.) 283.

Injury to passenger after leaving car.

Failure to stop a street car at the destination of a passenger, by reason of which he is carried to the next street, is held not to be the proximate cause of his falling on a slippery pavement in attempting to return to the point where he should have been permitted to leave the car. (Mo.) 295.

Imputing negligence of mother to child.

A child four years old is held not to be negligent in sitting alone on the seat of an

open street car holding on to the seat guard, so that, in case he is jolted from the seat and injured by the car crossing a defect in the track, the negligence of his mother, with whom he is traveling, in permitting him to occupy such position, can be imputed to him. (Tenn.) 437.

Injury by obstruction in street.

A property owner is held not to be liable for injuries to a traveler caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property. (Iowa) 538.

Injury to dam.

The owner of logs, who permits the same to pass over a dam constructed with sufficient sluiceways to permit the free passage of the logs, but which is not equipped with piling or piers, to which sheer booms may be attached, without guiding them through the sluiceways by means of sheer booms, and without taking out the sluice boards, is held not to be responsible for damage to the dam occasioned thereby, since a dam so constructed does not meet the requirements of the statute authorizing the construction of dams across navigable streams, and creates an unreasonable hindrance to the passage of logs. (Minn.) 977.

Injury to pier by dredging.

The owners of a pier, having obtained from the state the grant of the adjacent land under water, are held to be entitled to dredge it away to any proper depth to make it commercially useful, without liability to the owner of a neighboring pier which subsides because of the slipping of the intervening state lands towards the excavation. (N. Y.) 275.

Injury by X-ray.

In an action against a physician and surgeon for negligence and unskillfulness in applying to the body of a person the device known as "Roentgen's X-rays" for the purpose of locating a foreign substance thought to be in his lungs, it is held that the rule of liability is the same as that applied in other actions for malpractice, and one of ordinary care and prudence. (Minn.) 126.

Breaking electric wires.

One who depends for the operation of his machinery and the lighting of his place of business upon electric power supplied under contract by another party is held to have no right of action against a third party who negligently breaks the wires by which such electric power is conveyed, thereby stopping the business for several hours, by reason of which damages are suffered. (Ga.) 94.

VI. PROPERTY RIGHTS; WILLS; LIENS; DEEDS; MORTGAGES.

Homesteads.

The death of a husband, who, with his wife, had occupied a tract of land belonging to him as a homestead, is held not to deprive the wife of the right to maintain the homestead, and to continue to occupy it, free from forced sale under process of law for the payment of the husband's debts. (Kan.) 560.

Mines.

The right to follow a vein on its dip is held not to apply in favor of a patentee of a lode-mining claim, the exterior boundaries of which include a portion of a claim already patented to another, which includes a portion of the apex of the vein, so as to enable the second patentee to follow the dip of a portion of the apex within the limits of his patent into the territory already patented to the prior claimant. (Colo.) 925.

The owner of a mining claim, who has a right to pursue a vein apexing within it beyond its side lines, is held to be confined to operations within and upon the vein itself, and to have no right to drift a tunnel from his claim into the adjoining one for the purpose of intersecting the vein in its descent. (C. C. A. 9th C.) 207.

An entry upon a placer location to prospect for unknown lodes is held to be a trespass, and to give no valid title to a lode claim, unless the placer owner has abandoned his claim, waives the trespass, or is estopped to complain of it. (Colo.) 209.

Corpses.

A widow having by statute the primary right to administer upon the estate of her intestate husband is held to have the right to control the interment of his body, and a waiver of the right to administer is held not to include a waiver of such right of control, unless it is made to do so expressly. (Pa.) 179.

Right in cemetery lot.

One who purchases a lot in a public cemetery for burial purposes, though the right of interment therein be exclusive, is held not to acquire any title to the soil, but only a mere easement or license which will not support an action of ejectment. (Ga.) 99.

Waters.

See also *supra*, I.

The owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water is held to have no right to remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. (Cal.) 236.

The right to draw water from a common
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underground reservoir merely for the purpose of wasting it, to the injury of other landowners having equal rights to use, and means of access to, it, or of maliciously depriving them of its beneficial use, is denied. (Iowa) 255.

Wills.

A general disposition of his estate, real and personal, of whatever kind and wherever situated, without any reference to a power of appointment created by the will of another, or intent to indicate an intention to execute the power, is held not to be, in the absence of statute, a sufficient execution of a power to direct and appoint in what manner a fund established by the other will shall be distributed. (Del.) 949.

A residuary legatee, who receives, although under protest, the amount due him under the will, is held to have no right, upon a mere offer to bring the amount so received into court, to contest the validity of the will, where, upon the faith of his acceptance, the special legacies provided for have been distributed. (Mo.) 287.

Priority of liens.

Claims for labor are held not to take precedence of the lien of a chattel mortgage, upon the appointment of a receiver who takes possession of the mortgaged chattels after condition broken, under a statute providing that, where property of an employer is placed in the hands of an assignee or receiver, claims for labor performed within three months prior to the appointment of such assignee or receiver shall be first paid out of the trust fund in preference to other claims, since the mortgaged chattels, to the extent that they are required to satisfy the mortgage, are the property of the mortgagee, and not of the mortgagor. (Ohio) 845.

A chattel mortgage duly recorded in one state is held not to be entitled, under the doctrine of comity, to be given priority by courts of another state, to which the chattels are removed, over local attaching creditors who had no actual notice of it. (Tenn.) 353.

Deeds.

The rule that a marked line controls a call in a deed for course and distance is held not to be applicable, unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption that the grantor intended to adopt it. (N. C.) 135.

Mortgage.

A ring for the finger, although an article of personal adornment, is held to be a

proper subject for a chattel mortgage. (Md.) 800.

The right to dispossess, without the payment of the mortgage debt, a mortgagee of real property in possession after condition

broken is denied unless his possession was acquired under such circumstances that he ought not, in equity, to be permitted to retain it. (Kan.) 320.

VII. CIVIL REMEDIES; RULES AND PRINCIPLES.

An agent who has made a contract for the sale of his principal's property, for which he is to receive a commission, is held to have sufficient interest in a telegram which he sends to the principal for the purpose of having the sale confirmed, to be entitled to maintain an action for failure of the telegraph company to perform its contract. (Tex.) 491.

One holding by written assignment a verified, itemized account is held not to be the real party in interest, so as to be entitled to maintain an action thereon in his own name, where it is shown that, by a contemporaneous oral agreement, he had agreed to pay the full amount thereof, when collected, to his assignor. (Kan.) 581.

Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount paid by the insurance company, it is held that the insured may bring an action in his own name against the wrongdoer; and recover the full amount of the loss. (Kan.) 81.

Suit by insane person.

A person of unsound mind, who has not been adjudged insane, or for whom no conservator has been appointed, is held to be entitled to bring a suit by next friend. (Ill.) 513.

Injunction.

The right to the interference of equity to enjoin one with whom margins have been deposited in a stock gambling transaction from violating his agreement to keep them upon deposit in a bank until the transaction is closed, and prevent his withdrawing them from the bank, is denied, although he intends to remove the funds from the state, and thereby defraud the complainant. (Md.) 949.

An injunction to restrain a nuisance caused by the noise, smoke, and odor resulting from the operation of machine shops and boiler works in the vicinity of a private residence is sustained. (La.) 228.

Mandamus.

Mandamus is held to be the proper remedy to compel the reinstatement of a student wrongfully expelled from a law school without notice. (Md.) 108.

Attachment.

A railroad car sent loaded with freight from one state into another, and to be re-

turned loaded to the former state in the transaction of interstate commerce, is held not to be subject to attachment in the latter state. (W. Va.) 501.

A railroad car of a foreign company, sent into the state with freight to be delivered there, and then, within the reasonable time necessary for its return, reloaded, and in the customary and usual course of business forwarded to the state from which it came, is held not to be liable to attachment while awaiting reloading in the state to which first sent. (Minn.) 624.

A fund which has, under the order of the court, been deposited with the clerk is held not to become subject to attachment by the determination of the one who is entitled to receive it, and an order of the court that it be paid to him. (Md.) 112.

The liability of sureties on a contractor's bond is held not to be for the direct payment of money, within the meaning of a statute authorizing an attachment in actions on contracts "for the direct payment of money." (Mont.) 128.

Ejectment.

The owner of the fee of land subject to an easement of a public highway is held to be entitled to maintain ejectment against an intruder who wrongfully appropriates the same to a purpose wholly foreign to the easement; but his recovery of possession is held to be subject to the easement. (N. J. Err. & App.) 836.

Limitation of actions.

A foreign corporation transacting business in a state is held not to be entitled to plead the state statute of limitations in bar of a cause of action originating within the state in favor of a resident. (Kan.) 794.

Physical examination.

In an action for damages for a negligent injury to the eyes, claimed to be permanent, it is held that a timely request for an expert physical examination of the injured organs in the usual and ordinary manner should be granted, although involving the use of drugs for dilating the pupils of the eyes, subject, however, to the limitation that the examination do not produce serious discomfort or any deleterious consequence. (Kan.) 90.

The power of courts, at common law, to order an examination of the person of one alleged to have been injured by the negli-

gence of another, for the purpose of ascertaining the extent of the injuries, is denied. (Tex.) 494.

Evidence.

A physician called by a stranger to furnish aid to one who has attempted suicide, and who is compelled to render his services against the will and opposition of the patient, is held to be within the provision of the statute prohibiting a physician from testifying to facts learned while attending a patient in a professional capacity. (N. Y.) 839.

Exemption from process.

A defendant in a criminal case, coming

into the state to attend the trial, both as a witness and in accordance with the obligations of his bail bond, is held to be exempt from service of process in a civil action during the pendency of the proceedings, and for such reasonable time thereafter as is necessary for his return to the state of his residence. (Iowa) 534.

Release of joint tortfeasor.

The receipt from one joint tortfeasor of a sum in part satisfaction of the demand, and his release from further liability, are held not to operate to release the other from liability for the residue of the damages inflicted. (Ky.) 574.

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Where a death following a fatal blow struck in one county occurs in another, the commencement of a prosecution in either is held to bar a subsequent one in the other, under a statute providing that the jurisdiction shall be in the courts of the county "where the prosecution shall be first begun," although a *nolle prosequi* is entered before the termination of the trial. (Miss.) 807.

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statute is held not to be caused by the performance of a wrongful act, so as to render the one carrying the pistol guilty of manslaughter, under the provisions of a statute that whoever unlawfully kills a human being involuntarily, but in the commission of some unlawful act, is guilty of that crime. (Ind.) 942.

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By Next Friend of Person of Unsound Mind, see INCOMPETENT PERSONS.

1. Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount paid by the insurance company, the insured may bring an action in his own name against the wrongdoer, and may recover the full amount of the loss. Kansas City, Ft. S. & M. R. Co. v. Blaker (Kan.) 81

2. A child has no right of action to recover damages against his father and step-mother for cruel and inhuman treatment inflicted upon him by the latter with the consent of the former. McKelvey v. McKelvey (Tenn.) 991

3. The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy, by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit, constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of con- 1007

tract by the owner. *Whitwell v. Continental Tobacco Co.* (C. C. App. 8th C.) 689

4. Members of a combination to enhance the price of a commodity, which is void under the anti-trust act, who share in the profits secured by the combination, cannot claim exemption from suit on the part of a consumer under the provisions of the statute, on the ground that no direct purchase was made from them, nor complain that all the members of the combination were not made parties to the action. *Atlanta v. Chattanooga Foundry & Pipeworks* (C. C. App. 8th C.) 721

Who may maintain.

5. An agent who has made a contract for the sale of his principal's property, for which he is to receive a commission, has sufficient interest in a telegram which he sends to the principal for the purpose of having the sale confirmed, to be entitled to maintain an action for failure of the telegraph company to perform its contract. *Western Union Teleg. Co. v. Barefoot* (Tex.) 491

6. One holding by written assignment a verified itemized account is not the real party in interest, within the meaning of Kan. Civ. Code, § 26, requiring every action to be prosecuted in the name of the real party in interest, and he cannot maintain an action thereon in his own name, where it is shown that by a contemporaneous oral agreement he has agreed to pay the full amount thereof, when collected, to his assignor; and this is true notwithstanding the assignor testifies that the defendant in the action does not owe her anything, and that the whole amount is due her from the plaintiff, and that he is to pay her provided he recovers in the action. *Stewart v. Price* (Kan.) 581

7. An action will lie on behalf of a quarry owner against members of a voluntary association of dealers in stone of which he is not a member, who enforce a by-law of the association imposing a fine upon members who deal with those who are not members, so that members who desire to deal with nonmembers are coerced from doing so, to the ruination of the business of the quarry owner. *Martell v. White* (Mass.) 260

8. A municipal corporation engaged in the business of supplying water to its inhabitants for profit, which is injured in the purchase of necessary supplies by a combination among producers which is invalid under the anti-trust act, is entitled to maintain an action for redress under the provisions of that act. *Atlanta v. Chattanooga Foundry & Pipeworks* (C. C. App. 8th C.) 721

9. That a consumer injured in the purchase of supplies by a combination, illegal under the anti-trust act, is not engaged in an interstate business, does not deprive it of a right of action under the provisions of that act. Id.

Abatement.

10. A suit by a municipal corporation does not abate by the repeal of its charter and the substitution for the old corporation of a new one with substantially the same inhabitants and locality. *Mobile Transportation Co. v. Mobile* (Ala.) 333

Dismissal.

11. A suit instituted by the next friend of one alleged to be of unsound mind need not be dismissed in case such person appears by attorney, protests that he is of sound mind, and moves to dismiss the bill; but the court may determine whether or not it should retain jurisdiction by investigating complainant's mental condition. *Isle v. Cranby* (Ill.) 513

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Title to property below high-water mark on a tidal river, held by a municipality in trust for the public, cannot be acquired by an individual by adverse possession. *Mobile Transportation Co. v. Mobile (Ala.)* 333

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See also MONOPOLY, 1-6.

APPEAL AND ERROR.

1. A motion for new trial is not the sole remedy to cure an error in the amendment of a decree of a probate court allowing compensation to a broker who had rendered services to an estate, so as to make the allowance to the administrator, but the question is open upon appeal from a decree settling the account and ordering distribution of the estate. *Re Willard's Estate (Cal.)* 554

Appellate jurisdiction.

2. An appellate court is not deprived of jurisdiction of a cause by failure to get it into that court for the term specified in the notice of appeal. *Hoff v. Shockley (Iowa)* 538

3. The allowance of an appeal within the time prescribed by law is sufficient to remove the case to the appellate court, although the appeal is not perfected by the filing of the bond and issuance of service of citation within that time. *Columbia Iron & L. R. A.* 64

Works v. National Lead Co. (C. C. App. 6th C.) 645

4. The question of the jurisdiction of a district court is not involved, so as to require the appeal to be taken to the Supreme Court of the United States rather than to the circuit court of appeals, in the determination that a corporation is principally engaged in such a business that it can be adjudged a bankrupt. *Id.*

Record.

5. Leave to file a supplemental record in support of a petition for rehearing will not be granted to bring up proceedings of the trial court which occurred subsequent to the final judgment, if the matters were all within the knowledge of the plaintiff in error before the original bill of exceptions was approved and signed. *Clipper Min. Co. v. Eli Min. & L. Co. (Colo.)* 209

Objections.

6. An objection that a hypothetical question "is not a proper" one, is too general to raise any question for a review by the appellate court. *Longan v. Weltmer (Mo.)* 969

Questions not raised below.

7. A party cannot complain of a general instruction on the measure of damages which is correct as far as it goes, unless he calls the court's attention to the matter, and requests a limitation of the general language used. *Id.*

Discretionary decision.

8. The courts will not revise the honest judgment of the officials to whom is committed the assessment for taxation of the franchises of a corporation in fixing the taxable value of such franchises. *Bank of California v. San Francisco (Cal.)* 918

Review of verdict or finding.

9. To justify an inference that the amount of damages awarded by the jury was not the result of fair and unprejudiced consideration the facts in evidence should be such that no other conclusion can be entertained. *Longan v. Weltmer (Mo.)* 969

10. A finding of fact by the jury cannot be reversed by the supreme court on appeal, although it appears to be against the preponderance of evidence, if there is evidence to support it which cannot be said to be incredible, and it cannot be said that all the reasonable probabilities and inferences are against their conclusion. *Busse v. Rogers (Wis.)* 183

11. The court will not interfere with an award of \$3,000 as damages for injuries to a competent lineman of an electric light company earning at the time of injury \$60 per month, where he had been able to do but

little work prior to the trial, which occurred about a year after the injury, and there was evidence which would justify a conclusion that he had not at that time recovered from the effect of the accident. *Twombly v. Consolidated Electric Light Co. (Me.)* 551

Ground for reversal.

12. Error in sustaining a demurrer of a party disclaiming any interest in the litigation is not sufficient to justify a reversal and remanding of the cause for the purpose of allowing him to answer. *Harding v. American Glucose Co. (Ill.)* 738

13. Error in permitting consignees of dressed poultry to give their opinions that nothing was omitted to be done towards the proper handling of the poultry by them after receiving it, and that delay in delivery was not caused by anything they did or failed to do, does not require reversal of a judgment against the carrier for loss caused by delay in transportation, where it appears, from uncontradicted facts in the record, that the opinions were correct. *Pennsylvania R. Co. v. Naive (Tenn.)* 443

14. When one attacking a patent to a mining location is permitted, against the objection of his adversary, to go behind the patent and introduce evidence as to the priority of location, he cannot complain if his adversary is permitted to introduce evidence showing that his own location is the prior one. *Jefferson Min. Co. v. Anchoria-Leland Min. & M. Co. (Colo.)* 925

15. The refusal of the court to instruct the jury as to assault is not error, where it appears that, if the defendant was guilty of any offense, it was one of a higher grade than a mere assault. *State v. Ryno (Kan.)* 303

16. An instruction by the court, where a defendant does not testify in his own behalf, that, "while the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him,"— is not prejudicial error. *Id.*

17. Failure to give proper instructions as to contributory negligence, in an action to recover damages for wrongful death, is not reversible error, where there was no evidence upon which to base any instruction upon the subject. *Louisville & E. Mail Co. v. Barnes (Ky.)* 574

18. Refusal to give to the jury a requested instruction which is not strictly correct is not reversible error. *Pennsylvania R. Co. v. Naive (Tenn.)* 443

19. A party cannot complain of the grant-
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ing of prayers for his opponent which did not authorize a recovery of anything more than might be recovered under prayers offered by himself. *Salabes v. Castelberg (Md.)* 800

20. A decision awarding punitive damages must be reversed where, although they were allowable under the facts set out in the first count of the declaration, they were not asked for by it, but were asked for in another count under which no damages were allowable, where, from the instructions and the award, it is evident that they were allowed under the wrong count. *Illinois C. R. Co. v. Harper (Miss.)* 283

21. Error in refusing to retax costs after rendition of a judgment is no ground for reversal of the judgment. *Mobile Transportation Co. v. Mobile (Ala.)* 333

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Appeal; error in instructions which assume disputed facts. 970

Reversible error in refusing to require plaintiff to submit to physical examination; reversible error in admission of incompetent evidence. 90

Reversal of judgment because of admission of incompetent testimony. 437

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Master's Liability for Act of Employees in Causing, see MASTER AND SERVANT, 13.

ASSAULT AND BATTERY.

One assaulted by citizens of a town for the purpose of compelling him to leave it is not bound to retreat to avoid a conflict in order to protect himself from liability to prosecution for assault, but he may repel force with force so long as he uses only such force as is necessary, short of killing his assailants, even though he provoked the attack by drunkenness and disorderly conduct. *State v. Evenson (Iowa)* 77

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Assault; what constitutes; right to repel by force; duty of one attacked without felonious intent to retreat; right of third person to defend against assault member of family. 77

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Of Proceeds of Life Insurance, see INSURANCE, 5-7.

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Assignment; of right of action for negligently destroying property. 82

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Liability to Nonmember for Enforcement of Illegal By-law, see ACTION OR SUIT, 7.

ASSUMPTION OF RISK.

By Employee, see MASTER AND SERVANT, 5-9.

ATTACHMENT.

Superiority over Chattel Mortgage Recorded in State from Which Chattels Brought, see CONFLICT OF LAWS, 7.

1. A fund which has, under the order of the court, been deposited with the clerk, does not become subject to attachment by the determination of the one who is entitled to receive it, and an order of the court that it be paid to him. *Dale v. Brumbly* (Md.) 112

2. A clerk of court is a public officer, within the rule that money is not subject to attachment in the hands of such officers. *Id.*

3. The liability of sureties on a contractor's bond is not for the direct payment of money, within the meaning of a statute authorizing an attachment in actions on contracts "for the direct payment of money." *Ancient Order of Hibernians v. Sparrow* (Mont.) 128

4. When the right of the principal defendant in case of an attachment sued out against a third person as garnishee is subject to a right of the garnishee under a contract between them, the right of the garnishor is likewise subject to the right of the garnishee. *Wall v. Norfolk & W. R. Co.* (W. Va.) 501

5. Rolling stock and all other movable property of a railroad company or corporation are subject to process of attachment, where the attachment is applicable, as well as to ordinary execution, under W. Va. Const. art. 11, § 8. *Id.*

6. A railroad car sent loaded with freight from another state into West Virginia, to be returned loaded to the former state, in the transaction of interstate commerce, cannot be levied upon under an attachment in West Virginia; nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company against which an attachment has been issued. *Id.*

7. Loaded cars in possession of a railroad company under an agreement with another, by which they are to be received at connecting points by the former company, and 64 L. R. A.

hauled over its line to the destination of load of the car, and then be reloaded with other freight by the receiving company on its line, and carried over its line, and returned loaded to the railroad of the owner of the cars, the receiving company compensating the owning company for such use of the cars,—cannot be seized under an attachment against the company owning the cars, so as to defeat the rights, under such arrangement or contract, of the company receiving and entitled to so use the cars; and a garnishment of the receiving company cannot affect its rights under such arrangements by reason of its possession of such cars. *Id.*

8. A railroad car of a foreign company, sent into Minnesota with freight to be delivered there, and then, within the reasonable time necessary for its return, reloaded and, in the customary and usual course of business, forwarded to the state from which it came,—is not liable to attachment issued in an action in the Minnesota courts. *Connerly v. Quincy, O. & K. C. R. Co.* (Minn.) 624

NOTES AND BRIEFS.

Attachment; of foreign railroad car. 501, 503, 625
Of money in court. 112

ATTORNEYS.

What Constitutes Fulfilment of Contract to Employ Permanently, see CONTRACTS, 11.

ATTORNEYS' FEES.

Validity of Statute Permitting Recovery in Enforcing Mechanics' Lien, see CONSTITUTIONAL LAW, 6.

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Attorney's fees; validity of statute allowing recovery of, in certain actions. 326

AUCTION.

1. A sale will be treated as made by auction where, at the time duly appointed and announced, property to which the vendor has a good title is put up and offered for sale, bids are made, and it is sold to the highest bidder, although some of the conditions which attended the sale may be unusual. *Rowley v. D'Arcy* (Mass.) 190

2. An auction sale by the assignee of property of an insolvent debtor is not rendered void by a combination between creditors of the estate to enhance the price by fictitious bids, which is not known to, or participated in by, the assignee. *Id.*

BAGGAGE.

Right to Solicit, at Depot, see **CARRIERS**, 9.

BANKRUPTCY.

To What Court Case Involving Corporation's Right to be Adjudged Bankrupt Appealable, see **APPEAL AND ERROR**, 4.

The building, sale, and repairing of vessels employed in commerce is within the provisions of a statute permitting bankruptcy proceedings to be instituted against corporations engaged principally in manufacturing and mercantile pursuits. *Columbia Ironworks v. National Lead Co.* (C. C. App. 6th C.) 645

NOTES AND BRIEFS.

Bankruptcy; construction of bankruptcy statute; what is manufacturing corporation within meaning of; necessity of showing that corporation comes within one of specified classes. 645

BANKS.

A bank which receives from an agent for deposit in his own name the money of his principal, without notice of the agency, is protected, in applying it to a past-due debt of the depositor, to the same extent as in paying it out upon his checks, whenever such application is authorized by the agent, either expressly or by legal implication; and such authority ordinarily arises from the making of a deposit, without other directions, where the debt to which it is applied is an overdraft. * *Kimmel v. Bean* (Kan.) 785

NOTES AND BRIEFS.

Banks; right of bank to withhold funds of principal deposited by factor or agent; sufficiency of notice to bank of nature of deposit; when bank deemed bona fide purchaser for value of check; burden of proof to show that bank was not bona fide purchaser; right to apply trust fund to payment of pre-existing debt of trustee. 786

BENEVOLENT SOCIETIES.

1. A mutual benefit society cannot sue a former member for dues for nonpayment of which it has expelled him from the society. *L'Union St. Jean Baptiste v. Ostiguy* (R. I.) 158

2. Assessments by a mutual benefit association are not debts recoverable by action at law, where the right to the benefit is dependent on good standing in the society, and good standing depends on the payment of assessments which are always made in advance, and not to meet accrued obligations. *Id.*

NOTES AND BRIEFS.

Benefit societies; validity of by-law as to waiver, by member, of statutory provision as to privilege of physician's testimony. 840

BEST EVIDENCE.

See **EVIDENCE**, 3.

BICYCLES.

Imperfections in Highway as Proximate Cause of Injury to Bicyclist Thrown over Embankment, see **PROXIMATE CAUSE**, 1.

Liability of Town to Bicyclist for Defective Highway, see **HIGHWAYS**, 3.

NOTES AND BRIEFS.

Bicycles; duty of person riding on highway to exercise care; right of one riding to recover for injury by defect in street. 70

BILLS AND NOTES.

An indorsee of a negotiable note taken as collateral security for a pre-existing debt, there being no extension of time of payment or other new consideration, except such as may be deemed to arise from the acceptance of the paper, is a holder for value and in due course of business, and, in the absence of any circumstances charging him with notice, is protected against a claim of payment made to the original payee. *Birket v. Elward* (Kan.) 568

NOTES AND BRIEFS.

Bills and notes; transfer of negotiable paper before maturity; as raising presumption of want of notice of any defense to it; holder of note transferred as collateral security for debt as holder for value. 568

BOARD OF HEALTH.

Failure to Appoint, as Affecting Municipal Liability for Acts in Enforcing Health Ordinances, see **MUNICIPAL CORPORATIONS**, 7.

BONA FIDE PURCHASER.

Of Negotiable Paper, see **BILLS AND NOTES**.

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Attachment of Sureties' Property in Action on, see **ATTACHMENT**, 3.

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Bonds; liability of sureties on; as one for direct payment of money authorizing attachment. 123

BOUNDARIES.

Boundary of Governmental Grant Adjoining Tide Water, see **WATERS**, 3.
Burden of Showing Others than Given in Deed Intended, see **EVIDENCE**, 29.

1. Where a grantor, in dividing his estate, makes calls different from those which he had previously marked upon the ground, the question whether those in the deed, or those marked on the ground, will control, depends upon his intention. *Elliott v. Jefferson* (N. C.) 135

2. The rule that a marked line controls a call in a deed for course and distance is not applicable unless the marked line is so connected with the deed, either by intrinsic or extrinsic evidence, as to create a presumption that the grantor intended to adopt it. *Id.*

BROKERS.

Right to Enjoin Withdrawal of Margins from Bank by, see **INJUNCTION**, 5, 6.

By What Law Legality of Transactions Determined, see **CONFLICT OF LAWS**, 4.

NOTES AND BRIEFS.

Brokers; employed by executor or administrator to sell property of estate; liability of estate for commissions of. 554

BUILDING AND LOAN ASSOCIATIONS.

1. A building and loan association has no power to engage in the business of trading in real estate or acquiring the same, except as incidental to its legitimate business. *National Home B. & L. Asso. v. Home Sav. Bank* (Ill.) 399

2. The right of a building and loan association to purchase such real estate as it has a mortgage on for its necessary protection in making collections does not extend to the purchase of additional real estate, though taken as a part of the same transaction. *Id.*

NOTES AND BRIEFS.

Building and loan associations; member of, charged with notice of powers of officers and provisions of charter. 400

BURDEN OF PROOF.

See **EVIDENCE**, 28-31.

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BY-LAWS.

Action by Nonmember of Association Injured by Enforcement, see **ACTION OR SUIT**, 7.

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CARRIERS.

Telegraph Company as a Common Carrier, see **TELEGRAPHS**, 1.

Right to Furnish Liquors to Travelers, see **CORPORATIONS**, 10.

Concurring Negligence of, as Defeating Recovery from Another for Death of Passenger, see **PROXIMATE CAUSE**, 3.

Burden of Proof as to Negligence of, see **EVIDENCE**, 31.

Evidence of Defective Track, see **EVIDENCE**, 14.

Declarations of Ticket Agent and Conductor as Evidence of Carriage Contract, see **EVIDENCE**, 7.

Sufficiency of Instruction as to Measure of Duty of, see **TRIAL**, 6.

Evidence Erroneously Admitted in Action for Delay in Transporting Freight, as Nonreversible Error, see **APPEAL AND ERROR**, 13.

Duty and Liability towards passengers.

Carrying Passenger Past Street as Proximate Cause of Fall on Pavement, see **PROXIMATE CAUSE**, 2.

Imputing Negligence to Infant Passenger, see **NEGLIGENCE**, 4, 5.

Liability for Exemplary Damages for Ejection of Passenger, see **DAMAGES**, 4.

1. A conductor of a train running between two points connected by different routes is bound to listen to the explanation of a passenger holding a ticket which does not specify the route she is to take, that the agent selling the ticket had directed her to take the route on which the conductor finds her; and he cannot eject her from the train because of regulations of the carrier, unknown to her, requiring her to take the other route. *Illinois C. R. Co. v. Harper* (Miss.) 283

2. Insulting or ungentlemanly conduct is not necessary to render the ejection of a woman from a train wrongful, if, under the terms of her carriage contract she has a right there. *Id.*

3. The conductor of a passenger train is under no obligation to place upon the right car a passenger who has entered the wrong one by mistake. *Id.*

Carrier of freight.

Custom as Excusing Nondelivery of Perishable Freight on Holiday, see **CUSTOM**, 1, 2.

Evidence of Good Condition of Dressed Poultry at Time of Delivery to, see **EVIDENCE**, 21.

4. The liability of a carrier for neglect to give prompt notice of the arrival of perishable goods is not destroyed by the failure

of the consignee to make inquiries for them, although he has reason to believe that they are overdue. *Pennsylvania R. Co. v. Naive* (Tenn.) 443

5. One consigning goods to his agents in another city, for sale, is bound to take notice of a certain, well-established, and general custom in force there, that business will be suspended on a certain holiday, so that he cannot hold the carrier liable for failure to make delivery of the consignment on that day. *Id.*

6. A carrier is not guilty of negligence in failing to notify a consignee of the arrival of perishable goods on a legal holiday, where, by general custom of the locality, all business is suspended on that day. *Id.*

7. When perishable freight in possession of a railway company for transportation reaches its destination in the evening before a general holiday, when all business will be suspended, too late for delivery that night, at a time of year when, unless cared for, it will be likely to spoil before it can be delivered, the company is bound to use the facilities at hand to prevent that result, and it will be liable for loss occasioned by its failure to do so. *Id.*

8. The liability of a railroad company for goods in its possession for transportation as a common carrier does not cease, and its liability as warehouseman begin, until the goods are deposited in the depot or warehouse. *Id.*

Right to solicit baggage at depot.

9. Teamsters have no right, either at common law or under a statute requiring railroad companies to furnish facilities for the accommodation of the public, and to furnish to all persons equal terms, facilities, and accommodations for the transportation of persons and property over their roads, and for the use of buildings and grounds in connection with such transportation, to enter upon the railroad property to solicit the privilege of carrying the baggage of passengers; but the railroad company may give such right to one of them, and exclude others from its grounds, if the reasonable requirements of passengers are thereby fully met. *Hedding v. Gallagher* (N. H.) 811

NOTES AND BRIEFS.

Carriers; right to discriminate between hackmen and baggagemen at depot. 811

Liability of, for care of property after arrival; burden of proof to show negligence of; failure to deliver on holiday; restrictions on liability in bill of lading. 445

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The issue of stock by a cemetery corporation. 64 L. R. A.

tion is *ultra vires* when it is issued without any specific legislative authority. *Cooke v. Marshall* (Pa.) 413

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Cemeteries; nature of interest of purchaser of lot in; sufficiency to support action of ejectment; to support action of trespass *quare clausum fregit*. 99

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Checks; as negotiable instruments. 786

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Judicial Notice that Sweat-Shop Manufacture of, a Menace to Public Health, see *EVIDENCE*, 1.

Power of State to Regulate Manufacture, see *CONSTITUTIONAL LAW*, 10, 12.

COLLEGE.

Reinstatement of Student by Mandamus, see *MANDAMUS*, 1, 2.

A law school cannot dismiss a student, or refuse to permit him to graduate for irregularity in attendance, where its custom, as understood at the time of his matriculation, was that all that was necessary for graduation was payment of the required fees and completion of the work, to accomplish which the student might take such time as was needed. *Baltimore University v. Colton* (Md.) 108

COLLISION.

See SHIPPING; NOTES AND BRIEFS.

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Comity; doctrine of, as applied to enforcement of chattel mortgage made in other state. 353

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Commerce; combination in restraint of interstate commerce. 691

Interstate; restraint on, in violation of anti-trust act. 689

COMMON LAW.

Court's Authority at Common Law to Order Physical Examination, see DISCOVERY, 1.

The fundamental principles of right and justice on which the common law is founded, and which its administration is intended to promote, require that a different rule should be adopted whenever it is found that, owing to the physical features and character of a state, and the peculiarities of its climate, soil, and products, the application of a given common-law rule tends constantly to cause injustice and wrong, rather than the administration of justice and right. *Katz v. Walkinshaw* (Cal.) 236

COMPLAINT.

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See EVIDENCE, 6.

Waiver of Statutory Privilege, in Benefit Certificate, see INSURANCE, 3.

CONFLICT OF LAWS.

Validity of Foreign Corporation's Exercise of Charter Powers in Violation of Local Laws, see CORPORATIONS, 3.

1. A sale of goods by a drummer, the order for which is taken subject to the approval of his principal in another state, but which is consummated by the segregation of the goods sold from a stock of goods within the state, is a contract of the latter 64 L. R. A.

state, and subject to its laws. Succession of Welsh (La.) 823

2. Where an order for goods is taken by a drummer in one state, subject to the approval of his principal, and is transmitted to the principal in another state, and is there approved and there filled by the segregation and shipment of the goods, the sale is a contract of the domicile of the vendor, and does not give rise to a vendor's privilege on the goods, unless such privilege exists under the laws of such other state. *Id.*

3. The contract contained in a mutual benefit certificate, which requires the beneficiary to sign an acceptance of its provisions, is made where the contract is consummated by such acceptance, and subject to the laws there in force. *Meyer v. Supreme Lodge K. of P.* (N. Y.) 839

4. Transactions of a broker which become the basis of a note given by his principal, and which are performed in one state where the note is delivered under directions of the principal by telephone or letter from another state, are, for the purpose of determining the validity of the consideration for the note, to be judged by the law of the place where the broker performed them. *Winward v. Lincoln* (R. I.) 160

5. Provisions of a statute as to implications to be drawn from acts in connection with dealing in stocks have no application in the courts of another state, where the validity of a stock transaction is drawn in question any further than they may tend to throw light upon the validity of such transactions under the statute. *Id.*

6. A note, valid where made, cannot be enforced in another state to whose public policy the transactions which form its consideration are contrary. *Id.*

7. A chattel mortgage duly recorded in one state will not, under the doctrine of comity, be given priority by the courts of another state, to which the chattels are removed, over local attaching creditors who had no actual notice of it. *Snider v. Yates* (Tenn.) 353

8. A court will not entertain a suit to charge a person on an unsigned representation as to the credit of another person, although it is valid where made, if the statute of the place where the suit is brought provides that no action shall be brought to charge one on such a representation, unless it is in writing, signed by the party to be charged thereon. *Third Nat. Bank v. Steel* (Mich.) 119

9. Questions as to the execution of a power of appointment of personal property are to be decided by the law of the domicile of the donor of the power, and not by the

law of the domicile of the donee. *Lane v. Lane* (Del.) 849

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Conflict of laws; as to statute of frauds:—(I.) As between law of forum and substantive law of contract; (II.) as between law of place where contract is made and that of place where it is performable; (III.) as between law of place where contract is made and that of place where property is situated. 119

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When *lex loci celebrationis* governs; presumption that contract to be performed at place where made; interpretation of contract regulated by law of place of performance. 839

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Legislative Power to Define Practice of Medicine, see PHYSICIANS AND SURGEONS, 1.

Validity of Statute Permitting Amendment of Lien Statement in Action to Enforce, see LIENS, 3.

Validity of Statute Limiting Recovery in Libel Action against Newspaper to Actual Damages, see LIBEL AND SLANDER, 2.

Disability of Murderer of Ancestor to Inherit, as Affected by Constitutional Provision, against Forfeiture of Estate by Conviction for Crime, see FORFEITURE.

Validity of Ordinance Prohibiting Dairies without Council's Permission, see MUNICIPAL CORPORATIONS, 4.

Validity of Sunday Closing Law, see SUNDAY, 1.

Due process of law.

1. "Remedy by due course of law," as used in the Kansas Bill of Rights, § 18 means the reparation for injury, ordered by a tribunal having jurisdiction, in due course of procedure, after a fair hearing. *Hanson v. Krehbiel* (Kan.) 790

2. The right to a remedy by due course of law is not satisfied by the requirement contained in a statute to make specific reparation for the injury done, which reparation is the same in all cases, and bears no relation to the injury suffered, and has not been decreed by a tribunal after ascertainment of the extent of such injury. *Id.*

3. A municipal ordinance prohibiting the maintenance of a dairy within the city limits neither deprives citizens of property without due process or law nor abridges their privileges or immunities. *St. Louis v. Fischer* (Mo.) 679

Equal protection and privileges.

4. A statute providing that those who have served in the Army and Navy of the United States in the War of the Rebellion, and have been honorably discharged therefrom, shall be preferred for appointment to office in every public department, and upon all public works of the state and of the cities and towns thereof, is constitutional. *Goodrich v. Mitchell* (Kan.) 945

5. The attempt to confer the exclusive right to treat all diseases, physical or mental, real or imaginary, upon licensed doctors, is unconstitutional. *State v. Biggs* (N. C.) 139

6. The provision for the recovery of a

reasonable attorney's fee, to be fixed by the court and taxed as costs in the action when judgment is rendered for plaintiff in any action by a laborer or artisan to enforce a lien under the Kansas mechanics' lien law, is unconstitutional and void as a denial of the equal protection of the laws. *Atkinson v. Woodmansee* (Kan.) 325

7. A statute imposing a penalty upon a fire insurance company for refusal, in bad faith, to pay the amount due upon a policy, and also a like penalty upon an insured who institutes an action in bad faith, is not void as a special regulation of the business of insurance, which no differences between that and other kinds of business justify. *Continental Fire Ins. Co. v. Whitaker* (Tenn.) 451

8. That a corporation is engaged in a business which an individual might carry on without payment of any tax or license fee does not render the imposition of a tax upon its franchises an unlawful discrimination prohibited by U. S. Const. Amend. 14. *Bank of California v. San Francisco* (Cal.) 918

Police power.

9. The court cannot declare an act of the legislature which has a real and substantial relation to the police power void for unreasonableness. *State v. Hyman* (Md.) 637

10. The police power extends to prohibiting the use of a room in a tenement or dwelling house for the manufacture of men's clothing, except by the immediate members of the family living there, and then only under permit from a public official. *Id.*

11. Requiring a specified air space for every person employed in a manufacturing establishment is strictly and essentially a health regulation within the police power of the legislature. *Id.*

12. Persons giving out materials to be manufactured into men's clothing may be required to keep a register of those to whom they are given, to aid the public authorities in their supervision of the places where the work is done. *Id.*

13. The police power justifies legislation providing that insurance policies shall not be avoided for the falsity of representations or warranties, unless made with intent to deceive, or increasing the risk of loss; and it is immaterial that it is made to apply only to those issued by old-line companies, and not to those issued on the assessment plan. *Continental Fire Ins. Co. v. Whitaker* (Tenn.) 451

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Constitutional law; validity of statute permitting recovery of attorneys' fees in certain classes of actions. 326
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Arbitrary classification of different kinds of business in statute. 510

Validity of statute regulating making of clothing in tenements; as exercise of police power; limiting hours of labor; requiring immediate payment of wages of discharged employees; requiring workmen to be paid in cash; invalidating sale of stock of goods in bulk without ascertaining seller's creditors; forbidding barber shop to remain open on Sunday; providing for inspection of coal mines; discrimination between restrictions upon electric cars; special tax on business of hiring persons to work beyond limits of state; prohibiting sale of cigarettes or unwholesome food; test of constitutionality of law; review of legislation by courts; permitting executive officers to decide question finally and without appeal. 637

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CONTRACTS.

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When Damages Recoverable for Breach, see DAMAGES, 1.

By Municipal Corporations, see MUNICIPAL CORPORATIONS, 2, 3.

In Violation of Anti-Monopoly Law, see MONOPOLY, 7.

Validity of Contracts beyond Powers of Corporation, see CORPORATIONS, 16, 20.

See also NEGLIGENCE, 6.

1. A party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages for the negligent act of a third person, by which the performance of the contract was rendered impossible. *Byrd v. English* (Ga.) 94

Implied contract.

2. Mere acceptance of and payment for the service of a water company in furnishing water for general fire purposes are not

sufficient to establish a contract on the part of the water company to compensate the municipality for loss of property by fire for the extinguishment of which the company negligently failed to furnish water, although the service was undertaken in compliance with a demand therefor by the municipality. *Ukiah City v. Ukiah W. & I. Co.* (Cal.) 231

Recovery on implied, as affected by express, contract.

3. An express agreement with the promoters of a corporation for compensation for services rendered for its benefit will not prevent reliance on an implied one to recover the value of the services from the corporation in case it accepts the benefit of the services but repudiates the agreement. *Sullivan v. Detroit, Y. & A. A. R. Co.* (Mich.) 673

Former requisites; statute of fraud.

4. A signed letter stating that the writer remembers "of exhibiting a statement" of another's resources is not sufficient to make the letter a signed statement of them, within the meaning of a statute providing that no action shall be brought on such a statement unless it is signed, where the statement on which the plaintiff relies was exhibited by a third person, and there is nothing in the letter to identify the one to which it refers, and by the terms of the letter the exhibited statement did not contain the whole substance of the communication upon the subject. *Third Nat. Bank v. Steel* (Mich.) 119

Construction.

5. A contract for a municipal water supply, which is void because perpetual and therefore in excess of the powers of the municipal corporation, cannot be construed to have been intended to exist merely for the lifetime of the water company, and to be valid because such term was not unreasonable. *Westminster Water Co. v. Westminster* (Md.) 630

Validity.

6. A contract by one selling his business not to engage in it again for a series of years within the territory where it could be profitably transacted is void as in general restraint of trade. *Harding v. American Glucose Co.* (Ill.) 738

7. A contract by one selling the right to manufacture and sell a machine which he has devised, not to engage in the business of making such machines himself, nor grant anyone else the right to do so during the life of the contract, is not void as against public policy, where possible customers are limited in number and scattered throughout the country. *Bancroft v. Union Embossing Co.* (N. H.) 298

8. A contract not to compete in the 64 L. R. A.

manufacture of machinery under patterns, the right to use which is sold to the other contracting party, is not invalidated by the act of Congress of July 2, 1890, prohibiting restraints of trade and commerce among the several states and with foreign nations. *Id.*

9. A transaction by which a broker, upon orders of his customer, actually purchases stocks in good faith and with the intention that they shall be delivered upon demand, is not void as a wager at common law, although the stocks are not in fact paid for by, or delivered to, the customer, who has no intention of receiving them, but are held by the broker, who either borrows or advances the purchase money upon the security of the stock, and holds them until ordered by the customer to sell them. *Winward v. Lincoln* (R. I.) 160

Grounds for rescission.

10. That the belief of the parties to a contract for the exclusive right to manufacture machines of a certain pattern that the principal feature in the machine was patentable proves to be erroneous is not such a failure of consideration as will entitle the one obtaining the right to make the machines to rescind the contract, since the rights of the parties are to be governed by the terms of the contract, and their belief as to the rights obtained is immaterial. *Bancroft v. Union Embossing Co.* (N. H.) 298

Performance.

11. Employment for a year is a fulfillment of a contract to give an attorney permanent employment in consideration of services rendered in the formation of a corporation, since the contract is indefinite and terminable at the will of either party. *Sullivan v. Detroit, Y. & A. A. R. Co.* (Mich.) 673

Impairing obligation.

12. The provisions of the Federal Constitution prohibiting the impairment of the obligation of a contract do not apply to contracts which are not valid. *Westminster Water Co. v. Westminster* (Md.) 630

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Contracts; conflict of laws as to statute of frauds. 119

Surrender of instrument wrongfully obtained as consideration for promise. 801

For permanent employment, what constitutes fulfillment of. 675

Constitutional provision against impairment of; not operative unless there is a valid contract; binding effect on city of unreasonable contracts not authorized by charter; power of officers to make contract in perpetuity for water supply; ratification of *ultra vires* contract. 630

Doubt as to meaning of, admissibility of statement of parties to show their understanding of terms; right of court to consider surrounding circumstances in determining intention of parties; extrinsic evidence of contemporaneous oral agreement; merger of antecedent agreements or negotiations in writing; parol evidence inadmissible in absence of fraud, accident, or mistake to change terms of instrument. 393

Right to rescind because of partial failure of consideration. 298

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To release railroad from liability for damages by fire to property placed on right of way; validity of. 82

Exempting from taxation; impairment of obligation of. 36

CORPORATIONS.

Assessment and Taxation of Franchise, see TAXES, 2, 3, 9.

Validity of Franchise Tax, see CONSTITUTIONAL LAW, 8.

Laches as Bar to Quo Warranto against, see QUO WARRANTO.

Right of Foreign Corporation to Plead Statute of Limitations, see LIMITATION OF ACTIONS, 3.

Liability of Ship-Building Corporation to Bankruptcy Proceedings, see BANKRUPTCY.

Liability for Services Rendered under Agreement with Promoter, see CONTRACTS, 3.

Evidence in Action to Enjoin Sale to Trust, see EVIDENCE, 13.

See also BUILDING AND LOAN ASSOCIATION; CEMETERIES; RAILROADS.

Powers.

1. A corporation, being a creature of the law, has no powers which the law has not conferred upon it. *National Home B. & L. Asso. v. Home Sav. Bank* (Ill.) 399

2. The increase of stock is not within the implied powers of a corporation. *Cooke v. Marshall* (Pa.) 413

3. That a foreign corporation doing business in the state has power, under its charter, to relinquish the transaction of a branch of its business, does not authorize it to enter into a trust combination, or sell property required for the transaction of its business in violation of the local laws, or deprive the local courts of the power to see that the 64 L. R. A.

business transacted in the state shall not be disposed of in such a way as to violate the local statutes. *Harding v. American Glucose Co.* (Ill.) 738

4. The implied powers which a corporation has in order to carry into effect those expressly granted, and to accomplish the purposes of its creation, are not limited to such as are indispensable for these purposes, but comprise all that are necessary, in the sense of appropriate, convenient, and suitable, including the right of reasonable choice of means to be employed. *Central Ohio N. G. & F. Co. v. Capital City Dairy Co.* (Ohio St.) 395

5. Where a corporation formed for the purpose of manufacturing and dealing in a particular line of goods, instead of incurring the delay and expense incident to the construction of a new manufacturing plant and building up of an independent business, in good faith, with a view of promoting the interests of the corporation, chooses to purchase of an existing partnership engaged in a like business its established plant and assets, including its outstanding claims, among which is one for damages to the property caused by another's negligence, the corporation acquires a valid title to the claim for damages, as against the party liable, and may maintain an action thereon. Id.

6. Incidental or implied powers of a corporation exist only to enable it to carry out the express powers granted,—that is, to accomplish the purpose of its existence,—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises not directly, but only remotely, connected with its specific corporate purposes. *People ex rel. Moloney v. Pullman's Palace Car Co.* (Ill.) 366

7. The ownership of an office building near the business center of a city, by a manufacturing corporation, does not exceed its incidental powers merely because the building is larger than its needs for present use, and a part of it is therefore rented, if it is probable that the whole building will be needed for its own business in the future. Id.

8. The ownership, by a manufacturing corporation, of a town or city of more than 2,000 houses, with streets, alleys, sewer system, dwellings, tenement houses, churches, hotel, schools, theater, and business buildings, no one of which is occupied by any other than a tenant of the corporation, is

contrary to public policy, and in excess of the implied powers of the corporation. *Id.*

9. The ownership of a sewerage system, and of a sewerage farm on which vegetables are raised for sale, is not within the implied powers of a corporation because of the necessity of sewerage for a town owned by it, when the ownership of such town is in excess of its powers. *Id.*

10. Whiskies, wines, beers, and other malt and intoxicating liquors are included in the "supplies" which the charter of a corporation engaged in manufacturing and selling or using cars authorizes it to furnish to travelers on them. *Id.*

11. Vacant land may be held by a corporation when necessary for use in its business in the near future. *Id.*

12. Vacant lots kept for future dwellings cannot be owned by a corporation in the exercise of its implied powers, when they constitute part of a tract on which the corporation has built a town in excess of its powers. *Id.*

13. A sale of surplus steam by a corporation is not in excess of its powers when the steam is generated in the course of its business by boilers larger than are needed for its present uses, but which are bought in anticipation of probable future necessities. *Id.*

14. A corporation cannot become a stockholder in another corporation unless power to do so is specifically granted in its charter, or necessarily implied from it. *Id.*

15. The report of a legislative committee, that the property of a corporation is properly taxed, does not amount to a concession on the part of the state that the corporation had a right to acquire the title to the property. *Id.*

Contracts.

16. A contract of a corporation which is beyond its corporate powers and *ultra vires* in the strict and legitimate sense, and against public policy, cannot be made binding on the corporation by way of estoppel. *National Home B. & L. Asso. v. Home Sav. Bank (Ill.)* 399

17. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense of *ultra vires*. *Id.*

18. Acts of a corporation, which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily *ultra vires* when they are incidental to, or form part of, an entire transaction that, in its general scope, is within the corporate purpose. *Central Ohio N. G. 64 L. R. A.*

& F. Co. v. Capital City Dairy Co. (Ohio St.) 395

19. The validity of a transaction by a corporation is to be determined from its general character considered as a whole, rather than by segregating it into individual parts, and regarding each as distinct from the others. *Id.*

20. Option contracts providing for the sale of plants organized for the manufacture of glucose to a corporation organized to do a banking business and having no authority to purchase such plants, are void. *Harding v. American Glucose Co. (Ill.)* 738

Officers.

21. The acts of trustees of a corporation elected in strict conformity with the by-laws of the corporation for a long period of time, during which their title was unquestioned, will be regarded as entirely legal, although they were elected by holders of stock which the corporation had no power to create. *Cooke v. Marshall (Pa.)* 413

22. Original members of a corporation, who organized and chose officers to represent the corporation as their successors, cannot, after the lapse of thirty-two years, ignore their former action, and choose new officers upon discovering that the original choice was illegal, where, in the meantime the affairs of the corporation have been regularly carried on under the belief that the first action was legal. *Id.*

Stockholders' rights.

23. A stockholder has the right to maintain a suit to enjoin the corporation from entering an illegal trust, where the effect will be to subject the charter to forfeiture and destroy the value of the stock, since it will, in any event, close down the business of the corporation, and prevent the further earning of profits. *Harding v. American Glucose Co. (Ill.)* 738

24. A stockholder of a corporation may bring an action on behalf of himself and others who shall come in and become parties, to prevent the officers and a majority of the stockholders of the corporation from dealing wrongfully with the corporate property to the injury of stockholders, where it is reasonably certain that a demand upon the proper officers to bring the action would be unavailing. *Id.*

NOTES AND BRIEFS.

See also **RAILROADS.**

Corporations; liability of corporation given franchise to collect toll, for failure to keep highway in repair. 232

No legal existence outside of state where created; does not leave state by doing business in other state; running of statute of

limitations in favor of foreign corporation; personal service on foreign corporation doing business in state. 795

Nature of; extent of powers of; implied powers; nature of franchises of; construing charter most strongly against corporation; ownership of real estate by; ownership of stock in other corporation; acquiescence by state in acts of; forfeiture for unauthorized acts. 367

Right to equal protection of the laws. 337

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Right to increase stock; doubt as to, resolved against corporation; implied powers of. 413

Ultra vires purchase of chose in action by; right of party against whom it is sought to enforce right in action to rely on plea of *ultra vires*; right to question power confined to state; implied powers of corporation. 396

Binding effect on, of unauthorized acts of individual director or officer; power to purchase real estate and to assume mortgage thereon; ratification of *ultra vires* act; not necessary that corporate acts be immoral or expressly prohibited in order to be void; authority of agents of, the same as if agents of individual; estoppel to contend that act was beyond power of; where party dealing with corporation has acted in good faith; question of *ultra vires* to be raised only by direct proceeding in quo warranto. 399

CORPSE.

1. A widow having by statute the primary right to administer upon the estate of her intestate husband has a right to control the interment of his body, and a waiver of the right to administer will not include a waiver of such right of control, unless it is made to do so expressly. *Pettigrew v. Pettigrew* (Pa.) 179

2. The direction of a person as to the disposal of his body after death is entitled to respectful consideration when the question comes before the court, whether it is controlling or not. *Id.*

3. The duty of an executor or administrator terminates with the first interment of the body of the testator or intestate, and he has no right to a voice on the question of the removal of the remains. *Id.*

4. There is no universal rule for governing the right to remove the remains of a deceased person after interment, but each case must be considered in equity on its own merits, having due regard to the in- 64 L. R. A.

terests of the public, the wishes of decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association. *Id.*

5. A widow should be permitted to remove the body of her deceased husband from the lot of his father, where she had consented to its burial, in order to place it upon a lot purchased by her for that purpose beside his only child, who desired it to be done, where the child and widow could not, for lack of room, be buried where the father was, and family hostility would probably prevent such course if it was physically possible. *Id.*

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Corpse; right of wife to possession and control of body of deceased husband; right to remove body from one burial lot to another. 180

COSTS.

Refusal to Retax, as Reversible Error, see **APPEAL AND ERROR**, 21.

Validity of Statute Permitting Inclusion of Attorney's Fee in Enforcing Mechanics' Lien, see **CONSTITUTIONAL LAW**, 6.

COURTS.

Authority to Order Physical Examination, see **DISCOVERY**, 1, 2.

Jurisdiction of Circuit Court of Appeals, where Question Whether Corporation May be Adjudged Bankrupt Involved, see **APPEAL AND ERROR**, 4.

Commencement of Prosecution in One for Crime Partly Consummated in Each of Several Counties as Limiting Jurisdiction, see **CRIMINAL LAW**, 2.

1. The court is under no obligation to administer exact justice between litigants; its province being to try the issues formed by the pleadings according to the rules of procedure. *Austin & Northwestern R. Co. v. Cluck* (Tex.) 494

2. No court has authority to originate and introduce new process to enable parties to secure evidence in support of their cases. *Id.*

Exclusiveness of jurisdiction first acquired.

3. Where a death following a fatal blow struck in one county occurs in another the commencement of a prosecution in either will bar a subsequent one in the other, where the statute provides that the jurisdiction shall be in the courts of the county "where the prosecution shall be first begun," although a *nolle prosequi* is entered before

the termination of the trial. *Coleman v. State* (Miss.) 807

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Right to Salvage, see SALVAGE.

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What Constitutes Manslaughter, see HOMICIDE, 1.

Sufficiency of Information to Support Conviction for Wounding, see HOMICIDE, 2.

Variance between Indictment and Proof, see EVIDENCE, 32.

Exemption of Nonresident Defendant from Service of Civil Process, see WRIT AND PROCESS, 1.

Prosecution Begun in One of Two Counties Having Jurisdiction, as Bar to Proceedings in Other, see COURTS, 3.

Instruction as to Failure of Accused to Testify as Nonprejudicial Error, see APPEAL AND ERROR, 16.

1. Where there is a general instruction in a criminal case, that each juror shall act upon his own judgment, and that each must be satisfied beyond a reasonable doubt that every element of the offense has been proved before there can be a conviction, it is not necessary to apply this rule of individual right and responsibility of jurors to each feature and element of the offense. *State v. Ryno* (Kan.) 303

2. Where, by reason of the fact that a crime is partly consummated in each of several counties, the courts of each have jurisdiction of the offense, the state cannot begin a prosecution in one of them, and then, at its pleasure, dismiss that and commence another in another county, and so harass the accused in every county in which jurisdiction can be obtained. *Coleman v. State* (Miss.) 807

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Criminal law; indictment after entering of *nolle prosequi*, as second jeopardy. 808

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Child's Right of Action against Parents for, see ACTION OR SUIT, 2.

CUSTOM.

Shipper Chargeable with Notice of Custom to Suspend Business on Holiday, see CARRIERS, 5.

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Carrier's Failure Immediately to Notify Consignee of Arrival of Goods Excused by Suspension of Business in Accordance with, see CARRIERS, 6.

1. A custom to suspend business on the 4th of July is not unreasonable even when applied to the delivery, by a carrier, of perishable freight on that day; although the weather in the locality is usually very warm at that time of the year. *Pennsylvania R. Co. v. Naive* (Tenn.) 443

2. A custom to suspend business on a holiday does not violate the duty imposed by contract, common law, or statute, upon a carrier to transport goods delivered to it to their destination, according to its regular course of business, with all reasonable despatch, and to give prompt notice to the consignee of their arrival. Id.

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Custom; effect of, on contract.

DAIRIES.

Validity of Ordinance Prohibiting, see CONSTITUTIONAL LAW, 3; MUNICIPAL CORPORATIONS, 4. 5.

DAMAGES.

When Error in Award Presumed, see APPEAL AND ERROR, 9.

Allowance of Punitive Damages, when Reversible Error, see APPEAL AND ERROR, 20.

Review of Verdict on Ground of Excessive Award, see APPEAL AND ERROR, 11.

Amount Recoverable by Insured from One Occasioning Loss, see ACTION OR SUIT, 1.

Right to, for Libel *per se*, see LIBEL AND SLANDER, 1.

1. Injury must be shown, to authorize recovery of damages for breach of contract to permit the taking from a tank of all water not required for certain purposes, by the application of the water to purposes not covered by the agreement. *Abraham v. Oregon & C. R. Co.* (Or.) 391

2. Mental anguish and suffering will sustain an action for breach of contract promptly to transmit and deliver a telegram. *Cowan v. Western U. Teleg. Co.* (Iowa.) 545

3. The measure of damages in actions for tort is not the amount which might reasonably be supposed to have been contemplated by the parties as the reasonable result of the wrongful act, but such amount as represents the direct injury resulting from the act, although it could not have

been contemplated as the probable result of the act done. Id.

Exemplary.

4. Exemplary damages may be recovered for the ejection, in the night and at a strange place, of a lady from a train where she has a right to be under the carriage contract made with the agent selling her ticket, of which the conductor is fully informed, although the terms of the contract are not embodied in the ticket, and the regulations of the carrier require passengers between the termini named in the ticket to travel by another route. *Illinois C. R. Co. v. Harper* (Miss.) 283

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Damages; measure of, for injuries caused by negligence in applying X-ray. 970

Measure of, for failure of water company to furnish water to extinguish fire. 232

For death; when excessive. 103

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Liability of Owner of Logs for Injury to, see *WATERS*, 14.

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Dams; right to maintain in navigable stream as nuisance. 978

DEDICATION.

Of Land as "Levee" as Including Use as Street, see *LEEVEES*.

1. Land dedicated to a public use does not revert to the dedicators because of misuse or nonuse, unless its use for the dedicated purpose has become impossible, or so highly improbable as to be practically impossible. *McAlpine v. Chicago G. W. R. Co.* (Kan.) 85

2. A strip of land along the margin of a navigable river, dedicated on a city plat as a "levee," is not abandoned by the public, so as to cause a reverter to the original dedicators or their representatives, because railroads have been permitted to lay their tracks and build depots upon it, and its use has been permitted for other unauthorized purposes, or because river commerce has ceased, and boats do not land upon it, and approach to the river margin has become difficult. Id.

NOTES AND BRIEFS.

Dedication; reversion to dedicator upon abandonment of use for which dedication made; dedication not a conveyance; effect of statutes providing that maps and plats shall be sufficient conveyance to vest fee of dedicated land in city or county, upon rule of reverter; sufficiency of abandonment; effect of misuse; for what purposes land dedi-

cated as levee may be used; fee of land dedicated vesting in county. 85

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See also *BOUNDARIES*, 1, 2.

No rule can be invoked for the construction of a deed which tends to defeat the intention of the grantor. *Elliott v. Jefferson* (N. C.) 135

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Deeds; controlling effect of lines actually run and marked, over calls for course and distance in deed. 136

Grant of land for all legitimate railroad purposes; conveyance of fee-simple title or merely easement by; extrinsic evidence to vary terms of. 393

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To Action for Assault, see *ASSAULT AND BATTERY*.

Negligence of Telephone Company in Stringing Wire Which Burns Electric Wire, as Excuse for Failure to Insulate, see *ELECTRICAL USES AND APPLIANCES*, 3.

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Demurrer; overruling demurrer where answer covers parts of bill to which defendant has demurred; remanding case to lower court where demurrer improperly sustained. 752

DEPOT.

Right to Solicit Carrying Baggage at, see *CARRIERS*, 9.

DESCENT AND DISTRIBUTION.

The common-law right of a man to succeed to the property of his wife, upon her death, does not operate in favor of one who murders his wife. *Lanier v. Box* (Tenn.). 458

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Descent and distribution; effect of murder for purpose of succeeding to property, on devolution of property; property vests immediately in lawful heirs upon death of ancestor. 459

DIRECTION OF VERDICT.

See TRIAL, 14-16.

DISCOVERY.

1. At common law, courts have no authority to order an examination of the person of one alleged to have been injured by the negligence of another for the purpose of ascertaining the extent of the injuries. *Austin & Northwestern R. Co. v. Cluck (Tex.)* 494

2. The court cannot, in the absence of express legislative authority, direct the plaintiff in an action to recover for personal injuries to submit to an examination of his person, under a constitutional provision that the people shall be secure in their persons from all unreasonable seizures and searches. *Id.*

3. In an action for damages for a negligent injury to the eyes, claimed to be permanent, a timely request for an expert physical examination of the injured organs in the usual and ordinary manner should be granted, although involving the use of drugs for dilating the pupils of the eyes; subject, however, to the limitation that the examination do not produce serious discomfort or any deleterious consequence. *Atchison, T. & S. F. R. Co. v. Palmore (Kan.)* 90

NOTES AND BRIEFS.

Discovery; right to compel physical examination; discretion of court as to. 494

DISEASE.

Judicial Notice as to Spread of, from Sweat-Shop Clothing, see EVIDENCE, 1.

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Right of Society to Sue Expelled Member for, see BENEVOLENT SOCIETIES, 1, 2.

EASEMENTS.

Of Lotowner in Cemetery, see EJECTMENT, 2.

NOTES AND BRIEFS.

Easement; extent of right of party having easement in land. 393

EJECTMENT.

Public Statutes and Grants as Evidence of Title, see EVIDENCE, 15.

1. A municipal corporation may maintain ejectment for property between high and low water mark on a tidal river, held by 64 L. R. A.

it in trust for the public. *Mobile Transportation Co. v. Mobile (Ala.)* 333

2. One who purchases a lot in a public cemetery for burial purposes, though the right of interment therein be exclusive, does not acquire any title to the soil, but only a mere easement or license, which will not support an action of ejectment. *Doe ex dem. Stewart v. Garrett (Ga.)* 99

3. The owner of the fee of land, subject to an easement of a public highway, may maintain ejectment against an intruder who wrongfully appropriates the same to a purpose wholly foreign to the easement; but his recovery of possession will be subject to the easement in question. *Bork v. United New Jersey R. & C. Co. (N. J. Err. & App.)* 836

4. The laying of a steam railroad longitudinally in a street, unless by authority of a legislative grant, express or implied, will be regarded as such an exclusive and wrongful appropriation of that part of the street to a purpose foreign to the easement as to sustain an action of ejectment by the abutting owner against the company. *Id.*

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Ejectment; to obtain possession of public street; by owner of fee of land, subject to easement of highway; what obstruction sufficient to sustain. 837

To obtain possession of burial lot. 99

To dispossess mortgagee who has obtained possession surreptitiously; where debt has not been paid; right to, where mortgagee is in possession under foreclosure proceedings believed by him to be valid. 320

Necessity that plaintiff have right of possession, as well of fee, in order to recover. 338

ELECTRICAL USES AND APPLIANCES.

Defective Insulation of Electric Light Wire, Burned off by Falling Telephone Wire, as Proximate Cause of Injury to Passerby, see PROXIMATE CAUSE, 4.

1. It is the absolute duty of an electric-light company conveying electricity by overhead wires strung through the streets of a city, to keep its wires constantly insulated so as to be prepared to guard against the effect of objects coming in contact with them, regardless of the facts and causes which may bring about the contact. *Hebert v. Lake Charles I. L. & W. Co. (La.)* 101

2. A wire of an electrical company, detached from the poles and lying in the streets of a town, is, of course, out of place,

and those having control of it and charged with the legal duty of taking due care of it have the burden of accounting for its being found in that condition and situation, and to show that it was not due to its negligence. Id.

3. The fact that a telephone company may have strung its wires above those of an electric-light company already in position, without taking any steps to guard against the coming in contact of the wires of the two companies at the crossing points, and that in stringing its wires it did so, so negligently and loosely that one of them fell, in a storm, upon an uninsulated wire below, causing it to burn and fall on the street,—is no excuse to the electric-light company for not having performed its duty to keep its own wires properly insulated, and to take special precautions to guard against the increased danger caused by the telephone wires being strung above them. *Hebert v. Lake Charles I. L. & W. Co. (La.)* 101

4. The negligent breaking of the wires of an electric-light company, by which light and power are supplied under contract to the plant of a third person, who is thereby left for several hours without the means of conducting his business, does not render the wrongdoer liable for the resulting damages to such third person, although the latter is precluded, by the terms of his contract with the electric-light company, from recovering from it for damages occasioned by an accidental interruption of the current. *Byrd v. English (Ga.)* 94

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Measure of duty of electrical company in use of electricity; presumption of negligence where person killed by electric wire in highway; duty to keep wires insulated. 102

Electric-light plant as "manufacturing establishment" exempt from taxation. 35

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ELEVATED RAILWAYS.

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EMINENT DOMAIN.

Abutter's Right to Enjoin Use of Elevated Railroad until Compensation Made, see INJUNCTION, 4.

1. The construction in a public street of an elevated railroad track for the use of trains to be operated by steam, so as to interfere with the abutting owner's right to 64 L. R. A.

light, air, access, and privacy, is a taking of his property for which, under the Constitution, he is entitled to compensation. *De Geofroy v. Merchants' Bridge Terminal R. Co. (Mo.)* 959

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Eminent domain; condemnation of lands for depot grounds; effect of, to pass fee to railroad company. 393

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EQUAL PROTECTION.

See CONSTITUTIONAL LAW, 4-8.

EQUITY.

Equity may review the action of a municipal corporation in declaring ornamental trees adjoining the curb in the street in front of private property to be nuisances, and ordering their removal. *Frostburg v. Wineland (Md.)* 627

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Equity; supervision, by courts of, of gambling agreements; injunction to restrain removal of money deposited to cover margins on stock; jurisdiction of chancery to compel stakeholder to return money deposited with him on wager; intervention of equity to restore property to owner from whom unlawfully obtained; imposing constructive trusts on property unlawfully acquired. 950

When equity will interfere to restrain nuisance. 217

ESCHEAT.

The incapacity of a man's administrator to receive the proceeds of a policy on his life which had been assigned to his wife, because he wilfully took her life, does not cause their escheat to the state, but they will pass to her distributees, as though the husband had never been in existence. *Lanier v. Box (Tenn.)* 458

ESTOPPEL.

Of Legatee to Contest Will, see WILLS.

Erroneously collecting a tax on property held by the municipality in trust for public use will not estop the municipality from asserting its title. *Mobile Transportation Co. v. Mobile (Ala.)* 333

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Judicial notice.

1. The court will take judicial notice that the manufacture of wearing apparel in improperly ventilated, unsanitary, and overcrowded apartments will be likely to promote the spread of, if it does not engender, disease. *State v. Hyman* (Md.) 637

2. It is a matter of common knowledge that places for the accommodation and entertainment of travelers, such as hotels and taverns, steamboats and ocean vessels which carry passengers, almost universally sell to their guests and patrons whiskies, wines, and liquors, and that such things are regarded by a portion of the traveling public, and by those who transport and entertain them, as part of the "supplies" for travelers. *People ex rel. Moloney v. Pullman's Palace Car Co.* (Ill.) 368

Best evidence.

3. A card 5 or 6 inches square, tacked to the end of a wooden railway tie in a pile of ties loaded in a box car, discovered by a laborer engaged in unloading the ties for final use, bearing the printed words "Arkansas & Texas Tie Company," and the written words, "Creosote Treated Ties," is technically the best evidence of whatever information its inscription imparted; but, since it is obvious a card of that character is not intended to be preserved, and is not likely to be preserved, very slight evidence of its loss is sufficient to authorize parol proof of its contents; and a verdict will not be set aside because no other foundation for secondary proof than the foregoing facts is established. *Atchison, T. & S. F. R. Co. v. Palmore* (Kan.) 90
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Parol evidence concerning writings.

4. Parol evidence is not admissible to show that a grant of land for "all legitimate railroad, depot, and warehouse purposes" was intended not to authorize the use of the land for the purpose of a hotel or eating house. *Abraham v. Oregon & C. R. Co.* (Or.) 391

5. An order for the sale of goods, made in writing, evidences the contract, and its terms cannot be varied or contradicted by parol. *Succession of Welsh* (La.) 823

Confidential communications.

6. A physician called by a stranger to furnish aid to one who has attempted suicide, and who is compelled to render his services against the will and opposition of the patient, is within the provision of the statute prohibiting a physician from testifying to facts learned while attending a patient in a professional capacity. *Meyer v. Supreme Lodge K. of P. (N. Y.)* 839

Declarations.

7. Evidence of declarations of the ticket agents and conductor of the train first boarded by the passenger is admissible upon the question of the carriage contract, where one desiring transportation between two points connected by different routes asks for a ticket by the longer route, over which runs the more desirable train, and receives one which does not specify the route; and it is immaterial that the regulations of the carrier, of which the traveler has no knowledge, require the use of the more direct route. *Illinois C. R. Co. v. Harper* (Miss.) 283

8. Before inscriptions upon a card tacked to the end of a railway tie in a pile of ties loaded in a box car, bearing the words "Creosote Treated Ties," can be offered in evidence as an admission of the truthfulness of the recitals, or as an admonition concerning the character of the ties, it must be made to appear that the party to be charged made the admission or had notice of the warning. *Atchison, T. & S. F. R. Co. v. Palmore* (Kan.) 90

Opinions and conclusions.

9. An expert in handwriting may give, not only an opinion, but the reasons for his opinion, in his examination in chief, and, for the purpose of illustrating and explaining his testimony, and conveying to the jury the reasons for his opinion, may be permitted to make illustrations upon a blackboard. *State v. Ryno* (Kan.) 303

10. A person who has been employed as a locomotive engineer for a long time, and who is qualified by experience and observation to understand the operation and effect of spark arresters in locomotives, may give

testimony as to whether a locomotive equipped with a spark arrester in first-class condition would prevent the escape of sparks or fire from a locomotive sufficient to ignite and burn property on or near the right of way. *Kansas City, Ft. S. & M. R. Co. v. Blaker* (Kan.) 81

11. Physicians not claiming or pretending to know anything about the practice of magnetic healing are competent to testify as to the propriety, in any case, of giving particular treatment to a patient in the condition of one to whom it was given by such healers. *Longan v. Weltmer* (Mo.) 969

Hypothetical questions.

12. A hypothetical question may be predicated upon the testimony of plaintiff in an action to recover damages for malpractice. *Id.*

Relevancy.

13. Upon a bill to enjoin the directors of a corporation from selling its property to an organization intent on forming an illegal trust and crushing out competition, evidence is admissible as to the purchase, by the trust, of other plants of similar nature. *Harding v. American Glucose Co.* (Ill.) 738

14. In an action for injury to a street-car passenger because of defective condition of the track, evidence is admissible to show the existence of such defect prior to the time of the accident, where the conditions have remained substantially unchanged. *Nashville Railway v. Howard* (Tenn.) 437

15. Public statutes and grants constituting plaintiff's title papers may be read in evidence in an action to recover real property. *Mobile Transportation Co. v. Mobile* (Ala.) 333

Weight, effect, and sufficiency.

16. Proof of the genuineness of a disputed writing may be made by a comparison with other writings of the same person, either admitted or clearly proved to be genuine. *State v. Ryno* (Kan.) 303

17. The fact that fire which destroyed property originated in sparks from a passing locomotive may be shown by circumstantial evidence. *Kansas City, Ft. S. & M. R. Co. v. Blaker* (Kan.) 81

18. The mere fact that the excessive flow of water from one well interrupts that of several others does not tend to point out the location, course, or even the existence, of a subterranean stream. *Barclay v. Abraham* (Iowa) 255

19. To entitle one to recover damages for injuries negligently inflicted upon him by a magnetic healer from whom he is receiving

treatment for disease he is not bound to show that the treatment received was not proper or usual in magnetic healing, but it is sufficient to show that it was not proper to be given in any case to one in plaintiff's condition at the time of receiving it. *Longan v. Weltmer* (Mo.) 969

20. The jury may disregard testimony as to the condition of appliances by the breaking of which a servant is injured, where, if it is reliable, it is utterly incomprehensible how the accident can have happened. *Twombly v. Consolidated Electric Light Co.* (Me.) 551

21. The jury may infer that dressed poultry was in good condition when delivered to a carrier for transportation from evidence that special pains were taken with it because of the hot weather, and that it was prepared by dressing, cooling it out, and packing it in ice, in barrels. *Pennsylvania R. Co. v. Naive* (Tenn.) 443

22. Actual purchases of stock by a broker are shown by a ledger indicating that, in response to an order to purchase, the broker charged the customer with the price of the stock, charged him monthly interest on the amount invested, credited dividends received from the stocks and the entry of the final closing out of the stock at different prices during the day as shares were sold, while the broker's correspondent testifies that, as to at least some of the stock, the broker actually had the shares in his possession. *Winward v. Lincoln* (R. I.) 160

23. That one ordering a broker to purchase stock for him did not intend to receive the certificates is not sufficient to show that he did not intend an actual purchase by the broker on his account. *Id.*

24. That one ordering a broker to purchase stocks on his account had not the means of paying for them is not conclusive evidence that a mere wagering contract was intended, where the purchaser availed himself of the broker's credit and facilities for borrowing on the stocks themselves. *Id.*

Presumptions.

25. In the absence of evidence to the contrary, it will be presumed that a person about to cross a railroad track both looked and listened before venturing to do so. *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.) 344

26. In case of an accident to an employee, the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish, that the accident was the result of the negligence of the employer. *Neeley v. Southwestern Cotton Seed Oil Co.* (Okla.) 145

27. The court will assume, in the absence of evidence to the contrary, that the law of another state is the same as that established by a local statute permitting the suspension of business on legal holidays. *Pennsylvania R. Co. v. Naive* (Tenn.) 443

Burden of proof.

Burden of Proof as to Negligence in Respect to Electric Wire Fallen into Street, see **ELECTRICAL USES AND APPLIANCES**, 2.

28. The burden of showing the existence of an underground stream of water is upon the one asserting the right to its use. *Barclay v. Abraham* (Iowa) 255

29. One claiming that calls in a deed, which vary from those previously run on the ground, did not represent the will of the grantor, has the burden of showing that fact, where the calls in the deed are not inherently inconsistent. *Elliott v. Jefferson* (N. C.) 135

30. Where upon its face a transaction for the purchase and sale of stocks between customer and broker is a genuine one, the burden of proof is upon the one attacking it, to show its falsity. *Winward v. Lincoln* (R. I.) 160

31. When a shipper has shown that the property was delivered to the initial carrier in good condition, any carrier against which suit is brought for negligent injury to the property has the burden of showing that the injury was not caused by its negligence. *Pennsylvania R. Co. v. Naive* (Tenn.) 443

Variance.

32. Evidence of the death in another county of one mortally wounded in the county where the trial is had is not inadmissible in aid of a prosecution for murder on the ground that there is a variance from the indictment charging the killing within the county, where the statute permits trial of the offender in either county. *Coleman v. State* (Miss.) 807

33. That the complainant in an action for injuries caused by the fall of an insecure timber from a lumber pile alleged that the timber was insecure because of the defective condition of the derrick by the chains of which it was partially suspended, will not prevent a recovery in case it is shown that the timber was not in the chains, nor will it prevent the introduction of evidence of other causes of insecurity, where it expressly alleges that the injury was caused by defendant's negligence and carelessness in placing and leaving the timber. *Busse v. Rogers* (Wis.) 183

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An administrator may, in the discretion of the probate court, be allowed a reasonable amount to compensate for the services of a real-estate broker who succeeded in securing for the property belonging to the estate a materially greater amount than was bid for it at the attempted auction sale. *Re Willard's Estate* (Cal.) 554

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1. The driver of a milk wagon, who, knowing of the existence of a manhole to a sewer which projects above the surface of the street, attempts to turn his horse and wagon around in its vicinity without paying any attention to his course, is guilty of contributory negligence; so that, in case the wagon strikes the obstruction and is overturned to his injury, he cannot hold the city liable therefor. *Wheat v. St. Louis* (Mo.) 292

2. Persons driving upon a highway have no right to be so engrossed in their own affairs as to become oblivious to their surroundings, and fail to use reasonable care to observe and avoid obstructions and defects in the surface of the street. 1d.

3. A bicyclist may hold a town liable for injuries caused by a defect making a highway unsuitable for ordinary travel, under a statute making towns liable for injuries to any person traveling upon a dangerous embankment upon a highway by reason of any defect or want of repair of such embankment, or defective railings, which renders it unsuitable for the travel thereon. *Hendry v. North Hampton* (N. H.) 70

4. Assent by the agent of a property owner to the placing of sand in the street in front of it, by an independent contractor who has undertaken to erect a building on the premises, will not render the property owner liable for injuries caused to travelers on the street by failing to mark the obstruction by warning lights after dark. *Hoff v. Shockley* (Iowa) 538

5. The fact that at the time a child is injured by the fall of lumber wrongfully and negligently piled in a highway it has temporarily ceased to be a traveler, and turned aside to play, does not bar its right of recovery against the wrongdoer. *Busse v. Rogers* (Wis.) 183

6. The owner of trees in a highway has no right of action for the necessary trimming of them for the installation of an electric-lighting system for the municipality, which has full authority to establish the same, and full jurisdiction over the high-

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1. The purpose of the statute of descents and distributions is to provide for the transmission of title at death in case of intestacy, and to regulate the division of estates among heirs; it is not primarily an exemption or homestead law; and, though it may enlarge the right to an exemption of real estate from appropriation to the payment of debts, it cannot restrict the constitutional guaranty. *Cross v. Benson* (Kan.) 560

2. The constitutional exemption of a homestead from forced sale under process of law may survive to the family of its owner after his death. Id.

3. If a husband and wife occupy a tract of land belonging to him as a homestead, she is the family of the owner, within the meaning of the Constitution; and his death does not deprive her of the right to continue to be so designated, in order to maintain the homestead, to which she takes title, and which she continues to occupy, free from forced sale under process of law for the payment of his debts. Id.

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4. Upon the death of her husband, a wife may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts. Id.

5. The use of merely formal phrases will not make a devise of a homestead subject to the payment of the testator's debts; to do so, the language employed must be unequivocal and imperative. Id.

6. A minor child who resides with her grandparents under such circumstances that she becomes in fact dependent upon them and they become morally responsible for her nurture becomes a member of their family, within the meaning of the homestead provision of the Constitution, without formal adoption; and this is true, even though her father, who is divorced from her mother, still lives and has a decree of court awarding her custody to him. Id.

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1. The death of one of the participants in a friendly scuffle through the accidental discharge of a pistol carried in the pocket of the other contrary to the provisions of the statute cannot be said to be caused by the performance of a wrongful act, so as to render the one carrying the pistol guilty of manslaughter, under the provisions of a statute that whoever unlawfully kills a human being involuntarily, but in the commission of some unlawful act, is guilty of that crime. *Potter v. State* (Ind.) 942

2. One charged in an information with shooting with intent to kill with a deadly weapon, under Kan. Gen. Stat. 1901, § 2023, may, upon sufficient proof, be convicted, under § 2027 of the same act, of a wounding under circumstances that would have constituted manslaughter in the fourth degree if death had ensued. *State v. Ryno* (Kan.) 303

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1. An injunction to restrain the construction of boilers and tanks and the hammering of sheet iron in the open air may be granted where the noise caused thereby is such as to cause actual physical discomfort to the occupants of adjoining property. *Froelicher v. Oswald Iron Works* (La.) 228

2. Acts which disturb physical comfort to an injurious extent may be restrained by the interposition of the courts. *Id.*

3. Equity will not wait for the determination of the fact of nuisance in an action at law before enjoining the operation of a hospital in close proximity to a private residence, where the evidence clearly shows that it not only destroys the peace, quiet, and comfort of those living in the residence, but seriously and injuriously affects their health, and occasions irremediable injury. *Deaconess Home & Hospital v. Bontjes* (Ill.) 215

4. A track erected on pillars from 15 to 25 feet above the surface of the street for carrying railroad trains is inconsistent with the use of the place as a public street, and, although title to the fee is in the public, an abutting owner may enjoin the use of such track until compensation is made for the injury thereby inflicted on him. *De Geofroy v. Merchants' Bridge Terminal R. Co.* (Mo.) 959

5. Equity will not interfere to enjoin one with whom margins have been deposited in a stock-gambling transaction from violating his agreement to keep them upon deposit in a bank until the transaction is closed, and prevent his withdrawing them from the bank, although he intends to remove the funds from the state, and thereby defraud the complainant. *Baxter v. Deenen* (Md.) 949

6. A bill to enjoin a broker from withdrawing from the bank margins which have been deposited with him on stock-gambling transactions will not be entertained as a suit for an accounting because other customers are made parties defendant, and an accounting is alleged to be necessary to settle the conflicting interests, where only two of such customers answer the bill, and they decline to state the nature of their transactions, one even admitting that he has abandoned his interest. *Id.*

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Validity of Statute Penalizing Refusal to Pay Policy, see **CONSTITUTIONAL LAW**, 7.

Validity of Legislation Regulating Avoidance of Policies for False Representations or Warranties, see **CONSTITUTIONAL LAW**, 13.

1. An association, established by a railway company, composed of some or all of its employees and the company, for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employees who apply for membership in said fund and are admitted; the railway company to take charge of, and be responsible for, the funds, make up deficiencies in the same, supply facilities for conducting the business, and pay the operating expenses, supply surgical attendance for injuries received in its service, and to pay the members or their designated beneficiaries the stated share of the benefit fund so raised from wages retained by the company,—is not an insurance company or association; and, in agreeing to perform and in performing each and all of said acts, such railway company is not engaged in the transaction of insurance business. *State ex rel. Sheets v. Pittsburgh, C. C. & St. L. R. Co.* (Ohio) 405

2. The minority of one taking out a policy of fire insurance does not exempt him from complying with a stipulation therein that any action or suit for recovery on any claim must be brought within twelve months after the fire, the policy being issued and the loss occurring before the passage of Kan. Laws 1897, chap. 91, p. 182, forbidding such contracts; and an action brought several years after the loss occurs, when the insured attains his majority, is barred. *Mead v. Phoenix Ins. Co.* (Kan.) 79

3. A provision in a mutual benefit certificate by which the beneficiary waives the benefit of any statutory provisions prohibiting physicians from disclosing informa-

tion acquired in attendance upon patients does not meet the requirement of the statute that such waiver, in case of a deceased person, must be by his personal representatives in order to render the evidence admissible. *Meyer v. Supreme Lodge K. of P. (N. Y.)*

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Premium.

4. One who, without knowledge of the facts, takes an assignment of a policy or life insurance which, under the statute, is void because taken, without his consent, upon the life of one in whom the applicant has no insurable interest, and pays the premiums thereon in reliance upon the assurance by the agent of the company, confirmed by its vice president, that the policy is valid and the assignment good, may recover back the premiums paid. *American Mut. L. Ins. Co. v. Bertram (Ind.)*

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Assignment.

5. The contingent interest in the proceeds of a life insurance policy, which are payable to the wife of the assured, should she survive him, otherwise to his "executors, administrators, or assigns," is vested in him, and not in his representatives, as a special class, for the benefit of his heirs, so that he can dispose of it by assignment prior to the death of his wife. *Lanier v. Box (Tenn.)*

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6. The assignment by a man to his wife of his contingent interest in a policy of insurance on his life, which is payable to her should she survive him, but to his personal representatives or assigns in case she dies before he does, devests him of all interest in the policy, so that, in case he survives her, he will acquire a right to the proceeds of the policy, if at all, by virtue of his right as surviving husband, and not under the terms of the policy. *Id.*

7. A parol assignment, accompanied by delivery of the policy, is sufficient to transfer the right to the proceeds of a life insurance policy. *Id.*

Warranties and representations.

8. Violation of a provision in a fire insurance policy that it shall be void unless an inventory and books of account are kept in a fire-proof safe is within the operation of a statute providing that false warranties shall not avoid the policy, unless made with intent to deceive, or unless they increase the risk. *Continental Fire Ins. Co. v. Whitaker (Tenn.)*

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9. Misrepresentation as to the state of title cannot be charged against the applicant for fire insurance where he states the title correctly, and it is erroneously written in the application without his knowledge by the agent of the insurer. *Id.*

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10. Misrepresentations as to encumbrances do not increase the risk, so as to avoid a policy of insurance on the property, where the statute provides that misrepresentations shall not avoid the policy, unless they increase the risk, or are made with intent to deceive. *Id.*

11. A fire insurance policy is not avoided by misrepresentations as to encumbrances on the property where the applicant made no representations upon the subject, but the statement was inserted by the company's agent without knowledge of the applicant, and he signed the application without reading it. *Id.*

Waiver.

12. Knowledge by the agent of the insurer that the insured occasionally rode in steeple chases does not constitute a waiver of a provision in the policy that the insurer shall not be liable for injuries received through voluntary exposure to unnecessary danger. *Smith v. Aetna Life Ins. Co. (Mass.)*

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Cause of death or injury.

13. Accidental death of an assured, resulting from taking poison to frighten his wife into giving him money, is not within the provision of the policy that it does not include assurance against self-destruction or suicide. *Courtemanche v. Independent Order of Foresters (Mich.)*

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14. Negligence of an assured, resulting in his death, is not within the provision of a life insurance policy that it does not include assurance against self-destruction or suicide. *Id.*

15. Steeple-chase riding by one who gives his occupation as a cotton merchant is voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy exempting the insurer from liability for injuries resulting from such exposure. *Smith v. Aetna Life Ins. Co. (Mass.)*

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16. Death caused by accidentally eating spoiled oysters is within a clause in an accident insurance policy providing that the policy does not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed. *Maryland Casualty Co. v. Hudgins (Tex.)*

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Proof of loss.

17. Failure to furnish proofs of loss within the time required by a fire insurance policy does not prevent an enforcement of the policy where such failure is not, while other things are, made a ground of forfeiture by the policy, and proofs of loss are furnished before suit is brought. *Continental Fire Ins. Co. v. Whitaker (Tenn.)*

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Insurance; validity of policy taken by person having no insurable interest in life of party insured; right of persons paying premiums to treat policy as rescinded, though insurance company estopped from making such defense; rights of purchaser in good faith of void policy; right to recover back premiums paid; where insurer has represented the policy as valid; premiums paid not apportionable. 936

Right of beneficiary who murders insured to recover. 781

Provision against suicide; what constitutes voluntary self-destruction; injury by negligence covered by accident insurance in absence of stipulation to the contrary; liberal construction of policy in favor of beneficiary. 668

Life insurance policy as chose in action; wife's right to insure life of husband; effect of divorce on wife's interest in insurance on her husband's life in her favor; validity of gift of insurance policy; assignment of policy; vested interest of beneficiary in; right of insured who kills beneficiary to recover. 459

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What constitutes death from external, violent, and accidental means; provision against liability for injuries resulting from poison or anything accidentally taken, administered, absorbed, or inhaled. 349

Against accident; what constitutes voluntary exposure to unnecessary danger; question for jury as to; duty to state habit of indulging in dangerous sports; how policy may be canceled by company; who is agent entitled to receive notice of cancellation by company. 117

On property of infant; limitation in policy of time for bringing suit on; conclusiveness of. 80

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INTENT.

Evidence of, in Ordering Broker to Purchase Stock, see EVIDENCE, 23, 24.

INTEREST.

Interest does not begin to run upon premiums paid by an assignee of a void insurance policy until demand is made for their repayment. American Mut. L. Ins. Co. v. Bertram (Ind.) 935

JEWELRY.

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Jewelry; gold watch as. 471
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JUDGMENT.

Conclusiveness of Determination by Government Officials of Questions Relating to Mining Claims, see MINES, 1, 2.

1. A decree enjoining the operation of a hospital in a building during the continuance of its relative proximity to complainant's residence, and of the present internal and external construction of the building, sufficiently corresponds with a prayer that defendant be enjoined from further operating the hospital. Deaconess Home & Hospital v. Bontjes (Ill.) 215

2. A purchaser from defendant *pendente lite* acquires his interest subject to the decree which shall be rendered on the hearing; so that, in case a decree is entered against the vendor, setting aside the sale, the vendee will be bound thereby. Harding v. American Glucose Co. (Ill.) 738

3. A decree of a probate court allowing compensation to a broker for services to an estate may be amended so as primarily to make the allowance to the administrator under a motion to strike the item altogether from the account. *Re* Willard's Estate (Cal.) 554

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Judgment; setting aside void judgment; no right to set aside judgment because of mistake as to what the law is; clerical misprisions in. 556

JUDICIAL NOTICE.

See EVIDENCE, 1, 2.

LABORERS.

Lien of, see LIENS, 1, 2.

LACHES.

As Bar to Quo Warranto, see QUO WARRANTO.

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Laches; in bringing action by abutting owner to recover damages for operation of railroad in street. 961

LAKE.

Right of Riparian Owner to Bathe in, see WATERS, 1, 2.

LANDLORD AND TENANT.

A condition in a lease requiring the tenant to return the premises in as good condition as received, except where damaged by fire, etc., forbids the tenant to leave thereon his own distinguishable property, which has been injured and made worthless by a fire, where the tenancy has been terminated by agreement of the parties. Boardman v. Howard (Minn.) 648

NOTES AND BRIEFS.

Landlord and tenant; lease terminated by fire; duty of tenant to remove *débris* of his own property from premises. 649

Tenant's duty to leave premises in good condition:—(I.) Scope; (II.) the implied obligation: (a) its extent in general; (b) as to damages by fire and accident; (c) as to removal of rubbish; (III.) the obligation under express covenants: (a) in general; (b) repairs necessitated by natural decay; (c) repairs necessitated by reasonable use; (d) effect of condition of property at commencement of term; (e) repairs in particular: (1) papering, painting, and whitewashing; (2) other repairs; (3) alterations; (f) fire or unavoidable accident: (1) in general; (2) injuries caused by third persons; (g) injuries caused by imperfect construction; (h) buildings erected during term; (i) liability of tenant holding over; (j) liability of assignee of lessee; (k) removal of rubbish; (l) fixtures; (m) other cases; (n) when right of action accrues; (o) measure of damages: (1) in general; (2) effect of demolition of premises by lessor. 648

LATERAL SUPPORT.

1. No duty of lateral support which the owner of land under tide water owes to adjoining land extends to piers which may have been placed on such land. *White v. Nassau Trust Co. (N. Y.)* 275

2. The doctrine of lateral support has no application to lands under tide waters which have been granted by the state for the advancement of commerce. *Id.*

NOTES AND BRIEFS.

Lateral support; right to remove by dredging water bed. 275

Right to remove by dredging water bed; injury to piers by; liability for damage. 277

LAW SCHOOL.

See COLLEGE.

LEGATEE.

Estoppel to Contest Will, see WILLS.

LEVEES.

Abandonment of, see DEDICATION, 2.

The dedication as a "levee" of a strip of land lying along the margin of a navigable stream and included in the plat of a city, upon which several streets open and several lots having no means of ingress and egress except over and along it, includes its use as a street, as well as a landing place for boats. *McAlpine v. Chicago G. W. R. Co. (Kan.)* 85

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LIBEL AND SLANDER.

1. A false publication charging that one has been arrested, accused of an assault, and that, in attempting to collect a bill he threatened violence with a pistol, is libelous *per se*; and the libeled one may have general damages, without alleging or proving specific injury. *Hanson v. Krehbiel (Kan.)* 790

2. A statute limiting the recovery, in an action for libel against a newspaper publisher, to actual damages only, where it appears on the trial that the article was published in good faith, and that within a specified time after service of notice, by the party libeled, of his intent to bring an action, specifying the statement alleged to be libelous, a full and fair retraction was published in as conspicuous a place and type in such newspaper as was the alleged libelous article,—is void as denying the constitutional right to a remedy by due process of law for an injury suffered. *Id.*

NOTES AND BRIEFS.

Libel; validity of statute restricting recovery in action for; privilege of court records; what is libelous *per se*. 790

LICENSE.

Of Lotowner in Cemetery, see EJECTMENT, 2.

To Practise Medicine, Not Required from Osteopath, see PHYSICIANS AND SURGEONS, 2.

LIENS.

1. The "trust fund" mentioned in Ohio Rev. Stat. 1892, § 3206a, providing that, where property of an employer is placed in the hands of a receiver or assignee, claims for labor performed within three months prior to the appointment of the receiver or assignee shall be first paid out of the trust fund, in preference to all other claims, is the general fund remaining after the payment of valid securities and liens, obtained in good faith for value, against the property in the hands of the assignee or receiver. *St. Marys Machine Co. v. National Supply Co. (Ohio)* 845

2. Claims for labor do not take precedence of the lien of a chattel mortgage, upon the appointment of a receiver who takes possession of the mortgaged chattels after condition broken, under Ohio Rev. Stat. 1892, § 3206a, providing that, where property of an employer is placed in the hands of an assignee or receiver, claims for labor performed within three months prior to the appointment of such assignee or receiver shall be first paid out of the trust fund, in preference to all other claims; since

the mortgaged chattels, to the extent that they are required to satisfy the mortgage, are the property of the mortgagee, and not of the mortgagor. *Id.*

3. The provision of the Kansas mechanic's lien law, that, "in case of action brought, any lien statement may be amended by leave of court in furtherance of justice, as pleadings may be in any matter, except as to the amount claimed,"—permits an amendment correcting the description of the property and the name of the owner, and does not thereby authorize the taking of property without due process of law. *Atkinson v. Woodmansee (Kan.)* 325

NOTES AND BRIEFS.

Liens; priority of labor claims over lien of antecedent mortgage. 846

LIMITATION OF ACTIONS.

On Insurance Policy Imposing Limitation, as Affected by Insured's Minority, see *INSURANCE*, 2.

1. The statute of limitations begins to run against a right of action to recover for the injury inflicted upon abutting property by the erection of a permanent structure in the street for the operation of railroad trains upon an elevated track at the time the structure is completed and permanent injury inflicted. *De Geofroy v. Merchants Bridge Terminal R. Co. (Mo.)* 959

2. The statute of limitations does not begin to run against a right to recover back premiums paid by an assignee of a void life insurance policy until the invalidity of the contract is discovered, and further obligation thereon disavowed, and demand made for a return of the premiums paid. *American Mut. L. Ins. Co. v. Bertram (Ind.)* 935

3. A foreign corporation transacting business in a state cannot plead the state statute of limitations in bar of a cause of action originating in the state in favor of a resident. *Williams v. Metropolitan Street R. Co. (Kan.)* 794

4. The action provided by the 7th section of the act of 1890, in favor of a consumer injured by an illegal combination, is not penal so as to be governed by the provision of the Federal statute prescribing the limitation period for the commencement of such actions. *Atlanta v. Chattanooga Foundry & Pipeworks (C. C. App. 8th C.)* 721

5. An action by one injured by being compelled to pay an excessive price for supplies because of a combination in violation of the anti-trust act, to recover three times the amount of the loss as authorized by the 64 L. R. A.

statute, is not governed by a statute limiting the time of bringing actions for injuries to personal or real property and actions for the detention or conversion of personal property, but is governed by the provision limiting the time for bringing actions on a statutory liability. *Id.*

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Limitation of actions; on what running of statute depends; running of, in favor of foreign corporation. 795

Statute does not run until discovery of fraud on which action based; against action to recover insurance premiums. 936

When statute begins to run against action by abutting owner for damages caused by operation of railroad in street. 961

LIQUORS.

Judicial Notice that Liquors are Customarily Supplied to Traveling Public, see *EVIDENCE*, 2.

LODE.

Entry on Placer Location to Prospect for, as Trespass, see *TRESPASS*.

LOGS.

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Logs; liability for injuries caused by floating logs. 983, 986

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Lottery; conflict of laws as to lottery contracts. 160

MAGNETIC HEALER.

Liability for Malpractice, see *PHYSICIANS AND SURGEONS*, 5.

Evidence of Malpractice by, see *EVIDENCE*, 19.

Expert Evidence as to Propriety of Treatment, see *EVIDENCE*, 11.

MALICIOUS PROSECUTION.

Master's Liability for Arrest Caused by Servant, see *MASTER AND SERVANT*, 13.

Direction of Verdict in Trial for, see *TRIAL*, 15.

Sufficiency of Instruction as to Existence of Probable Cause for, see *TRIAL*, 11.

Acquittal of a criminal is not evidence of want of probable cause, in an action by accused against the prosecuting witness to recover damages for malicious prosecution. *Bekkeland v. Lyons (Tex.)* 474

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Malicious prosecution; acquittal of criminal charge as evidence of want of probable cause. 475

Acquittal or discharge on a criminal charge as evidence of want of probable cause: (I.) Acquittal and discharge: (a) generally; (b) on appeal; (II.) discharge by an examining magistrate: (a) as prima facie evidence of want of probable cause; (b) qualification of rule; (c) discharge held "persuasive evidence" of want of probable cause; (d) soundness of rule questioned; (e) cases refusing to adopt rule; (f) conclusiveness of presumption; (III.) where there was a want of jurisdiction; (IV.) failure to prosecute; (V.) failure to indict; (VI.) finding in criminal proceeding that the prosecution was malicious and without probable cause; (VII.) summary. 474

MALPRACTICE.

See PHYSICIANS AND SURGEONS, 3-5.

MANDAMUS.

1. Mandamus will lie to compel the reinstatement of a student wrongfully expelled from a law school without notice. *Baltimore University v. Colton* (Md.) 108

2. An action for breach of contract is not an adequate remedy for the wrongful expulsion of a student from a law school, thereby depriving him of the opportunity of obtaining a diploma and degree to which, under his contract, he is entitled. *Id.*

3. The existence of an equitable remedy will not defeat a right to a writ of mandamus. *Id.*

4. Although the right of a taxpayer to examine the books of a municipal corporation is absolute, the court has discretion to refuse to enforce it by mandamus, unless a proper case for the exercise of that right is shown. *State ex rel. Wellford v. Williams* (Tenn.) 418

5. A writ of mandamus to enable a taxpayer to secure a general examination of the books of the municipal corporation should be allowed where a period of several years is to be covered, and, notwithstanding the collection of vast sums as taxes which are heavy and burdensome, and the borrowing of additional sums, and the opportunity to secure from the legislature the means of raising additional taxes, the mayor finds it necessary to call a meeting of taxpayers to devise means of paving and repairing streets in the city. *Id.*

6. Mandamus will not lie to compel the levy of a tax to pay the contract price for water furnished a municipal corporation, where the contract was *ultra vires* on the 64 L. R. A.

part of the municipality because for a period extending beyond its power to contract, or which fixes a basis for determining the compensation which may, by changing circumstances, exceed the powers of the municipality or become unreasonable. *Westminster Water Co. v. Westminster* (Md.) 630

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Mandamus; to compel reinstatement of pupil wrongfully expelled from school. 109

MANUFACTURE.

Liability of Manufacturer for Concealed Defects, see NEGLIGENCE, 2.

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Manufacture; what constitutes. 34, 646

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Injunction against Withdrawal from Bank, see INJUNCTION, 5, 6

MASTER AND SERVANT.

Complaint in Action for Furnishing Unsafe Lodging for Servant, see PLEADING, 5.

Burden of Proving Master's Negligence, see EVIDENCE, 26.

Duty and Liability of master.

1. An employer who undertakes to furnish a domestic servant with a lodging place is bound to see that it is suitable for the purpose intended and is liable for injuries caused to the servant by sickness due to the leaky condition of the roof. *Collins v. Harrison* (R. I.) 156

2. A master is not shown to be negligent in employing an engineer by evidence that he had been known to drink intoxicating liquor, where there is nothing to show that the master knew it, or that he had ever been intoxicated. *Delory v. Blodgett* (Mass.) 114

3. One employing servants whose duties require the use of long ladders cannot relieve himself from liability for injuries to a servant through the breaking of a rotten round, by showing that he had a foreman who had general oversight of all the appliances used in the business, with the general duty of seeing that repairs were made when necessary. *Twombly v. Consolidated Electric Light Co. (Me.)* 551

4. The master, and not the servant for whose use it is furnished, is bound, in the absence of special circumstances changing the rule, to inspect and repair a ladder furnished for the use of the servant, which is of such length that a defect in it will imperil the servant's life or limb. *Id.*

Assumption of risks.

5. A corporation is not liable for injuries to its employee in attempting to rescue one of its members, who, in superintending and working with the employee, undermines a wall so that it is about to fall upon him, when the employee springs forward from a place of safety to avert the impending accident. *Saylor v. Parsons* (Iowa) 542

6. The risks assumed by an employee are such perils as exist after the employer has used due care and precaution to guard the former against danger by providing him a reasonably safe place to work in, reasonably safe appliances to work with, reasonably safe materials to work upon, and reasonably competent fellow servants to work with; but when the employee undertakes to use defective or unsafe appliances, with knowledge of such unsafe condition, he assumes the increased risk of danger, and the employer is relieved from responsibility to the employee by reason of the employee's knowledge. *Neeley v. Southwestern Cotton Seed Oil Co.* (Okla.) 145

7. An employee who, in reliance on his master's promise to repair a defective appliance, continues his work, and is injured by such defective appliance before the repairs are made, is ordinarily entitled to recover, but if the employer, before the accident, directly or indirectly revokes his promise to repair, the employee is not warranted in further continuing his service in reliance on such promise. Id.

8. A street-car conductor in charge of an extra car, whose duties require him to run onto a single track extending beyond the termination of the double tracks of the road, which the rules of the company require to be occupied by only one car at a time, takes the risk of injury from the absence of signals at the termination of the double tracks or schedules for extra cars for giving notice when the extension is occupied by such cars. *Simmons v. Southern Traction Co.* (Pa.) 205

9. A domestic servant is not deprived of a right of action against her employer for sickness caused by the leaky condition of the roof of the room furnished as her sleeping apartment by the fact that she continued to occupy it after learning of its unfit condition, if she did so under his promise to repair. *Collins v. Harrison* (R. I.) 156

Fellow servants and their negligence.

10. An expert machinist employed by a machine company and sent to make repairs upon plants of other persons at their request as his services may be needed, and who is, while so employed, subject to the direction of the one seeking his services as to what shall be done, although in his 64 L. R. A.

method of work he acts upon his own judgment, is, during the time so employed, the servant of the latter and the fellow servant of his employees, although he receives his wages from his own employer, who collects the pay for his time from those seeking his services. *Delory v. Blodgett* (Mass.) 114

11. It is the duty of the employer to provide the employee with reasonably safe machinery, tools, and appliances with which to do his work, and he cannot relieve himself from liability by delegating this duty to another; and in case of injury resulting from defective or unsafe appliances, the relations of fellow servants cannot arise. *Neeley v. Southwestern Cotton Seed Oil Co.* (Okla.) 145

12. The master cannot, by delegating to a servant the duty of inspecting long ladders furnished for the use of employees, and replacing rotten rounds, escape liability for injuries caused by neglect of the duty, on the ground that the neglect was that of a fellow servant of the one injured by a fall caused by the breaking of a rotten round. *Twombly v. Consolidated Electric Light Co.* (Me.) 551

Liability of master to third persons.

13. Employees of a mining partnership, who are charged with the care and management of its property, do not act within the scope of their employment in causing, long after the commission of the crime, the arrest, for the purpose of vindicating the law, of one who is suspected of having set fire to a building belonging to the partnership, so as to render the partnership liable for malicious prosecution in case the arrest proves to have been without justification. *Markley v. Snow* (Pa.) 685

Liability for acts of independent contractor.

14. A property owner is not liable for injuries to a traveler caused by obstructions placed in the street in front of the property without danger signals, by an independent contractor whom he has employed to construct a building on the property. *Hoff v. Shockley* (Iowa) 538

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Master and servant; injury to employee subjected to dangers which employer should provide against; duty of master to employ appliance in general use to guard against danger. 205

Providing suitable appliances and competent persons to attend to them as measure of master's duty; duty to inspect tools and appliances; liability for injury to servant from defective machinery or tools. 552

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Duty of master assuming to provide board and lodging for servant; assumption by servant of risk of leaky roof. 156

Question of vice principalship as depending upon character of work; assumption of risk, by servant, of danger of work out of line of employment; negligence of fellow servant. 543

Definition of independent contractor; liability for negligence of; exceptions to rule exempting from liability. 538

Liability for unauthorized institution of criminal proceeding by servants. 686

Which of two or more persons is master; two persons having different masters but engaged in common employment as fellow servants; who are fellow servants; duty of master in selecting servants; right to delegate. 114

MAXIMS.

1. *Aqua currit et debet currere, ut currere solebat.* People v. Hulbert (Mich.) 265

2. *Cessante ratione, cessat ipsa lex.* Katz v. Walkinshaw (Cal.) 236

3. *Cujus est solum, ejus est usque ad inferos.* Id. 101

4. *De minimis non curat lex.* People v. Hulbert (Mich.) 265

5. Ignorance of law excuses no one. American Mut. L. Ins. Co. v. Bertram (Ind.) 935

6. *In pari delicto potior est conditio defendentis.* Id. 949

7. *Res ipsa loquitur.* Hebert v. Lake Charles Ice, L. & W. Co. (La.) 101

8. *Sic utere tuo ut alienum non lædas.* People v. Hulbert (Mich.) 265

Katz v. Walkinshaw (Cal.) 236

9. Such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor. Elliott v. Jefferson (N. C.) 135

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Maxim; no wrong can be the foundation of a right. 460

Res ipsa loquitur. 102, 126

Sic utere tuo ut alienum non lædas. 228

MENTAL ANGUISH.

See DAMAGES, 2.

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MINES.

Entry on Placer Location to Prospect for Lodes as Trespass, see TRESPASS.

1. The rejection by the Land Department of an application for a patent for a placer mining claim for the reason that there was not such a showing by the applicant as entitled him to a patent is not conclusive against the validity of the claim in a subsequent proceeding before the courts to establish it against subsequent locations of lode claims. Clipper Min. Co. v. Eli Min. & L. Co. (Colo.) 209

2. The determination by the government officials after notice to adverse claimants of the priority of a mining location and the issuance of a patent therefor is conclusive upon the question of seniority of location. Jefferson Min. Co. v. Anchoria-Leland Min. & M. Co. (Colo.) 925

Right to follow vein.

3. The right to follow a vein on its dip does not apply in favor of a patentee of a lode mining claim the exterior boundaries of which include a portion of a claim already patented to another which includes a portion of the apex of the vein, so as to enable the second patentee to follow the dip of the portion of the apex within the limits of his patent into the territory already patented to the prior claimant. Id.

4. The owner of a mining claim, who has a right to pursue a vein apexing within it, beyond its side lines, is confined to operations within and upon the vein itself; and he cannot drift a tunnel from his claim into the adjoining one for the purpose of intersecting the vein in its descent. St. Louis M. & M. Co. v. Montana Min. Co. (C. C. App. 9th C.) 207

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Mines; right to follow vein on dip; vein extending between boundaries of two claims; right to work belongs to first location; rights of patentee relating back to date of location of claim; statutory limitation of width of mining claim. 927

Right to follow vein on dip beyond side lines; extending tunnel from claim into adjoining one; conclusiveness of description in grant on question of what passed by patent; necessity of express grant to confer right to hold and use mines; conclusiveness of issuance of patent as to rights of patentee. 207

MONEY IN COURT.

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as money in court; exemption from attachment. 112

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Right of Foreign Corporation to Enter into Trust in Violation of Local Laws, see CORPORATIONS, 3.

Stockholder's Right to Enjoin Corporation from Entering Trust, see CORPORATIONS, 23.

Purchase of Other Plants as Evidence of, see EVIDENCE, 13.

Right of Action of Consumer Not in Interstate Business, against, under Federal Statute see ACTION OR SUIT, 9.

Right of Municipality to Maintain Action against, see ACTION OR SUIT, 8.

Liability of Members of Combination to Consumer, see ACTION OR SUIT, 4.

Validity of Contract Not to Re-engage in Business, see CONTRACTS, 6.

1. The Federal anti-trust act should have a reasonable construction,—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled. *Whitwell v. Continental Tobacco Co.* (C. C. App. 8th C.) 689

2. Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of the anti-trust act of July 2, 1890, chap. 647, § 1. Id.

3. Attempts to monopolize a part of commerce among the states, which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not, made illegal or punishable by the anti-trust act of July 2, 1890, chap. 647, § 2, because such attempts are indispensable to the existence of any competition in commerce among the states. Id.

4. Every contract, combination, or conspiracy, the necessary effect of which is to stifle, or directly and substantially to restrict, competition in commerce among the states, is in restraint of interstate commerce, and violates the anti-trust act of July 2, 1890, chap. 647, § 1. Id.

5. Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle, or directly and substantially to restrict, competition in com-

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merce among the states, violates the anti-trust act of July 2, 1890, chap. 647, § 2. Id.

6. The restriction by a manufacturer, a corporation, and its employee, of the sales of its products to those who refrain from dealing in the commodities of its competitors, by fixing the prices of its goods to those who do not thus refrain so high that their purchase is unprofitable, while it reduces the prices to those who decline to deal in the wares of its competitors, so that the purchase of the goods is profitable to them,—is not violative of the anti-trust act of July 2, 1890. Id.

7. An agreement between publishers or and dealers in books, whereby they agree not to sell books of any kind to dealers who shall be suspected of selling copyrighted books at less than the net price fixed by the publishers, or who shall supply books to dealers who are suspected of making such sales, violates a statutory provision that every contract whereby a monopoly in the sale of any commodity of common use is or may be created, or whereby competition in the supply or price of any such article is restrained or prevented, or whereby, for the purpose of establishing or maintaining a monopoly, the free prosecution of any lawful business is or may be restricted,—is against public policy and void. *Straus v. American Publishers Asso.* (N. Y.) 701

8. A formal written agreement is not necessary to constitute an illegal trust; it is sufficient that concerted action showing an understanding or scheme is shown by the acts of the parties. *Harding v. American Glucose Co.* (Ill.) 738

9. An illegal trust is created by the conveyance, by the stockholders of several competing companies engaged in the manufacturing business, to one company organized for the purpose of taking their property and consolidating their interests. Id.

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MORTGAGE.

Mortgagee's Warranty against Requiring Mortgagor to Pay Tax on Interest, see STATUTES, 2.

Rights of mortgagee in possession.

1. A mortgagee of real property in possession of the mortgaged premises after condition broken may not be dispossessed without the payment of the mortgage debt, unless his possession was acquired under such circumstances that he ought not, in equity, to be permitted to retain it; and one who assumes possession of the property under color of foreclosure proceedings believed by him to be valid, however defective they may be in fact, is within the protection of this rule. *Stouffer v. Harlan* (Kan.) 320

Chattel mortgages.

Superiority to Laborer's Lien, see LIENS, 2. Mortgagee's Right to Chattels Removed to Another State, as against Local Attaching Creditors, see CONFLICT OF LAWS, 7. Mortgagee's Promise to Cancel Mortgage as Inuring to Benefit of Subsequent Pawnee, see PLEDGE.

2. A ring for the finger, although an article of personal adornment, is a proper subject for a chattel mortgage. *Salabes v. Casstelberg* (Md.) 800

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3. A sufficient description of a diamond ring for the purpose of a chattel mortgage is effected by specifying the weight of the stone, the style of setting, and the house where the owner resides and the ring is to be kept. Id.

4. After condition broken, the mortgagee under a chattel mortgage is the owner of the property covered by the mortgage, and the mortgagor has only a right of redemption. *St. Mary's Machine Co. v. National Supply Co.* (Ohio) 845

5. Where a receiver is appointed and takes possession of chattels covered by a chattel mortgage, after condition broken, as provided in Ohio Rev. Stat. 1892, § 3206a, such chattels, to the extent that the same may be required to satisfy the mortgage, are the property of the mortgagee, and not the mortgagor. Id.

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Act Subjecting Property of, to Payment of Debts, as Affecting Lands Held in Trust for Public, see WATERS, 10.

Tide Lands Held by, Not Subject of Adverse Possession, see ADVERSE POSSESSION.

Powers.

1. Charter authority to a municipal corporation to prohibit the erection of cow stables and dairies "within prescribed limits" includes power to prohibit them anywhere within the city limits. *St. Louis v. Fischer* (Mo.) 679

2. A municipal corporation has no power to contract to levy 5 cents on each \$100 of assessed property within its limits, in perpetuity, in payment for a water supply, under a statute authorizing it to levy annually a tax not exceeding that amount, "and out of the proceeds to pay the water company such sum as the mayor and common council may deem proper." *Westminster Water Co. v. Westminster* (Md.) 630

3. A municipal corporation has no power to contract to pay a water company for a water supply a sum annually, in perpetuity, equal to 5 cents on the \$100 of the "present valuation of assessment," under a statute authorizing it to levy annually a tax not exceeding 5 cents on the \$100 of assessed property. Id.

Ordinances.

4. An ordinance of a municipality having power to prohibit and regulate dairies within the city limits, forbidding a dairy within such limits unless permission for their maintenance is obtained from the city council, is not void as providing for special privileges. *St. Louis v. Fischer* (Mo.) 679

5. An ordinance prohibiting the maintenance of dairies within the city limits is not rendered retroactive and void by being made applicable to premises on which a dairy once existed which has been abandoned, so as to entitle a subsequent occupant of them to re-establish the business notwithstanding the ordinance. Id.

Liability for damages.

6. A municipal corporation is not liable for the acts of its officers, who, in attempting to guard the public health, remove a smallpox patient to a pesthouse so overcrowded and illy adapted to its purpose that he dies from the consequent exposure. *Twyman v. Frankfort* (Ky.) 572

7. Failure of a municipal corporation to appoint a board of health will not render it liable for injuries to private individuals through the efforts of its other officials to enforce its health ordinances. Id.

8. That a municipal corporation has passed an ordinance directing the removal to a pesthouse of persons afflicted with smallpox does not render it liable for the negligent acts of its officials in enforcing the provisions of the ordinance. Id.

9. A municipal corporation is not rendered liable for the result of acts undertaken for the preservation of the public health, by a statute providing that in case of death by wrongful act damages may be recovered from the corporation causing it. Id.

Right to inspect books.

10. A citizen and taxpayer of a municipal corporation is not deprived of the right to inspect its books by the facts that an ordinance requires the submission of the books to the inspection of certain officers or committees appointed by them, and that the grand jury has a right to make such inspection. *State ex rel. Wellford v. Williams* (Tenn.) 418

11. That one seeking to inspect the books of a municipal corporation is politically hostile to their custodian does not deprive him of the right of inspection, unless it is sought with the corrupt purpose of merely furthering such animosity. Id.

12. That inspection of the books of a municipal corporation by a taxpayer will produce worry and inconvenience, and that the transactions shown by them are numerous and involve vast amounts of money, are not sufficient grounds for denying the inspection. Id.

13. A citizen and taxpayer should be allowed by the court to make a general examination of the books of the municipal corporation when it is shown to be important to the public interests that such examination be made. Id.

14. The right to make a general examination of the corporate books by a taxpayer of a municipal corporation should not be lightly granted, or permitted with unnecessary frequency; the occasion should be grave and important; and the persons seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court.

Id.

15. Pending judicial proceedings to obtain the privilege of making a general examination of the books of a municipal corporation cannot be thwarted by the appointment of a committee on the part of the custodian of the books, or his associates in authority, to make an examination in lieu of the one sought.

Id.

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Liability of Third Person for Negligence Occasioning, to Person Injured by Nonperformance of Contract, see CONTRACT, 1.

Liability to User for Negligence Causing Interruption of Electric Current, see ELECTRICAL USES AND APPLIANCES, 4.

Failure to Give Proper Instructions as to Contributory Negligence, When Harmless Error, see APPEAL AND ERROR, 17.

1. A corporation cannot be held liable to one who is injured in attempting to save its superintendent from peril, on the ground that it ought to have anticipated that, when the superintendent placed himself in peril, someone, upon discovering that fact, would attempt to shield him, where there is nothing to show that the work undertaken by the superintendent might not have been done with safety; since the company was not bound to assume that the superintendent would needlessly expose himself, or that, in case he did so, someone would imperil his own safety to rescue him. *Saylor v. Parsons* (Iowa)

542

2. The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of its employees, representing it to be strong and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale, for injuries caused by such defect, although there was no privity of contract between the plaintiff and the defendant in the sale of the buggy. *Woodward v. Miller* (Ga.) 932

3. One who, in using the street adjoining his property as part of his lumber yard, piles lumber there in an unstable manner, is liable for injuries caused by its fall upon a child who, while traveling along the street, follows its inclination to play, and attempts to climb upon the pile, and thereby causes the timber to fall. *Busse v. Rogers* (Wis.) 183

Imputed negligence.

4. There is no basis for imputing to an infant passenger on a street car any negligence on the part of his mother, in whose care he is, which proximately contributes to his injury, where he is thrown from the car by its jolting, unless the facts show heedlessness on the part of the child and negligence on the part of the mother in failing to prevent his incautious act. *Nashville Railway v. Howard* (Tenn.) 437

5. A child four years old is not negligent in sitting alone on the seat of an open street car, holding on to the seat guard, so that, in case he is jolted from the seat and injured by the car crossing a defect in the track, the negligence of his mother, with whom he is traveling, in permitting him to occupy such position, can be imputed to him. *Id.*

Contributory negligence.

6. The placing of structures on the right of way of a railroad company, which are permitted to remain there with the consent of the company until they are negligently set on fire by a passing locomotive, which fire extends to and burns other and adjoining property, does not constitute contributory negligence on the part of the owner, or deprive him of the remedy given by law for the negligent burning of property not on the right of way. *Kansas City, Ft. S. & M. R. Co. v. Blaker* (Kan.) 81

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A new trial cannot be granted for surprise in the case made by the evidence which the court permitted to be introduced, where there is nothing to show that the complaining party would be able to fortify or strengthen the case which he has made. *Jefferson Min. Co. v. Anchoria-Leland Min. & M. Co.* (Colo.) 925

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Agent's Knowledge as Waiver of Provision in Insurance Policy, see INSURANCE, 12.

NUISANCES.

Noise as, see INJUNCTION, 1.

When Injunction May be Granted, against, see INJUNCTION, 3.

1. Trees which have been standing for forty years without impeding the travel on a public highway are not shown to be nuisances because they extend a few inches outside the curb on a proposed plan for the improvement of the street, where the curb can be so arranged as to carry water flowing in the gutter around them, so that it will not interfere with the flow of the water, or the improvement of the street in a workmanlike manner. *Frostburg v. Wineland* (Md.) 627

2. An offensive occupation cannot be carried on to the very great annoyance of one dwelling immediately near. *Froelicher v. Oswald Iron Works* (La.) 228

3. A hospital will not be permitted to be conducted in such proximity to a private residence that the sights, sounds, and smells which are a necessary part of its operation become an intolerable nuisance to those dwelling in the residence. *Deaconess Home & Hospital v. Boutjes* (Ill.) 215

4. That the persons responsible for the management of a hospital were not aware that it was being conducted so as to be a nuisance to adjoining property owners is no objection to the granting of an injunction against its operation in such manner. Id.

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Nuisance; dairy or cow stable as; power of legislature to declare particular property nuisance. 683

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OBSTRUCTIONS.

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OFFICERS.

1. It is no part of the official duties of a register of deeds to search the records of his office to ascertain whether persons signing a petition to obtain a liquor license are freeholders. *State ex rel. Lancaster County Comrs. v. Holm* (Neb.) 131

2. A register of deeds may, by agreement, search the records of his office to ascertain whether persons signing a petition for a liquor license are freeholders, for persons who, under the rules of the excise board of a city, are required to make proof of the qualifications of such signers by his certificate, and may collect and receive such compensation as may be agreed upon therefor. Id.

3. A county officer is not required to account for and pay over to his county money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office, and which are not incompatible with, and are not included within, his official duties. Id.

4. A register of deeds who searches the records of his office to ascertain whether persons signing a petition for a liquor license are freeholders, for persons who, under the rules of the excise board of a city, are required to make proof of the qualifications of such signers by his certificate, must place the fee for his certificate and seal on his fee book, and account for and pay the same over to the county, if in excess of the salary allowed him by law; but he cannot be compelled to account for and pay over the amount received by him for his labor in searching the records. Id.

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Validity of Restricting Right to Treat all Diseases to Licensed Physicians, see CONSTITUTIONAL LAW, 5.

Sufficiency of Evidence of Malpractice, see EVIDENCE, 19.

1. The legislature cannot define the practice of medicine or surgery, for the purposes of an act forbidding such practice without a license, as the management of any disease, physical or mental, real or imaginary, for fee or reward, by any method whatever. State v. Biggs (N. C.) 139
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2. An examination and license as for a practitioner of medicine and surgery cannot be required for the treatment of disease by baths, physical culture, the manipulation of muscles, bones, spine, and solar plexus, and advice as to diet. Id.

3. In an action against a physician and surgeon for negligence and unskillfulness in applying to plaintiff's body the device known as "Roentgen's X-rays" for the purpose of locating a foreign substance thought to be in his lungs, the rule of liability is the same as that applied in other actions for malpractice, and one of ordinary care and prudence. Henslin v. Wheaton (Minn.) 126

4. A physician who applies the X-rays, not for medical purposes, but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in applying it determined by the opinions of physicians of his own school. Id.

5. To render a magnetic healer liable for injuries caused by magnetic treatment of a patient it is not necessary that he should be, or claim to be, a practising physician; it is sufficient that he undertakes to cure plaintiff's malady, and inflicts injury by negligent or unskillful treatment. Longan v. Weltmer (Mo.) 969

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Physicians and surgeons; negligence of; measure of care. 970

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PLEADING.

Variance between Pleading and Proof in Negligence Action, see EVIDENCE, 33.

1. The defense that the statute prevents the maintenance of an action because the instrument on which it is brought is not signed by the party to be charged may be raised by a plea of the general issue. Third Nat. Bank v. Steel (Mich.) 119

Complaint.

2. One seeking to recover a reward offered by a public statute need not allege that he rendered his services with the knowledge that the reward was offered, or with intention to earn the same. Clinton County Comrs. v. Davis (Ind.) 780

3. Allegation of the contract relations in an action to recover for failure accurately to transmit a telegram does not necessarily make the action one upon contract, since that matter may be pleaded by way of inducement to an allegation of facts constituting a tort. *Cowan v. Western U. Teleg. Co.* (Iowa) 545

4. The sender of a telegram which was altered in transmission need not allege freedom from contributory negligence, in an action to recover for the injury thereby caused to her, where the statute makes telegraph companies liable for mistakes in transmitting messages, and provides that, in actions to recover damages, the burden is upon the company to prove that the mistake was not due to its own negligence. *Id.*

5. Setting up a promise to repair as a ground for continuing service, in an action by a servant against her employer for injuries caused by an unsafe lodging place, does not render the complaint bad for duplicity, as counting upon both contract and tort. *Collins v. Harrison* (R. I.) 156
Demurrer.

6. Demurrer to a special traverse admits the truth of the statements made in the plea, and raises the question of the sufficiency of the matters stated in the inducements to the plea to constitute a valid defense. *People ex rel. Moloney v. Pullman's Palace Car Co.* (Ill.) 366

7. Where the facts constituting an estoppel to the maintenance of the action affirmatively appear on the face of the petition the defense may be interposed by demurrer without the necessity of a plea or answer. *Stone v. Cook* (Mo.) 287
Answer.

8. Answering to the same portion of a bill which is demurred to overrules the demurrer. *Harding v. American Glucose Co.* (Ill.) 738

9. That a paragraph of an answer alleging facts sufficient to constitute a defense to the action purports to be only a partial answer does not render it insufficient as to such part. *Clinton County Comrs. v. Davis* (Ind.) 780

10. A specification in an answer to a petition for recovery on a policy insuring against accident one who came to his death by eating spoiled oysters, the facts as to which are set out in the petition, that, if the death was so caused, it was because the oysters contained ptomaine poison, which would bring the death within one exception in the policy, does not preclude reliance upon another exception from liability in case of death from things voluntarily taken, where the allegations of the answer 64 L. R. A.

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Necessity of pleading statute of frauds in order to take advantage of such defense. 121

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A promise by a chattel mortgagee, who has a right to possession of the mortgaged property because of the default of the mortgagor, that, in case the mortgagor will surrender a pawn ticket representing the property, the mortgagee will redeem the property, cancel the mortgage, and consider the transaction closed, is without avail to the one who issued the pawn ticket with constructive notice of the rights of the mortgagee; since, having the exclusive right to the possession of the property, his promise is without consideration, and it is the duty of the pawnee, and not that of the mortgagee, to protect his interest by redemption. *Salabes v. Castelberg* (Md.) 800

POISON.

See INSURANCE, 13, 16.

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POWER OF APPOINTMENT.

Taxation of, see TAXES, 1.

By What Law Questions as to Execution of, Decided, see CONFLICT OF LAWS, 9.

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A general disposition of his estate, real and personal, of whatever kind and wherever situated, without any reference to a power of appointment created by the will of another, or intent to indicate an intention to execute the power, is not, in the absence of statute, a sufficient execution of a power to direct and appoint in what manner a fund established by the other will shall be distributed. *Lane v. Lane* (Del.) 849

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The principal's directions as to delivery of a telegram, and not those given by the agent, will control in case an agent who has negotiated a sale of property sends a telegram for the purpose of securing confirmation of the sale; so that, if the delivery is authorized by the principal, but is contrary to the directions given by the agent, the agent cannot hold the company liable for losses sustained by him because the message never reaches the principal. *Western Union Teleg. Co. v. Barefoot*, (Tex.) 491

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Liability of Corporation for Services Rendered under Contract with, see CONTRACTS, 3.

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See INSURANCE, 17.

PROXIMATE CAUSE.

1. Imperfections in the surface of a highway which give a traveler on a bicycle an impetus which results in his falling over an adjoining unrailed and dangerous embankment cannot, as matter of law, be regarded as the cause of the resulting injury to him. *Hendry v. North Hampton* (N. H.) 70

2. Failure to stop a street car at the destination of a passenger, by reason of which he is carried to the next street, is not the proximate cause of his falling on a slippery pavement in attempting to return to the point where he should have been permitted to leave the car. *Haley v. St. Louis T. Co.* (Mo.) 295

3. That the death of a person drowned by falling into the water while attempting to disembark from a barge in charge of a steamboat was caused partly by the negligence of the steamer whose passenger he was does not preclude a recovery for the death from another steamboat company whose negligence was also responsible for such death. *Louisville & E. Mail Co. v. Barnes* (Ky.) 574

4. The defective insulation of an electric-light wire, because of which it burns and falls to the ground when struck by a telephone wire strung above it so carelessly and loosely that it falls in a storm, is the proximate cause of the death of a person who comes in contact with it while passing along the street. *Hebert v. Lake Charles I. L. & W. Co.* (La.) 101

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QUO WARRANTO.

The right of the state to restrain usurpation of power by a corporation which is clearly antagonistic to good public policy is not defeated by any imputation of laches, or upon the ground that acquiescence is to be inferred from the failure to invoke the aid of the courts at an early day. *People ex rel. Moloney v. Pullman's Palace Car Co.* (Ill.) 366

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RAILROAD RELIEF ASSOCIATION.

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As within Implied Powers of Railway Company, see **RAILROADS**, 2.

The establishment by a railway company of a relief association for the benefit of its employees, the relief fund being created by voluntary contributions from the employees' wages, and the company being charged with the care of the fund and the duty of attending to the working details of the scheme, is not contrary to public policy. *State ex rel. Sheets v. Pittsburgh, C. C. & St. L. R. Co.* (Ohio) 405

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See also **RAILWAY RELIEF ASSOCIATIONS**.

As Carriers, see **CARRIERS**.

Attachment of Cars of Foreign Company under Process of State Courts, see **ATTACHMENT**, 8.

Attachment of Rolling Stock, see **ATTACHMENT**, 5-7.

As Wrongful Appropriation of Street, see **EJECTMENT**, 4.

Evidence as to Origin of Fire from Locomotive, see **EVIDENCE**, 17.

Expert Testimony as to Efficiency of Spark Arrester, see **EVIDENCE**, 10.

Placing Structures on Right of Way as Negligence Contributing to Fire, see **NEGLIGENCE**, 6.

1. The use of land for the erection and maintenance by railway companies of hotels and eating stations along their roads for the use and accommodation of their employees and passengers is a legitimate railroad purpose only when they are reasonably necessary for the convenience of such persons. *Abraham v. Oregon & C. R. Co.* (Or.) 391

2. The establishment by a railway company of an association composed of some or all of its employees and the company, for the purpose of accumulating a relief fund by voluntary contributions from the wages of the employees who are members, the company taking charge of the funds and attending to the details of carrying out the scheme, is within the implied powers of the railway company, and not *ultra vires*. *State ex rel. Sheets v. Pittsburgh, C. C. & St. L. R. Co.* (Ohio) 405

3. A railroad corporation, by its very incorporation under the laws of the state, assumes as one of its primary obligations that it shall operate the road under such conditions as properly to secure the safety of the general public. *Muntz v. Algiers & G. R. Co.* (La.) 222

4. A railroad company (in this case a horse-car company) is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or by another corporation to which it has leased it. *Id.*

5. An exemption of a railroad company from liability for the burning of property on a portion of its right of way rented for the erection of an elevator and warehouses, contained in the lease thereof, will not relieve it from liability for the burning of other property not on the right of way, but which was destroyed by fire negligent

ly set out by the railroad company on the rented premises, and communicated from there to property connected therewith. *Kansas City, Ft. S. & M. R. Co. v. Blaker* (Kan.)

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Contract to release company from liability for damages by fire to property placed on right of way; liability for loss of property on other land by fire communicated from buildings on right of way; negligence in permitting escape of sparks; right to show by circumstantial evidence; competency of proof that there was a device which would prevent escape of sparks. 82

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Title to Mortgaged Chattels Taken in Possession after Condition Broken, see MORTGAGE, 5.

The sale by a receiver of the assets of an insolvent commission company will pass a claim for repayment of advances made to a produce buyer to enable him to procure produce to be shipped to the company for sale, together with a lien which had been expressly given by contract upon the property shipped to secure the advances. *Cincinnati T. W. Co. v. Webster* (Ky.) 219

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The receipt from one joint tort feisor of a sum in part satisfaction of the demand, and his release from further liability, do not operate to release the other from liability for the residue of the damages inflicted. *Louisville & E. Mail Co. v. Barnes* (Ky.) 574

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Sufficiency of Complaint in Action for, see PLEADING, 2.

The vote buyer cannot claim the reward offered by a statute providing that a person who furnishes information resulting in the conviction of a person for selling his vote shall be entitled to a reward. *Clinton County Comrs. v. Davis* (Ind.) 780

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No compensation can be allowed the crew as special salvors for throwing overboard a cargo of coal from a stranded vessel which has not been abandoned, although the service rendered is hazardous and perilous and results in floating the vessel so that it is brought safely into port. *Gilbraith v. Stewart Transportation Co.* (C. C. App. 7th C.) 193

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Extra-Territorial Application, see **CONFLICT OF LAWS**, 5.

Construction of Federal Anti-Trust Act, see **MONOPOLY**, 1.

Application of Tax Law to Power of Appointment Previously Created, see **TAXES**, 1.

1. While one part of a statute may be unconstitutional and void, and another part good, this is the case only where the portions are clearly separable and susceptible of separate enforcement; but when it is apparent that the entire faulty enactment is designed to constitute a complete whole, and that one part would not have been enacted except in connection with the other, if a part is found to be bad the entire statute must fall. *Hanson v. Krehbiel* (Kan.) 790

2. A statute requiring a mortgagee to warrant that he will not require the mortgagor to pay the tax imposed by statute upon the interest payable under the mortgage is not applicable to a mortgage under which no interest is payable, either directly or indirectly. *Salabes v. Castelberg* (Md.) 800

3. A statute prescribing in what manner appearance may be made in an action has no effect upon a rule exempting nonresidents from suit while in the state as witnesses or parties to an action. *Murray v. Wilcox* (Iowa) 534

4. The grant of the fee of land under tide water is within the title of an act granting "The Riparian Rights in the River Front." *Mobile Transportation Co. v. Mobile* (Ala.) 333

5. A court will not blindly follow the construction of a particular statute by the courts of the state from which it was borrowed, when it does not appeal to the court as founded on right reasoning. *Ancient Order of Hibernians v. Sparrow* (Mont.) 128

6. All English statutes in force in Tennessee prior to the adoption of the Code of 1858 were repealed by that enactment. *Lanier v. Box* (Tenn.) 458

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Imputing Negligence to Infant Passenger on, see NEGLIGENCE, 4. 5.

Assumption of Risk by Street-car Conductor, see MASTER AND SERVANT, 8.

1. A traveler may cross an electric street-railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent, if, in view of his distance from the car, the rate of speed of its approach, and all other circumstances, a reasonably prudent man would accept the hazard and undertake to cross. *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.) 344

2. One about to cross a street-railway track in front of an approaching car has a right to rely upon a compliance with the law by the company, and to believe that the car is running at a lawful rate of speed and is under the control of the motoneer. Id.

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Evidence of Existence of, see EVIDENCE, 18.

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See TAXES, 11-13.

SUICIDE.

See INSURANCE, 13, 14.

SUNDAY.

1. A statute which prohibits the keeping open of butcher shops for the sale of meats, and other business places, on any portion of Sunday, while it authorizes confectionery and tobacco to be sold in an orderly manner on that day, is not such an unreasonable discrimination between these several occupations as to make the law invalid as special or class legislation. *State ex rel. Hoffman v. Justus* (Minn.) 510

2. The repairing of a belt in a factory so as to prevent 200 hands from losing a day's work the following day is within an exception to a Sunday law permitting works of necessity on that day, where the defect was not discovered until too late to repair it on Saturday with the appliances at hand, and

the owner of the mill was not negligent in not having foreseen the accident, or having appliances at hand to repair it immediately. *State v. Collett* (Ark.) 204

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What taxable.

1. The power to tax the exercise of a power of appointment by will is not destroyed by the fact that the power of appointment was created by deed prior to the passage of the statute providing for the tax. *Re Delano* (N. Y.) 279

2. The right to exist as a corporation is a franchise which may be assessed for taxation to the corporation, instead of the members or stockholders. *Bank of California v. San Francisco* (Cal.) 918

3. The right to exist as a corporation may be taxed as property, and the tax need not be in the form of an excise tax. *Id.*

4. A constitutional declaration that "property," for the purpose of taxation, shall include franchises, authorizes taxation of the right to exist as a corporation. *Id.*

5. A claim on a policy insuring the life of one who dies before the day on which property is to be valued for taxation is assessable under a statute providing for the assessment of claims due or to become due, although proof of death has not been made, and the insurer has sixty days after such proof in which to pay the demand. *Cooper v. Board of Review of Montgomery County* (Ill.) 72

6. The fact that the funds of a life insurance company are subject to taxation in its hands does not prevent the assessment of the value of an unpaid claim against the company in the hands of a representative of the assured,—at least, where the fund to meet the claim is to be raised by assessment, and it does not appear that 64 L. R. A.

the assessment has been made, or the fund collected at the time the tax is levied. *Id.*
Exemptions.

7. An establishment for the collection and distribution of electricity for the purpose of power and light is not for manufacturing purposes within the meaning of a statute permitting towns to exempt manufacturing establishments from taxation. *Williams v. Warren* (N. H.) 33

8. An exemption from taxation of a plant established to saw and dress lumber, and to collect and distribute electricity for power and light, is not effectual as to the portion devoted to the manufacture of lumber when it fails because of illegality as to the electrical apparatus, where there is nothing to show that the exemption would have been voted upon that portion had it been known that the remainder was not subject to exemption. *Id.*

Assessment.

9. The value of the shares of corporate stock may be taken into consideration in assessing the corporate franchises for taxation. *Bank of California v. San Francisco* (Cal.) 918

10. For the purpose of taxation, the value of a claim on an insurance policy promising the payment of an amount certain within sixty days after proof of death will be presumed to be measured by the face value of the policy. *Cooper v. Board of Review of Montgomery County* (Ill.) 72

Succession tax.

11. The succession tax cannot be assessed at the death of the testator upon the corpus of the estate when property is devised in trust which shall continue for a period of twenty years, during which time annuities shall be paid to certain persons named, among whom the estate shall be distributed at the expiration of that period if they are alive at that time, and, if they are not alive, among persons whom they shall appoint and certain persons named by the testator, under a statute authorizing a tax against a person who "shall become beneficially entitled, in possession or expectation, to any property or income thereof," where the tax rate differs according to the relationship to the testator of the person who ultimately becomes entitled to the property. *People v. McCormick* (Ill.) 775

12. A present succession tax cannot be assessed upon a remainder when it cannot be determined who will ultimately be entitled to it. *Id.*

13. A present succession tax cannot be imposed upon each annuitant to the full extent of his proportionate share of the entire fund from which the annuity is to be

paid, although by joint action of all annuitants the entire income may be divided between them, where the will limits the amount to be paid to each in the absence of such joint action, and no increase can be made without the consent of all. Id.

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Taxes; right of taxpayer to inspect books of municipality. 418

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Directions of Principal as Controlling Delivery of Telegram Sent by Agent, see PRINCIPAL AND AGENT.

Right to Damages for Mental Anguish Caused by Nondelivery of Telegram, see DAMAGES, 2.

Complaint in Action for Failure Accurately to Transmit Telegram, see PLEADING, 3, 4.

1. An action of tort will lie against a telegraph company for breach of a contract promptly to transmit a telegram, since there is also a breach of its public duty as a common carrier. *Cowan v. Western U. Teleg. Co.* (Iowa) 545

2. That a telegram sent by agent to principal is not delivered to the one in whose care it was directed by the agent according to the principal's instructions, in consequence of which it never reaches the principal, will not render the company liable for nondelivery at the suit of the agent, if it was delivered to another person whom the principal had authorized to receive messages for him. *Western Union Teleg. Co. v. Barefoot* (Tex.) 491

3. Delivery of a telegram to one authorized to receive it, who changes the address and returns it to the company to be forwarded, is a sufficient delivery to absolve the company from liability in case the message never reaches the addressee because the new address is incomplete. Id.

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Trees; in public streets; control of, by municipality; liability for cutting in installing electric lighting system. 805

In highway; right of municipality to destroy. 628

TRESPASS.

An entry upon a placer location to prospect for unknown lodes is a trespass, and no valid title to a lode claim can be initiated thereby, unless the placer owner has abandoned his claim, waives the trespass, or is estopped to complain of it. *Clipper Min. Co. v. Eli Min. & L. Co. (Colo.)* 209

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New Trial for Surprise in Introduction of Evidence, see **NEW TRIAL**.

1. The withdrawal of their answers, by the defendants, in a suit to enjoin the sale of property to an illegal trust will not prevent consideration of the evidence which had been taken under the issues formed by the answers in disposing of the case. *Harding v. American Glucose Co. (Ill.)* 738

Questions of law and fact.

2. When, on the trial of a cause, a question is presented as to the existence of negligence or contributory negligence, and the facts which the evidence reasonably tends to establish are such that all reasonable men 44 L. R. A.

must draw the same conclusions from them, the case is one of law for the court; but if fairminded men may honestly draw different conclusions, the cause should not be withdrawn from the jury. *Neeley v. Southwestern Cotton Seed Oil Co. (Okla.)* 145

3. The question of the contributory negligence of an employee in using a defective ladder to adjust a belt upon moving machinery, after he had complained of the hazard of using the ladder, and had been told by the manager that the ladder was all right, and if it did not suit him the manager would get someone who would use it,—is for the jury. *Id.*

4. Whether or not a person is guilty of negligence in attempting to cross a street railway track in front of an approaching car is generally a question of fact for the jury. *Kansas City-Leavenworth R. Co. v. Gallagher (Kan.)* 344

5. The sufficiency of the proof of a writing to be admitted as a standard of comparison is a question to be passed upon in the first instance by the court, but the weight and effect to be given the evidence by comparison, including the genuineness of the standards, is ultimately a question for the determination of the jury. *State v. Ryno (Kan.)* 303

Instructions.

6. A trial judge is not bound to explain to the jury, in an action to recover for injuries to a street-car passenger, the meaning of the words "as far as human skill and foresight will go," as measuring the carrier's duty to provide for the safety of the passenger, where he has not instructed them that such is the measure of the carrier's duty, but has merely told them that the carrier is bound to keep its appliances in reasonably safe order and condition. *Nashville Railway v. Howard (Tenn.)* 437

7. Refusal of the trial judge to instruct the jury that an infant passenger on a street car could not recover for personal injuries if the negligence of his mother, with whom he was traveling, proximately contributed to the injury, is not error, where there are no facts in the case to show such negligence. *Id.*

8. It is not error to refuse to give instructions which have no bearing upon the real case before the court. *Pennsylvania R. Co. v. Naive (Tenn.)* 443

9. That a bill of lading admitted in evidence in an action to recover damages for a carrier's delay in delivering goods received by it for transportation was not actually read to the jury will not justify the court's refusal to give instructions based upon its terms. *Id.*

10. Where, in instructing upon the measure of damages, the court permits a recovery for certain injuries, "if any," and then adds, "together with" damages for other injuries, it is not necessary to repeat the words "if any," in case of every additional element of damages mentioned. *Longan v. Weltmer* (Mo.) 969

11. The whole question of the existence of probable cause is not submitted to the jury in an action for malicious prosecution by a modification of an instruction directing them that, if defendant had knowledge of certain facts, he had probable cause, by adding the qualification "unless the jury find" that other facts existed which ought to have convinced defendant, as a reasonably prudent man, that he could not honestly rely on the facts enumerated. *Markley v. Snow* (Pa.) 685

Nonsuit and direction of verdict.

12. A bill should not be dismissed as to defaulting defendants where it is sufficient to justify the relief prayed for, and its material allegations are sustained by the proofs. *Harding v. American Glucose Co.* (Ill.) 738

13. A nonsuit should not be granted if enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proved. *Katz v. Walkinshaw* (Cal.) 236

14. The court may withdraw a case from the jury and direct a verdict for the defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Neeley v. Southwestern Cotton Seed Oil Co.* (Okla.) 145

15. A verdict cannot be directed for defendant in an action for malicious prosecution if his good faith is called in question by testimony, notwithstanding the existence of facts which might constitute probable cause. *Markley v. Snow* (Pa.) 685

16. A peremptory instruction to find for defendant cannot be given in an action for wrongful death, where the testimony tends to show that, while deceased was attempting to pass from a barge to a wharf boat, defendant made an unusual, unsafe, and dangerous landing at the wharf boat with its steamer in such a way as to cause the barge to separate from the boat and precipitate deceased into the water. *Louisville & E. Mail Co. v. Barnes* (Ky.) 574

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17. A finding that one committing murder

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Of Right to Administer as Affecting Right to Control Interment, see **CORPSE**, 1.

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WATERS.

Riparian rights.

1. The fact that a lower riparian proprietor upon a lake decides to use the water for drinking and cooking purposes does not render the reasonable use of the lake by upper proprietors for bathing purposes unlawful, although such use has a tendency to render the water less desirable for drinking and cooking purposes. *People v. Hulbert* (Mich.) 265

2. An upper riparian owner cannot, through the police power, be denied the right to bathe in a lake because a municipality takes its water supply therefrom. *Id.*

3. A governmental grant of land adjoining a tidal body of water will not extend 64 L. R. A.

below high-water mark. *Mobile Transportation Co. v. Mobile* (Ala.) 333

Percolating and subterranean waters.

4. Water percolating from mountain slopes to the valley, where it reaches an impervious barrier, and is held under an impervious stratum of earth, so that, when the latter is perforated, the pressure from above causes artesian wells, cannot be regarded as a water course so as to confer riparian rights upon owners of the surface. *Katz v. Walkinshaw* (Cal.) 236

5. The owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. *Id.*

6. A landowner has a right to make such beneficial use of water from underground reservoirs in the improvement of his estate as he may choose. *Barclay v. Abraham* (Iowa) 255

7. There is no right to draw water from a common underground reservoir merely for the purpose of wasting it, to the injury of other landowners having equal rights to use and means of access to it, or of maliciously depriving them of its beneficial use. *Id.*

Tide lands.

8. The state alone can take advantage of a failure, by its grantee of lands under tide water, to fill them in as required by the terms of the grant. *White v. Nassau Trust Co.* (N. Y.) 275

9. The admission of a new state into the Union vests in it the title of the general government to the land under tide water as far as high-water mark within its territorial limits. *Mobile Transportation Co. v. Mobile* (Ala.) 333

10. Property between high and low water mark of a tidal river, held by a municipal corporation in trust for public use, will not pass by an act placing the property of the municipality in the hands of commissioners for the payment of its debts. *Id.*

Right to dredge.

11. The owners of a pier, having obtained from the state a grant of the adjacent land under water, may dredge it away to any proper depth to make it commercially useful, without liability to the owner of a neighboring pier which subsides because of the slipping of the intervening state lands towards the excavation. *White v. Nassau Trust Co.* (N. Y.) 275

Running logs.

12. The right of the public to the use of streams for driving logs is not paramount

and unqualified, under Minn. Gen. Stat. 1894, § 2385, declaring that all rivers within the state of sufficient size for floating logs, timber, and lumber are public highways so far as to prevent obstruction to the free passage of logs, etc., but is subject to the incidental delays occasioned by dams, if the means of passage through or around them are reasonably sufficient for the purpose, since by § 2386 riparian owners are authorized to construct dams across such streams, provided they are equipped with locks, sluiceways, or booms sufficient and so arranged as to permit such materials to pass through without unreasonable delay. *Crookston W. P. & L. Co. v. Sprague* (Minn.) 977

13. A dam constructed with sufficient sluiceways to permit the free passage of logs, but which is not equipped with piling or piers to which sheer booms may be attached, or with some other means by which the logs may be directed to the sluiceways, does not meet the requirements of Minn. Gen. Stat. 1894, § 2386, authorizing riparian owners to construct dams across streams used for floating logs, provided they are equipped with locks, sluiceways, or booms sufficient and so arranged as to permit logs, timber, etc., to pass through without unreasonable delay; and it creates an unreasonable hindrance to the passage of logs at periods of high water, when it is difficult and impracticable to attach sheer booms, and guide the logs into the sluiceways, and keep them from running over the crest of the dam. *Id.*

14. The owner of logs, who permits them to pass over a dam (which, though constructed with sufficient sluiceways, is not equipped with piling or piers to which sheer booms may be attached, or provided with some other means by which logs may be directed to the sluiceways) without guiding them through the sluiceways by means of sheer booms, and without taking out the sluice boards, is not responsible for damage to the dam occasioned thereby, since the dam does not meet the requirements of Minn. Gen. Stat. 1894, §§ 2385, 2386, declaring all rivers of sufficient size for floating logs public highways, but authorizing riparian owners to construct dams across such streams, provided they are equipped with locks, sluiceways, or booms sufficient and so arranged as to permit logs, timber, etc., to pass through without unreasonable delay. *Id.*

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Public water supply; power of officers to make contract in perpetuity for supply. 631

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Right to Control Husband's Interment, see CORPSE, 1, 5.

WILLS.

As Execution of Power of Appointment, see POWERS.

Charging Debts upon Homestead, see HOMESTEAD, 5.

A residuary legatee who receives, although under protest, the amount due him under the will cannot, upon a mere offer to bring the amount so received into court, contest the validity of the will, where, upon the faith of his acceptance, the special legacies provided for have been distributed. *Stone v. Cook* (Mo.) 287

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WITNESSES.

Exemption from Service of Civil Process, see WRIT AND PROCESS, 1.

Qualifications as Experts, see EVIDENCE, 9-11.

1. A witness cannot refuse to answer a question merely because it calls for immaterial evidence. *Harding v. American Glucose Co.* (Ill.) 738

2. Plaintiff in an action to recover damages for personal injuries cannot be asked as to his willingness to furnish a specimen of urine for analysis for the purpose of aiding in ascertaining his physical condition. *Austin & Northwestern R. Co. v. Cluck* (Tex.) 494

3. A plaintiff in an action to recover damages for personal injuries may be compelled to testify at the trial as to whether or not he has refused to submit to a physical examination by physicians to be appointed by the court at the instance of defendants. Id.

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WRIT AND PROCESS.

Exemption from Suit, as Affected by Statute Prescribing Mode of Appearance, see STATUTES, 3.

1. A defendant in a criminal case, coming into the state to attend the trial, both as a witness and in accordance with the obligations of his bail bond, is exempt from service of process in a civil action during the pendency of the proceedings, and for such reasonable time thereafter as is necessary for his return to the state of his residence. *Murray v. Wilcox* (Iowa) 534

2. Motion to set aside the service is the

appropriate remedy for a nonresident who is served with process while in the state as a defendant in a criminal action.

Id.

to action from service while attending trial in other state; of nonresident witnesses; motion to set aside improper service. 535

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